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Comment Letter on SEC's Proposed Rule on Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, File Number S7-12-23

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100 F Street NE
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October 9, 2023

RE: File Number S7-12-23 - Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers

Dear Ms. Countryman:

We appreciate the opportunity to comment on File Number S7-12-23 (the "PDA Release"), released by the Securities and Exchange Commission (the "Commission") on July 26, 2023. As business law scholars with a strong focus on the risks and opportunities arising from the average person's participation in securities markets and the corporate sector as well as on the role of technology in corporate governance, we particularly welcome the Commission's attention to the matters addressed in the PDA Release.

We have published together and with other professors on models of share ownership and corporate governance that foster the ability of average citizens to participate in the corporate sector.[1] We have advocated for mandatory investing education at least at the high school level in *The Educated Retail Investor: A Response to "Regulating Democratized Investing,"* 83 OHIO ST. L.J. ONLINE 205 (2022) (attached as Annex A), knowing well the risks and opportunities associated with investing, but also the opportunity people miss when they fail to vote shares they own. We have been investigating the use of technology in business law matters with a critical approach. One of us wrote one of the very first law journal articles on the use of artificial intelligence ("AI") in corporate boardrooms, *Artificial Agents in Corporate Boardrooms*, 105 CORNELL L. REV. 869 (2020).[2] That article sheds light on some insurmountable issues that the use of AI in boardrooms would raise and can be considered one of the fiercest critiques of the use of technology in corporate governance.

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[1] Our scholarship addressing individuals' participation in the securities markets and in corporate governance include: LYNN STOUT, SERGIO GRAMITTO, & TAMARA BELINFANTI, CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL (2019); 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), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4147388; Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Wireless Investors & Apathy Obsolescence*, 100 WASH. U. L. REV. 1653 (2023); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Corporate Forum*, 102 B.U. L. REV. 1861 (2022); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Educated Retail Investor: A Response to "Regulating Democratized Investing,"* 83 OHIO ST. L.J. ONLINE 205 (2022); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Wireless Investors Movement*, U. CHI. BUS. L. REV.: ONLINE EDITION (2022); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51 (2021).
[2] Sergio Alberto Gramitto Ricci, *Artificial Agents in Corporate Boardrooms*, 105 CORNELL L. REV. 869 (2020).

With this letter, we side with a mindful use of technology, in the interest of efficient access to securities markets for current and future retail investors, with positive societal ramifications. As the PDA Release emphasizes, technology has been making securities markets increasingly accessible to the average person.[3] Individuals' ability to buy, hold, and vote equities make the corporate sector and capitalism inclusive.[4] This is particularly important against a backdrop characterized by an excessive concentration of equities ownership and power, with worrisome societal ramifications.[5] With corporations rivaling nation states in influence and fiscal power, access to corporate equities for all should be a primary goal for advanced socio-economic systems. Precisely because equities carry the power to vote in shareholders meetings, cost-efficient access to equities for all is ultimately a democratic matter.[6]

Over 90 years ago, Congress made the decision to encourage individuals' participation in the securities markets and to protect individuals via the adoption of a comprehensive disclosure system. This non-paternalistic system was based on the belief that once provided with information, individuals are free to exercise their own judgment with respect to investing. In other words, it fostered individuals' participation in the securities markets. As John Coates points out in his new book *The Problem of 12: When a Few Financial Institutions Control Everything* this disclosure system caused individuals to invest in the markets and has led to the significant U.S. capital markets that we have today.[7] Any regulation that undermines the ability of the average person to efficiently buy, hold, and vote shares of stock effectively entrenches power in the hands of a few and excludes participation of bottom wealth and income quintiles from the economy.

We fear that if passed in its current form, this rule would undermine most of the transparency, liquidity, and efficiency advancements that the Commission has rightly attributed to technologies.[8] True, technology, including AI, risks to exponentially spread the ramifications of the actions of knave or fool actors. But a presumption that all technology is disadvantageous for retail investors is unjustified. In fact, the Commission itself points out the benefits of technologies, when appropriately deployed.[9]

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[3] PDA Release at 6, 12, 15.

[4] LYNN STOUT, SERGIO GRAMITTO, & TAMARA BELINFANTI, CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL 79-83 (2019).

[5] JOHN COATES, THE PROBLEM OF 12: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING 50, 88-93 (2023); Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 12-16, 50 (2022); Commissioner Robert J. Jackson Jr., Testimony, Common Ownership: The Investor Protection Challenge of the 21st Century, Testimony Before the Federal Trade Commission Hearing on Competition and Consumer Protection (Dec. 6, 2018), https://www.sec.gov/news/testimony/jackson-testimony-ftc-120618#.ZSMHCJGidrM.mailto.

[6] Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, 41 Seattle U. L. Rev. 551, 554 (2018).

[7] JOHN COATES, THE PROBLEM OF 12: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING 24 (2023).

[8] PDA Release at 12 n.19.

[9] PDA Release at 12.

As currently drafted, the broad definition of "covered technology"[10] combined with the equally broad definition of "investor interaction"[11] is overreaching and encapsulates more behavior than what we believe is the potentially dangerous technology. For example, terms like "technological," "analytical," and "computational" lend themselves to many interpretations which cause unworkable uncertainty in its application. In fact, the Commission itself recognizes that the proposed rule would apply to well established, common practices such as using spreadsheets in providing advice to clients – something that broker-dealers have been using for decades.[12] Moreover, we fear that the overly broad proposed rule will eliminate the ability of retail investors to use mobile investing platforms for the purchase and sale of securities as well as other online vehicles meant to provide investors with education, information, and with access to issuers' management. In reassessing the rule, we recommend that the Commission target only specific forms of technology such as certain iterations of AI. A blanket regulation as the one currently proposed does not serve individual investors seeking access to securities markets via investment apps or those in a more traditional relationship with a broker-dealer.

We believe that the Commission can play a fundamental role in weeding out technology-based practices that pose a threat to investors, without impacting an increasingly better-developed infrastructure, largely reliant on technology, for retail investors. A regulatory approach based on clear and effective disclosure is consistent with the Commission's long tradition favoring a disclosure of conflicts rather than an elimination of conflicts (see Annex B). The Commission could require that essential information be made available to investors at the time of decision-making. It can also set criteria to avoid all but incomprehensible "terms and conditions"-types of disclosure. For example, it could require that essential information be provided in bite-sized formats making it more accessible to laypersons.

We also suggest that the Commission promote issuers' engagement with all investors, in particular retail investors, by deploying technology that facilitates access for everyone. This can be accomplished by strengthening safe harbors for issuers that host online fora under Rule 14a-17 to provide sound information to markets and to put in place a reliable fact checking infrastructure, as we discuss in *The Corporate Forum*, 102 B.U. L. REV. 1861 (2022) (attached as Annex C).

We believe that gone are the times of investor apathy. In today's society, it is increasingly more important that individuals are included in corporate sector decision making, as we argue in *Wireless Investors & Apathy Obsolescence*, 100 WASH. U. L. REV. 1653 (2023) (attached as Annex D). The infrastructure that enables retail investors' engagement is built around two pillars. First is access to securities markets for all. Second is seamless voting mechanics. Overly burdensome regulation on the use of technology can drive away investing apps that participate in building the

[10] In the proposed rule, "Covered technology means an analytical, technological, or computational function, algorithm, model, correlation matrix, or similar method or process that optimizes for, predicts, guides, forecasts, or directs investment-related behaviors or outcomes." PDA Release at 230.
[11] In the proposed rule, "Investor interaction means engaging or communicating with an investor, including by exercising discretion with respect to an investor's account; providing information to an investor; or soliciting an investor; except that the term does not apply to interactions solely for purposes of meeting legal or regulatory obligations or providing clerical, ministerial, or general administrative support." PDA Release at 230.
[12] PDA Release at 62, 137, 184.

infrastructure necessary to make securities markets inclusive and interactive for laypersons who cannot afford excessive friction. For these reasons, we respectfully recommend that the Commission will reconsider its regulatory strategy with respect to the matter at stake.

Thank you for your consideration. If you have any questions or need additional information, please contact us by mail at the addresses listed below or by e-mail at sergioalbertogramittorcci@umkc.edu and christinasautter@smu.edu.

We are providing our institutional affiliations and ties for identification purposes only. The views expressed in this letter are solely our own.

Sincerely,

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Annex A

Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Educated Retail Investor: A Response to "Regulating Democratized Investing,"* 83 OHIO ST. L.J. ONLINE 205 (2022).

See attached.

The Educated Retail Investor: A Response to "Regulating Democratized Investing"

SERGIO ALBERTO GRAMITTO RICCI* & CHRISTINA M. SAUTTER†

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I. INTRODUCTION

Abraham Cable's article *Regulating Democratized Investing* is not only topical, but also necessary.[1] Cable's article tackles the debate on regulating mobile-first investing apps in a sophisticated fashion that carefully considers the interests at stake such as investor protection, market protection, and market accessibility.[2] It largely opposes paternalistic regulation, which would raise unsurmountable barriers at the entrance of the stock market for retail investors.[3] But it concedes to a form of regulation that in Cable's own words "serves ultra-retail investors a modest portion of what they really want."[4]

We strongly appreciate the subtle analysis that Cable carries out in his Article as well as his well-thought-out proposal. However, we are not entirely persuaded that a solution that "serves ultra-retail investors a modest portion of what they really want" would be fully satisfactory.[5] In addition, we fear that Cable's proposals would further discourage investors with limited financial

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1 Abraham J.B. Cable, *Regulating Democratized Investing*, 83 OHIO ST. L.J. 671 (2022).

2 *See generally id.*

3 *See id.* at 677–79, 698.

4 *Id.* at 710.

5 *Id.*

means from participating in the stock market and, through that, in the corporate sector.[6]

Historically, investing in the stock market has proved to be a strong investment venue over time.[7] Setting restrictions that disproportionately affect investors with smaller financial means could acerbate income and wealth inequality.[8] It could also be socially divisive, by further fostering an "us" against "them" perception of the economy, because the lowest wealth and income percentiles would be—and feel—excluded from a capitalistic system that precludes them from participation.[9] Nor should we assume that alternative activities such as gambling and shopping that people excluded from full participation in the stock market may carry out are less risky for their finances—as long as people are actually aware of the risks associated with investing in company shares.[10]

Conversely, easing access to the stock market has several advantages. First, the stock market can be a strong saving technology for retirement and a good source of income.[11] Second, a more accessible stock market facilitates a more demographically heterogeneous share ownership.[12] This, in turn, has positive impacts on diversity in corporate governance.[13] Third, citizen involvement in the stock market and in corporate governance increases citizens' agency and can promote social cohesion.[14] After all, it is hard to conceive a form of inclusive capitalism without an accessible stock market—and mediately to the corporate sector—for all.[15]

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[6] *See 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), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4147388 [https://perma.cc/42DM-5J2C].

[7] *See* Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799, 1832 (2022) ("As SEC Commissioner Hester Peirce recently observed, 'Our financial markets are among the greatest wealth-generating machines ever developed by any society,' . . . ." (quoting Hester M. Peirce, *Prosperity's Door*, U.S. SEC. & EXCH. COMM'N)) (July 21, 2021), https://www.sec.gov/news/speech/peirce-prosperity-door-072121?utm_medium=email&utm_source=govdelivery [https://perma.cc/7D4U-MYCD]).

[8] *Id.* at 1833–84.

[9] *See* Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, 41 SEATTLE U. L. REV. 551, 559–69 (2018) (discussing social and economic issues in American capitalism); *see also* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51, 56–62 (2021) (discussing how the GameStop frenzy was fueled by a sense of revenge against Wall Street).

[10] *See* Fisch, *supra* note 7, at 1825.

[11] *See id.* at 1831–32.

[12] *See* Gramitto Ricci & Sautter, *supra* note 6 (manuscript at 2–3).

[13] *See id.* (manuscript at 7) (arguing that democratizing access to share ownership fosters diversity in corporate governance).

[14] *See* Stout & Gramitto, *supra* note 9, at 559–69.

[15] *See generally* LYNN STOUT, SERGIO GRAMITTO & TAMARA BELINFANTI, CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL (2019)

We suggest an alternative approach. Our proposal heavily relies on investing education and engagement. Investing education should be mandatory at least at the high school level for all. It ought to encompass classes on personal finance, financial markets, and corporate governance.[16] In addition, citizen engagement in corporate governance should be nurtured. It should be nurtured because a more inclusive corporate sector would help restrain the growing income, wealth, and influence inequality.[17] Moreover, only a form of investing that considers the effects of investing on corporations, society, and the planet is an aware form of investing.

II. NEW INVESTORS AND INFORMATION SOURCES

A. *New Investors, Social Media, and Finfluencers*

A FINRA-NORC study of households that opened non-retirement investment accounts during 2020 found that two-thirds of them were opened by investors who had never opened a taxable account previously.[18] Almost two-thirds of these new investors were below the age of 45.[19] In fact, Millennials and GenZ'ers make up for 67% of the new retail investors in 2020.[20] The diffusion of mobile-first investing apps, like Robinhood, has increased younger retail investors' participation in financial markets.[21]

Notoriously, Millennials are "extremely comfortable with mobile devices," and GenZ'ers, having grown up in a completely wired culture, prefer to communicate via their smartphones.[22] So, it is no surprise that young generations of investors rely on technology and online sources of information in their investing efforts. A 2021 survey of Millennial and GenZ investors

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(discussing how corporations and capitalism can serve all citizens if all citizens have an equity interest in the corporate sector and participate in corporate governance).

16 *See infra* Part II.

17 *See* Stout & Gramitto, *supra* note 9, at 559–69 (arguing that society-wide share ownership and citizen involvement in corporate governance can ameliorate several social and economic ills).

18 FINRA INV. FOUND. & NORC AT THE UNIV. OF CHI., INVESTING 2020: NEW ACCOUNTS AND THE PEOPLE WHO OPENED THEM 2 (2021), https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them_1_0.pdf [https://perma.cc/M937-PMBV].

19 *Id.* at 3.

20 *The Rise of the Investor Generation*, CHARLES SCHWAB CORP., https://www.aboutschwab.com/generation-investor-study-2021 [https://perma.cc/38BG-C7NU].

21 Fisch, *supra* note 7, at 1833–34.

22 *Boomers, Gen X, Gen Y, Gen Z, and Gen A Explained*, KASASA: THE KASASA EXCHANGE (July 6, 2021), https://www.kasasa.com/exchange/articles/generations/gen-x-gen-y-gen-z [https://perma.cc/M9PS-WPUP]; Mary Ann Becker, *Understanding the Tethered Generation: Net Gens Come to Law School*, 53 DUQ. L. REV. 9, 12 (2015).

revealed that 77% of them relied most heavily on social media for investing information.[23]

Unlike older generations who grew up in a time when money was a "taboo" topic of conversation, only 6% of GenZ'ers and 14% of Millennials "say they *don't* openly discuss their finances and investment gains and losses."[24] Nearly 60% of Millennial and GenZ investors belong to an online investment community or forum.[25] Moreover, online investment communities often make new generations of investors develop a form of camaraderie and mutual trust that facilitate their collective actions.[26]

A 2018 study found that "only 30% of the general population demonstrates understanding of basic financial concepts such as the workings of interest rates, inflation, and risk diversification."[27] With technology and social media easing access to financial markets that percentage appears particularly low and alarming. Easier access to financial markets needs to be coupled with broad-based investing literacy. New investors are aware of the critical role of investing education and describe themselves as "hungry for access to investing education and advice," with 94% desiring to do their own research and 90% wanting "educational materials to improve their investing skills."[28]

Robust demand for investing education and advice has fostered the popularity of social media influencers who provide financial content, sometimes referred to as "finfluencers."[29] Finfluencers are able to reach significant numbers of investors and potential investors and their opinions carry substantial weight with their often hundreds of thousands of followers.[30] As a result,

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[23] Jack Caporal, *Gen Z and Millennial Investors: Ranking the Most Used, Trusted Investing Tools*, THE MOTLEY FOOL, https://www.fool.com/research/gen-z-millennial-investors-tools/ [https://perma.cc/655R-GJ5G] (Aug. 3, 2021).

[24] Mallika Mitra, *Is It Taboo to Talk About Money? Not According to Gen Z Investors*, MONEY (Dec. 15, 2021) (emphasis added), https://money.com/gen-z-investors-talk-about-money/ [https://perma.cc/D4X3-Q8U3]. This is compared to 31% of GenX and 42% of Baby Boomers. *Id.*

[25] Julie Ryan Evans, *Nearly 60% of Young Investors Are Collaborating Thanks to Technology, Often Turning to Social Media for Advice*, MAGNIFY MONEY, https://www.magnifymoney.com/blog/news/young-investors-survey/ [https://perma.cc/LVF3-X5KD] (Feb. 22, 2021).

[26] Gramitto Ricci & Sautter, *supra* note 9, at 52–53, 71–72, 87.

[27] JILL E. FISCH, ANDREA HASLER, ANNAMARIA LUSARDI & GARY MOTTOLA, NEW EVIDENCE ON THE FINANCIAL KNOWLEDGE AND CHARACTERISTICS OF INVESTORS 1 (2019), https://gflec.org/wp-content/uploads/2019/10/FINRA_GFLEC_Investor_FinancialIlliteracy_Report_FINAL.pdf [https://perma.cc/P7YD-D2KS].

[28] *The Rise of the Investor Generation*, *supra* note 20.

[29] *See* Vanessa Pombo Nartallo, *'Finfluencers': Financial Education and Regulator Surveillance*, BBVA (Oct. 8, 2021), https://www.bbva.com/en/finfluencers-financial-education-and-regulator-surveillance/ [https://perma.cc/8ZCN-N6Q8] (discussing the proliferation of finfluencers and related risks of relying on finfluencers for financial educational purposes).

[30] *See* Misyrlena Egkolfopoulou, *Wall Street Influencers are Making $500,000, Topping Even Bankers*, BLOOMBERG: WEALTH (Sept. 17, 2021), https://www.bloomberg.

myriads of retail investors who might lack investing education source information and advice from social media influencers.

B. *Risks Associated with Online Information Sourcing*

Social media and finfluencers are largely unregulated in the United States.[31] Anyone can dole out information and advice on social media platforms, unless they are hired by brokerages in which case they are regulated by FINRA.[32] One of the benefits of social media—that relationships are built easily and people feel close to, and trust, one another even if they have never interacted in real life—is also one of the risks of social media.[33] Misinformation on social media is common and gets perpetuated.[34] With the vastness of social media, it is

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com/news/articles/2021-09-17/social-media-influencers-income-advertising-wall-street-products [https://perma.cc/NFJ3-CBL4] (providing examples of finfluencers and their numbers of followers).

31 The regulation of finfluencers would be substantially more robust if finfluencers qualified as investment advisors under the Investment Advisors Act of 1940. The definition of "investment advisor" under the Investment Advisors Act includes:

> [A]ny 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.

15 U.S.C. § 80b-2(a)(11). However, the definition of "investment advisor" excludes "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." *Id.* § 80b-2(a)(11)(D).

32 *See Social Media Influencers, Customer Acquisition, and Related Information Protection*, FINRA (Sept. 2021), https://www.finra.org/rules-guidance/guidance/targeted-examination-letters/social-media-influencers-customer-acquisition-related-information-protection [https://perma.cc/3S33-TY2P] (setting forth guidance on engagement with social media influencers).

33 *See* Shane Hickey, *As 'Finfluencers' Spread Through Social Media, Beware the Pitfalls*, THE GUARDIAN (Aug. 22, 2021), https://www.theguardian.com/money/2021/aug/22/as-finfluencers-spread-through-social-media-beware-the-pitfalls [https://perma.cc/53AQ-V6M4] ("Social media is designed specifically to appeal to whoever is using it, so they see posts from people who are like them, and talk in a way they relate to, and they can join in the conversation, so they feel closer to the subject.").

34 *See* Chris Meserole, *How Misinformation Spreads on Social Media—And What to Do About It*, LAWFARE (May 9, 2018), https://www.lawfareblog.com/how-misinformation-spreads-on-social-media-and-what-to-do-about-it [https://perma.cc/L6BQ-XQTN] (describing how misinformation on social media has spread more quickly than accurate information regarding the same events); *see also* Statement, European Sec. & Mkt. Auth., Episodes of Very High Volatility in Trading of Certain Stocks (Feb. 17, 2021), https://www.esma.europa.eu/sites/default/files/library/esma70-155-11809_episodes_of_very_high_volatility_in_trading_of_certain_stocks_0.pdf [https://perma.cc/JGR9-DJRP] (urging "retail investors to be careful when taking investment decisions based exclusively on information from social media and other unregulated online platforms, if they cannot verify the reliability and quality of that information"); Sue S. Guan, *Meme Investors and Retail*

difficult for companies to ensure that fact-checking occurs.[35] If companies rely on finfluencers to boost online engagement, they must carefully select these individuals.[36] Even if companies are not formally engaging finfluencers, they must contend with potential misinformation.

Generational affinities for online information sourcing cause investors, particularly young investors, to trust online information.[37] This form of trust can prove particularly strong when new generations of investors experience the sense of camaraderie that sometimes develops across members of online investment communities.[38] As a result, investors who source investing information and advice online can easily fall into the trap of believing all information they find online.[39] This can be exacerbated if they previously received good advice online: it is then "easy to keep trusting what [they] see online."[40]

Investing education provides retail investors with a toolbox to better navigate the information sources they find online. A 2016 study of retirement investing found that individuals with higher financial literacy made better investment decisions, including selecting higher performing portfolios, paying lower fees, and accessing more information in the decision-making process.[41] The diffusion of mobile-first investing apps makes an improvement of investing education even more compelling than in the past. Moreover, direct investing in company shares provides retail investors with the power to participate in

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Risk, 63 B.C. L. REV. 2051, 2086–87 (2022) (cautioning about retail investor misinformation sourced online).

[35] *See* Egkolfopoulou, *supra* note 30 (discussing how companies look for quality social media content creators on platforms where "misinformation run[s] rampant and unchecked").

[36] *See* Akshaya Kamalnath, *Social Movements, Diversity, and Corporate Short-Termism*, 23 GEO. J. GENDER & L. 449, 472 (2022) (cautioning that some influencers who "are responsible for starting trends . . . are not necessarily well-informed or objective when evaluating issues").

[37] *See* Caporal, *supra* note 23.

[38] *See* Gramitto Ricci & Sautter, *supra* note 9, at 71–73.

[39] GenZ'ers and Millennials also are more likely to rely on financial advice when they are obtaining advice from "someone like" them. Charlotte Principato, *Here's Where the Youngest Generation of Investors is Getting Their Financial Advice*, MORNING CONSULT (May 25, 2021, 12:01 am ET), https://morningconsult.com/2021/05/25/tiktok-is-flush-with-financial-advice-but-social-media-hasnt-replaced-professional-sources-for-guidance-yet/ [https://perma.cc/MJ5J-3DST].

[40] Sophie Kiderlin, *Social Media Has Hooked Young Investors on Finance, But a Growing Number Are Taking More and More Risks. 'Finfluencers' and Money Experts Say It's Time for Some Caution.*, BUS. INSIDER (Jul. 18, 2021), https://markets.businessinsider.com/news/stocks/gen-z-investing-social-media-finance-fintok-millennial-investors-2021-7 [https://perma.cc/YVA6-8U8J].

[41] Jill E. Fisch, Tess Wilkinson-Ryan & Kristin Firth, *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors*, 66 DUKE L.J. 633, 657–58 (2016).

corporate governance.[42] A sound approach to investing education encompasses both finance and corporate governance. Investing education should mandatorily be included in, at least, high school curricula, and private ordering efforts can supplement scholastic education. In a just released World Economic Forum (WEF) report, the WEF advocates for financial literacy even earlier and recommends that public and private parties collaborate to provide "robust" financial literacy curriculum in early childhood education.[43]

III. INVESTING LITERACY IN THE UNITED STATES SCHOOL CURRICULA

Unfortunately, United States schools hardly incorporate personal finance education into the curriculum let alone education regarding financial markets and corporate governance.[44] During the 2021-2022 academic year, only 22.7% of United States public high school students were required to take "at least a single semester-long course solely dedicated to [p]ersonal [f]inance."[45] In addition, another 48.2% of U.S. public high school students had access to a stand-alone, at least one semester long personal finance course "either as an elective or as one option to fulfill a graduation requirement."[46] The rise to almost a quarter of U.S. public high students having taken a personal finance course as a graduation requirement is recent and comes amidst a push across the country for personal finance education.[47] In 2018, for example, only 16.4% of U.S.

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[42] *See generally* Gramitto Ricci & Sautter, *supra* note 9.

[43] WORLD ECON. F., THE FUTURE OF CAPITAL MARKETS: DEMOCRATIZATION OF RETAIL INVESTING 74 (2022), https://www3.weforum.org/docs/WEF_Future_of_Capital_Markets_2022.pdf [https://perma.cc/X6H8-DK2U].

[44] The Article focuses primarily on investing literacy education at the high school level as there has been a recent push to increase personal finance education in grades 9–12. Although some elementary and middle schools do provide personal finance education, most resources developed have focused on high school and college students. *See* Jeremiah Johnson, Donna Spraggon, Gaby Stevenson, Eliot Levine & Gregg Mancari, *Impact of the FutureSmart Online Financial Education Course on Financial Knowledge of Middle School Students*, 32 J. FIN. COUNSELING & PLAN. 368, 369 (2021). The Council for Economic Education and Jump$tart have published benchmark standards and learning outcomes to be achieved by the end of the 4th, 8th, and 12th grades. COUNCIL FOR ECON. EDUC. & JUMP$TART, NATIONAL STANDARDS FOR PERSONAL FINANCIAL EDUCATION 5 (2021), https://files.consumerfinance.gov/f/documents/2021_Natl_Standards_Downloadable_final.pdf [https://perma.cc/5YH5-EKNT]. These standards include investing in stocks as part of the learning outcomes to be achieved at first by the end of the 8th grade. *Id.* at 27.

[45] NEXT GEN PERS. FIN., NGPF'S 2022 STATE OF FINANCIAL EDUCATION REPORT 6 (2022) [hereinafter NGPF], https://d3f7q2msm2165u.cloudfront.net/aaa-content/user/files/Files/NGPFAnnualReport_2022.pdf [https://perma.cc/3VQJ-3K9K].

[46] *Id.* at 2.

[47] NGPF maintains a Google Doc spreadsheet tracking financial education bills being introduced in state legislatures. Next Gen Pers. Fin., *NGPS Financial Education Bill Tracker: 2022 State Legislative Sessions*, GOOGLE DOCS, https://docs.google.com/document/d/1tWjd8LCMl0AJT2AmE3leIDqQ-x46z5luvQ09wImV2eQ/edit [https://perma.cc/H6YM-WTD9]. As of July 26, 2022, 69 bills had been introduced in 27 states. *Id.*

public high school students graduated having been required to take a personal finance course.[48] However, as we write, eight states have "fully implemented legislation guaranteeing a standalone [p]ersonal [f]inance course for all students."[49] Another seven states are in the process of implementing similar guarantees.[50] Once those guarantees are fully implemented, 39.7% of public high school students in the United States will have taken a personal finance course prior to graduation.[51]

Although these statistics are promising, there are several issues. First, currently, over three-quarters of American public high school students are not required to take a personal finance course prior to graduating.[52] Even when the seven additional states have fully implemented their guarantees, approximately 60% of public high school students still will not have a personal finance course graduation requirement.[53] Moreover, these numbers focus on public high school students and do not reflect students who attend private high schools, which accounts for approximately 8.8% of the total U.S. high school population.[54]

In addition, access to personal finance education is inequitable. More specifically, "[i]n schools with >75% Black and Brown student population" only "1 in 20 students were guaranteed access" while "[i]n schools with <25% Black and Brown population 1 in 7 students were guaranteed access."[55] The numbers are similar for schools with greater than 75% of the student population eligible to receive free or reduced lunches, with only 1 in 20 students having

48 NGPF, *supra* note 45, at 2.

49 *Id.* at 5. Those states are: Alabama, Missouri, Mississippi, Virginia, Tennessee, Utah, North Carolina, and Iowa. *Id.*

50 *Id.* at 3. Those states are: Florida, Georgia, Michigan, Nebraska, Ohio, Rhode Island, and South Carolina. *Id.*

51 *Id.* at 2.

52 *Id.*

53 *See id.*

54 State regulation of private and home schools vary. *See State Regulation of Private and Home Schools*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/index.html [https://perma.cc/8U9A-KJWR] (Aug. 1, 2019) (setting forth summaries for all 50 states plus the District of Columbia and U.S. territories). Most states *do not* require that the curriculum for private schools be like that of public schools. *See* Comparison Charts: Operating Regulations, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/inits/ed/non-public-education/files/operating-regs-comparison-chart.pdf [https://perma.cc/2DWY-L347]. For information on private high school enrollment, see *Table 205.10 Private Elementary and Secondary School Enrollment and Private Enrollment as a Percentage of Total Enrollment in Public and Private Schools, by Region and Grade Level: Selected Years, Fall 1995 Through Fall 2017*, INSTITUTE OF EDUCATION SCIENCES: NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/programs/digest/d20/tables/dt20_205.10.asp [https://perma.cc/5N66-4YPJ]. As of 2017, 1,468,000 students were enrolled in private high schools. *Id.*

55 NGPF, *supra* note 45, at 5.

guaranteed access.[56] Thus, despite the increase in personal finance education in the United States, some key groups are still being left behind.[57]

Even when students do take personal finance courses in high school, the extent to which the complexities of investment strategies is covered is unclear, and most courses fail to cover the innerworkings of corporate governance literacy.[58] Another critique is that a one-time semester-long course is not sufficient to teach all of the basics of money management let alone investing and corporate governance literacy nor is such a course conducive to longer term retention of information.[59] Moreover, some studies have found that personal finance education does not increase financial literacy.[60] Critics argue that such education leads to overconfidence and overoptimism which, in turn, may cause individuals to make worse decisions than had they not taken a personal finance course.[61]

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[56] *Id.*

[57] White men have dominated investing and younger investors traditionally have been less likely to invest in stocks. *See* Fisch, *supra* note 7, at 1832. Relatedly, another study found that "financial literacy is associated with gender (males are more financially literate) and investment experience, and is somewhat correlated with education." Fisch, Wilkinson-Ryan & Firth, *supra* note 41, at 657–59. Financial literacy is particularly important because, as we detail in other work, more diverse and younger investors have come into the market since 2020. *See* Gramitto Ricci & Sautter, *supra* note 6 (manuscript at 4) (describing the diversity of individuals opening brokerage accounts since 2020).

[58] *See* Kelly Anne Smith, *These States Now Require Students to Learn about Personal Finance*, NASDAQ (Apr. 1, 2022), https://www.nasdaq.com/articles/these-states-now-require-students-to-learn-about-personal-finance. Various organizations have created standards and modules that teachers can adopt. Most of these do contain a section on investing but they do not cover corporate governance education. *See, e.g.*, FED. RSRV. BANK OF ST. LOUIS & FED. RSRV. BANK OF ATLANTA, A "STANDARD" PERSONAL FINANCE CURRICULUM, 6.1–6.6 (2020), https://www.stlouisfed.org/education/-/media/project/frbstl/stlouisfed/education/curriculum/pdf/a_standard_personal_finance_curriculum.pdf [https://perma.cc/H4JM-PUTF] (containing a unit on financial investing); *Investing Unit*, NGPF, https://www.ngpf.org/curriculum/investing/ [https://perma.cc/9C84-ZEPD] (containing an investing unit as part of a semester course, a nine-week course, and a full year course); *Program Overview*, FINEDGE, https://finedge.uchicago.edu/explore-the-program/overview [https://perma.cc/MUN7-CAPN] (containing an investing module).

[59] *See* Smith, *supra* note 58 ("[N]ot everyone agrees that the mandated standalone classes go far enough in being effective for students because personal finance and money management is complex and multi-faceted—it can't be absorbed overnight."); *see also* Lewis Mandell & Linda Schmid Klein, *The Impact of Financial Literacy Education on Subsequent Financial Behavior*, 20 J. FIN. COUNSELING & PLAN. 15, 21 (2009) (studying individuals who took a personal finance course in high school for the first five years after graduation and finding those individuals "were no more financially literate than those who did not take the course").

[60] *See, e.g.*, Mandell & Schmid Klein, *supra* note 59, at 21–23 (finding that personal finance education does not increase financial literacy and calling for additional research on how to structure courses to be more effective).

[61] *See, e.g.*, Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 236–37 (2008) (arguing personal finance education leads to overconfidence).

Other studies have found that if a financial education program focuses only on objective financial knowledge and is "too technical and/or complex" it may result in a decrease in subjective financial knowledge, which is an individual's perception of their financial knowledge.[62] Accordingly, experts recommend that financial education lessons be presented in a "straightforward and comprehensible manner" and that educators should "actively monitor" perceptions of how knowledgeable students believe themselves to be.[63] Along these lines, incorporating games into a lesson plan has been successful in presenting information in a comprehensive fashion, which has been found to increase financial literacy.[64]

For students who have had the opportunity to take personal finance courses in both high school and college, there is an increase in their investment knowledge and likelihood to increase their savings.[65] A study found that college personal finance courses are usually more effective at establishing long term financial literacy comprehension than high school courses.[66] Therefore, the more opportunities students acquire to build upon their financial literacy, the more likely they will be able to retain the information and implement it into their investing and finances.

A. *Other Initiatives—Academic and Private Ordering*

In many middle schools and high schools across the nation there are after-school programs and clubs available to teach students how to invest through stock market clubs and competitions.[67] About one million students in the United States play online stock market games, like *The Stock Market Game*, each year either as part of a course or in an after school-school program or club.[68] These games feature fake money that they invest in real companies students are

[62] *See, e.g.*, Kenny K. Chan, Emily J. Huang & Reka A. Lassu, *Understanding Financially Stressed Millennials' Hesitancy to Seek Help: Implications for Organizations*, 43 J. FIN. EDUC. 141, 146, 156 (2017).

[63] *Id.* at 156.

[64] *See* Cynthia Harter & John F.R. Harter, *Is Financial Literacy Improved by Participating in a Stock Market Game?*, 10 J. FOR ECON. EDUCATORS 21, 28 (2010) (describing study finding that students who were taught about investing using the *Stock Market Game* along with the *Learning from the Market* curriculum performed better than students in the control group, this included on "assessment questions that were not related to the stock market").

[65] William Walstad et al., *Perspectives on Evaluation in Financial Education: Landscape, Issues, and Studies*, 48 J. ECON. EDUC. 93, 99 (2017).

[66] Tzu-Chin Martina Peng, Suzanne Bartholomae, Jonathan J. Fox & Garrett Cravener, *The Impact of Personal Finance Education Delivered in High School and College Courses*, 28 J. FAM. & ECON. ISSUES 265, 280 (2007).

[67] *See* The Journal, *Are Stock-Market Games Turning Teens into Risky Investors?*, WALL ST. J. (May 10, 2022) (downloaded using Apple Podcasts), podcasts.apple.com/us/podcast/the-journal/id1469394914 [https://perma.cc/HG5N-49GE].

[68] *Id.* at 01:50–01:57.

familiar with, such as Apple, Amazon, and Tesla.[69] Using *The Stock Market Game*, one program, Capitol Hill Challenge, grants approximately 600,000 middle school and high school students across the country a chance to compete using a $100,000 hypothetical portfolio.[70]

Proponents argue that these games are an effective and fun way to teach students about the stock market.[71] Conversely, some argue that due to the short time frame in which students use the game, these games can create a gambling behavior rather than instill prudent and slow investment strategies that are essential in the real world.[72] However, there is a potential solution: have students invest real money to help them understand the considerable risks. This alteration, when implemented, has proven effective.[73] However, concerns about an inherent short-term approach to investing persist. A sound approach to investing education should make learners deal with a much longer time horizon than the one they can experience in the time frame of classes or simulations. Moreover, a sound approach to investing education should tie investing to corporate governance and show the effects of decision-making on corporations as well as on society and the planet. Simulations that take into account the complexities of these layers could possibly be developed using artificial intelligence and gaming dynamics.

Another financial education opportunity stems from fintech itself outside of the formal educational context. For example, Robinhood provides educational tools not just to its customers but also to the general public via Robinhood Learn and Robinhood Snacks.[74] Robinhood also has in-app education for its customers, which includes access to free news and interactive lessons.[75] Although these tools are a step in the right direction, experts like Jill Fisch argue that even more can be done to encourage education as trading occurs.[76] For example, she advocates for "just-in-time education," or educational information that pops when an investor is making a decision such as executing a trade or seeking an option quote.[77] She further argues that such education can be

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[69] *Id.* at 01:40–02:07.

[70] *About the Capitol Hill Challenge Program*, THE STOCK MARKET GAME, www.stockmarketgame.org/capitol-hill-challenge.html [https://perma.cc/7X7S-VKQA].

[71] *See* Harter & Harter, *supra* note 64, at 30–31.

[72] The Journal, *supra* note 67, at 02:24–02:51.

[73] *Id.* at 12:40–17:47 (detailing how students invested a $100,000 donation given to a high school stock market club and describing how students spent more time researching and evaluating stocks resulting in the elimination of the initial gambling mentality).

[74] Letter from David Dusseault, President, Robinhood Fin. LLC, to Vanessa A. Countryman, Sec'y., Sec. & Exch. Comm'n 10 (Oct. 1, 2021), https://www.sec.gov/comments/s7-10-21/s71021-9316498-260092.pdf [https://perma.cc/B9B2-5BHA].

[75] *Id.* Similarly, tastyworks, a brokerage platform largely dedicated to options trading, has an affiliate, tastytrade, with comprehensive courses on options and futures trading. *Learn Courses*, TASTYTRADE, https://www.tastytrade.com/learn-courses [https://perma.cc/L2SU-4SUF].

[76] Fisch, *supra* note 7, at 1858–60.

[77] *Id.* at 1859–60.

gamified in nature to be more engaging and interactive.[78] Relatedly, GenZ'ers have been expressing an appetite for readily available investing educational materials which are presented in a palatable format including bite-sized information and nudges.[79]

In the future, Fisch's "just-in-time education" recommendation could also be extended to proxy materials and proxy voting to make materials and corporate governance more accessible and engaging for retail investors. Although many retail investors care about corporate governance engagement, they are not generally well versed in corporate governance legal terminology. There are examples on social media of retail shareholders showing a lack of knowledge regarding the meaning of a "record date," what happens on the record date, and when voting occurs.[80] Retail investors are not just unfamiliar with corporate law terminology but also the mechanics of corporate governance as well as the substantive issues at play in proxy items.[81] For example, some technicalities like a partially completed proxy card resulting in the remainder of votes being cast in accordance with management recommendations are not necessarily intuitive. Investing education courses should include instruction not just on investing but these intricacies of corporate governance to empower retail investors.

[78] *See id.*

[79] Amy Ouellette, *What Gen Z Really Wants from the Workplace*, EBN (July 20, 2022), https://www.benefitnews.com/advisers/opinion/the-employee-benefits-gen-z-wants-and-expects [https://perma.cc/YB2R-58WY]. *See generally* Sergio Alberto Gramitto Ricci & Christina M. Sautter, Response, *The Corporate Forum*, 102 B.U. L. REV. 1861 (proposing a forum on corporate websites aimed at enhancing shareholder engagement and accessibility to information which may incorporate just-in-time investing education).

[80] *See, e.g.*, u/Late-but-trying, *June 2nd- What Does it Mean?,* REDDIT (May 18, 2021), https://www.reddit.com/r/amcstock/comments/nfsiim/june_2nd_what_does_it_mean/ [https://perma.cc/CX5Q-P7P7] (asking what the meaning of the June 2 record date was in relation to the 2021 AMC Entertainment shareholders meeting). Some shareholders believed that they needed to vote their shares by the record date while others believed that the record date indicated the date that voting began. *See, e.g.*, u/Orphenboy, *PLEASE DON'T BE CONFUSED ABOUT THE VOTE DATES, It STARTS June 2nd, not STOPS.,* REDDIT (May 18, 2021), https://www.reddit.com/r/amcstock/comments/nf7tgw/please_dont_be_confused_about_the_vote_dates_it/ [https://perma.cc/6HZ2-BAKK] (stating, correctly, that voting did not end on the June 2 record date for the 2021 AMC Entertainment shareholders meeting, but stating, incorrectly, that the vote began on June 2).

[81] *See, e.g.*, Lewis Braham, *Robinhood's New Proxy Platform Battles Investor Apathy*, BARRON'S (Oct. 22, 2021), http://www.shareholderforum.com/access/Library/20211022_Barrons.htm [https://perma.cc/H7D2-W6ZS] (stating that shareholder apathy "often stems from ignorance of proxy issues").

B. *The Importance of Including Corporate Governance in Education*

Civics education has been found to nurture political engagement with positive ramifications on equality and citizens' agency.[82] In a globalized world, with corporations rivaling nation states in power and influence, the benefits of widespread investing education cannot be overstated.[83] Corporate governance allows citizens to partake in decision making affecting virtually all aspects of their lives.[84] Share ownership is the key that provides access to corporate governance.[85] Including corporate governance in investing education curricula not only completes the set of knowledge necessary for investing in companies' shares, but also enhances the agency of investors as citizens. Investing education bridges the gap between citizens and Wall Street. It also provides citizens with the tools to engage with the companies in which they invest.

IV. CONCLUSION

Cable's article sheds light on salient issues with intertwined finance and social ramifications. Rather than constraining agency of retail investors, we go for the jugular and push forward an agenda to educate citizens about investing and engaging with corporations. Although this approach requires time to bear fruit, the transition costs appear reasonable in consideration of the values at stake as well as of the lasting positive effects investing education produces on society.

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82 *See generally* MEIRA LEVINSON, *Benefits of Civic Education: Increased Equality and Narrowed Civic Empowerment Gap*, *in* GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS (Jonathan Gould, ed., 2011), https://dash.harvard.edu/handle/1/10861135 [https://perma.cc/6G34-JSAN] (discussing how taking a civics course results in an increase in voting and promotes civic equality).

83 *See* CHRISTOPHER M. BRUNER, THE CORPORATION AS TECHNOLOGY: RE-CALIBRATING CORPORATE GOVERNANCE FOR A SUSTAINABLE FUTURE 9–10 (2022) (detailing the size of Fortune 500 companies in comparison to nation states); *see also* STOUT, GRAMITTO & BELINFANTI, *supra* note 15, at 15–16 (discussing how the corporate sector can provide influence and income to all); *see also* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Wireless Investors & Apathy Obsolescence*, 100 WASH. U. L. REV. (forthcoming 2023) (discussing how new generations of investors overcome collective action problems to actively contribute to steer corporations).

84 *See* Gramitto Ricci & Sautter, *supra* note 6 (manuscript at 6–7).

85 *See id*.

Annex B

Selected SEC and SRO Provisions Requiring & Allowing Firms to Address Potential or Actual Conflicts Through Disclosure

Below is a non-exhaustive list of SEC and SRO provisions that both allow and require firms to address conflicts through disclosure – and not neutralization or elimination.

SEC Rules Applicable to Broker-Dealers Under the Securities Exchange Act of 1934, as Amended.

- Section 15D: This section directs the SEC, or the SROs at the direction of the SEC, to address material conflicts of interest relating to recommendations in research reports through disclosure. For example, if a research analyst has an ownership interest in securities that are the subject of a research report, that ownership interest must be disclosed.

- Rule 10b-10: Broker-dealers must disclose certain conflicts of interest associated with transactions on confirmations, including whether they are acting as agent for both the customer and another person and payment for order flow relationships.

- Rule 15c1-5: Broker-dealers who have a control relationship with an issuer must disclose to customers if they offer these securities to or trade these securities with the customer.

- Rule 15c1-6: Broker-dealers who are involved in a distribution of securities must disclose that conflict of interest to customers if they offer these securities to or trade these securities with the customer.

- Regulation Best Interest (Exchange Act Rule 15l-1): Broker-dealers must disclose all material facts relating to the scope and terms of the relationship with the retail customer and conflicts of interest associated with the recommendation.

- Form CRS (Exchange Act Rule 17a-14): Broker-dealers must disclose certain conflicts of interest associated on Form CRS, provide the form to retail investors, and file it on their websites.

- Rule 17g-5: A person within a nationally recognized statistical rating organization is prohibited from having certain material conflicts of interest relating to the issuance or maintenance of a credit rating unless, among other things: (1) the rating organization has established and is maintaining and enforcing written policies and procedures to address and manage conflicts of interest; and (2) the rating organization has disclosed these conflicts of interest.

- Rule 17g-7: Rating agencies must disclose certain material conflicts of interest when taking a rating action with respect to assigning a credit rating. They must disclose (1) if they were paid to determine the credit rating by the obligor, issuer, underwriter, depositor, or sponsor of the security or money market instrument being rated; or (2) paid for services other than determining credit rating by the person that paid the rating agency to determine the rating.

Rating agencies also must disclose whether a conflict influenced a rating, a revised credit rating or an affirmation of the rating. The publication must include disclosures about the existence and impact of the conflict.

- Regulation AC (Rule 501): Research analysts must include a statement in their reports if (i) all or part of the analyst's compensation was or will be related to specific recommendations or views expressed in the report, (ii) identifying the source, amount, and purpose of such compensation, and (iii) further disclosing that the compensation could influence the recommendations or views in the report.

- Regulation NMS Rule 606: Broker-dealers must disclose the material aspects of their relationship with venues to which they route, including descriptions of payment for order flow or profit-sharing relationships.

- Regulation NMS Rule 607: Broker-dealers must include in account statements a description of any payment for order flow they receive.

SEC Rules Applicable to Investment Advisers Under the Investment Advisers Act, as Amended.

- Under the Investment Advisers Act, pursuant to its duty of loyalty, an investment adviser must eliminate *or make full and fair disclosure* of all conflicts of interest which might incline an investment adviser— consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict.

- The SEC's recently finalized private funds rule, Rule 211(h)(2)-1, prohibits an adviser from engaging in certain activities that raise conflicts of interest and are contrary to the public interest, unless the adviser satisfies certain conditions, including, among others, certain disclosure and consent requirements.

SEC Rules Applicable Under the Securities Act of 1933, as Amended.

- Section 17(b): Requires broker-dealers to address conflicts of interest relating to compensation by disclosing if they received consideration from an issuer or underwriter to prepare a research report or marketing material that discusses the issuer.

- Item 404(a) of Regulation S-K: Requires public companies to disclose certain transactions with related persons (related party transactions).

- In 2020, the SEC adopted amendments to the financial disclosure requirements for guarantors and issuers of guaranteed securities registered or being registered in Rule 3-10 of Regulation S-X, and for issuers' affiliates whose securities collateralize securities registered or being registered in Rule 3-16 of Regulation S-X.

- The SEC's crowdfunding rules require crowdfunding issuers to disclose, among other things, related party transactions and information about officers and directors as well as owners of 20 percent or more of the issuer.

- Under Regulation D, firms must disclose to the purchaser in writing "any material relationship between himself or his affiliates and the issuer or its affiliates that then exists, that is mutually understood to be contemplated, or that has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship."

FINRA Rules.

- FINRA Rule 2210: Broker-dealers providing recommendations in securities must disclose if they have certain conflicts of interest with regard to the recommended security (e.g., if they or the persons responsible for the recommendations have a non-nominal financial interest in the recommended securities or received investment banking compensation from the issuer for acting as a manager or co-manager).

- FINRA Rule 2241: Broker-dealers must disclose in equity research reports if they or the research analyst responsible for the report has a material conflict of interest with regard to the issuer discussed in the report (e.g., they received compensation from the issuer or have an ownership interest in the issuer).

- FINRA Rule 2242: Broker-dealers must disclose in debt research reports to retail investors if they or the research analyst responsible for the report has a material conflict of interest with regard to the issuer discussed in the report (e.g., they received compensation from the issuer or have an ownership interest in the issuer).

- FINRA Rule 2262: Broker-dealers engaging in offerings where they have a control relationship with the issuer must disclose to customers "the existence of such control" at or before the completion of the transaction."

- FINRA Rule 2269: Broker-dealers participating in a primary or secondary distribution must disclose to customers (at or before the completion of a transaction) if they are acting as a broker for a customer or both a customer and another person or a dealer and receive or expect to receive a fee from a customer for advising such customer with respect to the securities.

- FINRA Rule 5121: Broker-dealers engaging in offerings with certain conflicts of interest must provide "prominent disclosure of the nature of the conflict of interest" in the prospectus, offering circular or similar document for the public offering.

- FINRA Rule 5122: Broker-dealers engaging in private placements of their own securities or a control entity's securities must provide certain disclosures, including the amount of compensation to be paid to the broker-dealer and its associated persons.

MSRB Rules.

- MRSB G-22: Prohibits discretionary account transactions and effecting purchase and sale transactions of municipal securities by dealers, where the dealer has a control relationship with respect to the security, absent disclosure to the customer of such relationship.

- MSRB Rule G-42: Requires a municipal advisor to make full and fair disclosure, in writing, of all material conflicts of interest and all legal and disciplinary events that are material to a client's evaluation of a municipal advisor.

Annex C

Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Corporate Forum*, 102 B.U. L. REV. 1861 (2022).

See attached.

RESPONSE

THE CORPORATE FORUM[†]

SERGIO ALBERTO GRAMITTO RICCI[*] & CHRISTINA M. SAUTTER[**]

CONTENTS

[†] 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.[1] 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.[2] Despite saluting the resurgence of retail investors as good news, Fisch also cautions about risks associated with the growth of retail investors.[3] In our response, we focus on one of the risks associated with the growth of retail investing that Fisch surveys: uncontrolled information sourcing.[4] 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.[5] 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.[6] 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.[7] 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."[8] 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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[1] *See generally* Jill E. Fisch, *GameStop and the Resurgence of the Retail Investor*, 102 B.U. L. REV. 1799 (2022).

[2] *Id.* at 1831-51.

[3] *Id.* at 1851-60.

[4] *See id.* at 1851-54 (detailing issues raised by investors sourcing information via social media).

[5] 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.

[6] 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.*

[7] 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).

[8] 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.[9] 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.[10] 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.[11] 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.[12] Our

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[9] 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.

[10] *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.

[11] *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").

[12] *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.[13]

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.[14] 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.[15] 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.[16] Relatedly, as Fisch explains, and as we also have examined in prior work, younger retail investors rely heavily on social

[13] 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://perma.cc/649Z-CGFW].

[14] 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).

[15] 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://perma.cc/77M3-4F5M] (discussing how mobile-first investing apps have been playing a role in increasing diversity of share owners).

[16] *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.[17] 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.[18] A large number of wireless investors belong to the Millennial and GenZ generations.[19]

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.[20] The reliance on sources other than unwieldy mandated disclosure is explainable with Millennials and GenZ'ers' preference for processed information, readily available for consumption.[21] As Fisch cautions, however, the reliance on online sourced information is accompanied by the potential for misinformation.[22] In addition, even before these new generations of retail

[17] 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).

[18] Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 12, at 51, 53 (introducing terms "wireless generations" and "wireless investors").

[19] 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 Gen'Zers).

[20] 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*.

[21] *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.

[22] 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.[23]

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.[24] 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.[25]

Against this backdrop, the corporate forum could enhance the flow of information among shareholders and between a corporation and its shareholders.[26] 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.[27] Moreover, the corporate forum could be a venue to provide shareholders with just-in-time investing education—an

[23] 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.

[24] Fisch, *supra* note 1, at 1858.

[25] 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).

[26] *See* Electronic Shareholder Forums, 73 Fed. Reg. 4450, 4459 (Feb. 25, 2008) (codified at 17 C.F.R. § 240.14a-17).

[27] 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.

educational model Fisch advocates for in *GameStop and the Resurgence of the Retail Investor*.[28]

The corporate forum would provide a centralized venue for all shareholders to discuss issues that are most important to them.[29] 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.[30] 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

[28] 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].

[29] 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.

[30] 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.[31] The forum could be a discussion board similar to a Reddit subreddit incorporating attributes of the Say Technologies Q&A platform.[32] 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.[33] 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.[34] In addition, like Reddit, the forum could be sorted via new posts, via most popular

[31] 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.*

[32] *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).

[33] 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://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.

[34] 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).[35]

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.[36] 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.[37] The verification process would help assuage another concern which is that individuals who post in the forum are who they claim to be.[38] 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.[39] 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.[40] The cost of running the forum would depend also on the features of the forum, which can make it more or less

[35] Reddit currently allows posts to appear via top voted posts based on Today, This Week, This Month, This Year, and All Time.

[36] *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).

[37] *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").

[38] 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).

[39] *See* Electronic Shareholder Forums, 73 Fed. Reg. at 4450-59.

[40] *See id.* at 4455-56 (discussing potential costs of forum).

costly.[41] 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.[42] 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.[43] 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.[44]

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.[45] In settling on sixty days, the SEC balanced the information gathering function of a forum against proxy solicitation concerns.

[41] *See id.* (listing attributes of forums which may affect costs).

[42] 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).

[43] 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.

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

[45] 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."[46] 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.[47]

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.[48] The corporate forum could also provide easily accessible just-in-time investing education materials.[49] 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.[50] No matter if management utilizes a video format or written

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[46] *See* Electronic Shareholder Forums, 73 Fed. Reg. at 4454.

[47] *See* Gumbs & Gay, *supra* note 38, at 12-13.

[48] 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—Gadflys or Eagles?*, 27 FIN. ANALYSTS J. 89, 89-90 (May-June 1971).

[49] 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).

[50] *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.[51]

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.[52] Moreover, views expressed on the forum may not necessarily reflect the average shareholder in the corporation.[53] Admittedly, this is not a perfect solution as misinformation tends to spread quickly, sometimes more quickly than accurate information regarding the same matter.[54] However, if inaccurate information is raised in shareholder conversations on the forum, management will have an opportunity to correct such misinformation.[55] In fact, "to quickly dispel any misleading information" is one of the benefits to which the SEC pointed in adopting Rule 14a-17.[56]

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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[51] 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).

[52] 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).

[53] *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").

[54] *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].

[55] 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.

[56] *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.[57] 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.[58]

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.[59] 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."[60]

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.[61] Establishing, maintaining, and furthering trust not just with shareholders but with other stakeholders is essential to the success of companies.[62] As former SEC Commissioner Aguilar stated, "trust is fundamental to both trade and investment. When there is a lack of trust, both

57 Fisch, *supra* note 1, at 1811.

58 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).

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

60 Fisch, *supra* note 1, at 1852.

61 *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.").

62 *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."[63] Relevantly, the forum could help to remedy the issue of executives not interacting with retail investors.[64] 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.[65]

Fisch explains that investor relations experts are advising companies to develop strategies to nurture their relationships with retail investors.[66] 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.[67]

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.[68]

[63] Aguilar, *supra* note 30.

[64] *See* Fairfax, *supra* note 11, at 1301 (stating that forums can result in a "genuine dialogue between corporations and their shareholders").

[65] *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.

[66] Fisch, *supra* note 1, at 1842.

[67] *Id.*

[68] *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.[69] 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.[70] In its adopting release, the SEC suggested a period for the sixty days leading to the

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.*

69 *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).

70 *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.[71] 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."[72] So, Rule 14a-17 clarifies that the issuer hosting the forum would not be liable for statements made by others in the forum.[73] 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.[74] 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.[75] 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

[71] *Id.* at 4453-54.

[72] 17 C.F.R. § 240.14a-17 (2008).

[73] *Id.*

[74] *Id.*

[75] *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.[76]

There might be instances, for example, the case of an issuer reposting questions and comments, that could raise doubts about liability exposure.[77] 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.[78]

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.

[76] *See* 17 C.F.R. § 243 (2021).

[77] 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).

[78] 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).

Annex D

Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Wireless Investors & Apathy Obsolescence*, 100 WASH. U. L. REV. 1653 (2023).

See attached.

WIRELESS INVESTORS & APATHY OBSOLESCENCE

SERGIO ALBERTO GRAMITTO RICCI[*] & CHRISTINA M. SAUTTER[**]

ABSTRACT

This Article discusses how a subgenre of retail investors makes investors' apathy obsolete. In prior work, we dub retail investors who rely on technology and online communications in their investing and corporate governance endeavors "wireless investors." By applying game theory, this Article discusses how wireless investors' global-scale online interactions allow them to circulate information and coordinate, obliterating collective action problems.

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INTRODUCTION

Today virtually anyone can make investment decisions from their phones. Investing apps allow the average citizen to buy, hold, and sell shares at their fingertips.[1] Conversations about investing and finance have permeated the internet with an increasingly large segment of society engaging in discussions about securities. This is bridging the gap between financial markets and retail investors—individuals typically holding a relatively small number of shares who are not professional investors. While all shareholders of public companies are typically granted the right to vote in director elections and on other significant items, the trend has been that this power is scarcely employed by retail investors.[2] Traditional investor apathy and free riding have hindered retail investors' engagement.[3] Retail

1. *See* 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) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4147388 [https://perma.cc/MBU8-G74F].

2. *See* Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1314 (2019).

3. ROBERT CHARLES CLARK, CORPORATE LAW 390–93 (2d ed. 1986).

shareholders[4] with small investments typically leave the burden to vote to larger shareholders.[5] Many commentators deem investors' apathy for the best. Some view retail investors as unequipped to make informed decisions compared to the sophisticatedly trained Wall Street professionals. Retail investors have been considered "irrational and uninformed noise traders, who distort stock prices and harm market functioning."[6] This common belief is grounded partly in retail investors' lack of investing education and partly in structural barriers to information and inability to communicate and coordinate.[7]

Despite being the economic beneficiaries of corporations with governance rights,[8] retail investors have traditionally remained apathetic in yielding shareholder voting power—casting, on average, 31% of their shares despite the overall rate of voting reaching nearly 80%.[9] On average, only 11% of retail investors choose to vote, with this likelihood increasing for shareholders with a larger stake in the company, when financial returns have been poor, and when Institutional Shareholder Services (ISS) opposes shareholder-sponsored proposals up for a vote.[10]

Retail investors have been traditionally studied through their buying and selling behavior to determine approval or dissatisfaction of public companies, rather than voting decisions.[11] This "satisfaction or sell" mentality has conventionally been considered rational. The rationality is grounded in the consideration that diversified retail investors with small stakes in large companies will have, at most, a negligible impact on the voting outcome. So, the cost of staying informed and intelligently voting largely outweighs any impact a retail investor's participation may have.[12]

Apathy is typically explained through two interrelated rationales—one of great cost and one of little benefit. In this Article, we offer a supplementary, but probably paramount, explanation of retail investors' apathy, drawing on game theory and using the uber-famous prisoner's dilemma. The prisoner's dilemma paradigm shows how, if retail investors can communicate and coordinate their actions, apathy becomes irrational.[13]

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4. In this Article, we interchangeably use the terms "retail investor" and "retail shareholder."
5. CLARK, *supra* note 3, at 390–93.
6. Gaia Balp, *The Corporate Governance Role of Retail Investors*, 31 LOY. CONSUMER L. REV. 47, 71–72 (2018) (footnote omitted).
7. Fairfax, *supra* note 2, at 1304.
8. *See id.*
9. Alon Brav, Matthew Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. FIN. ECON. 492, 508, 501 (2022).
10. *Id.* at 500–01.
11. *See, e.g.*, Fairfax, *supra* note 2, at 1304–10.
12. *See* Kobi Kastiel & Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 DEL. J. CORP. L. 55, 60–61, 66 (2016); Katrin Tinn, *Everyone Is a Stock Trader Now: Retail Investors and COVID-19*, CEPR PRESS, July 2, 2021, at 88, 98–99.
13. *See infra* Part II.

In other words, retail investors' apathy is a suboptimal behavior, explainable with the bygone inability to communicate and coordinate their actions.

A specific type of retail investor is leading the paradigm shift that obliterates traditional obstacles to retail investors' engagement in corporate governance. In prior work, we refer to these retail investors as *wireless investors* because of their use of technology and online communication.[14] Wireless investors tend to invest using app native trading platforms and gather information about investing via social media and online fora.[15] Most wireless investors are Millennials or GenZ'ers. Millennials are considered digital pioneers, while GenZ'ers are "digital natives," with the latter's immersion in technology being more substantial than any generation that has come before them.[16] The two generations' shared immersion in the technological world has created similar values when choosing where to invest finances, for whom to vote in both local and national elections, and where to call their workplace home.[17] Millennials and GenZ'ers develop an online connection that spans from investing to igniting social, environmental, and political change.[18]

Informed by the generational features and aptitudes characterizing wireless investors, this Article sheds new light on investors' apathy using game theory. It also discusses how wireless investors can shift retail investing paradigms by obliterating traditional collective action problems along with investors' passivity. Part I of this Article surveys retail investors' apathy. Part II proposes a new framework to investigate retail investors' apathy, based on game theory. Part III examines wireless investors' ability to overcome traditional collective action problems through the creation of

14. Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51, 52–53 (2021) [hereinafter Gramitto Ricci & Sautter, *Corporate Governance Gaming*]; Gramitto Ricci & Sautter, *supra* note 1 (manuscript at 2–3); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Wireless Investors Movement*, U. CHI. BUS. L. REV.: ONLINE EDITION (2022) [hereinafter Gramitto Ricci & Sautter, *The Wireless Investors Movement*], https://businesslawreview.uchicago.edu/online-archive/wireless-investors-movement [https://perma.cc/7S9V-2HWQ].

15. Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 14, at 52–53; Gramitto Ricci & Sautter, *supra* note 1 (manuscript at 2–3).

16. Kim Parker & Ruth Igielnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z So Far*, PEW RSCH. CTR. (May 14, 2020), https://www.pewresearch.org/social-trends/2020/05/14/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far-2/ [https://perma.cc/8MSB-KFA3].

17. *Id. See generally* Kim Parker, Nikki Graf & Ruth Igielnik, *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RSCH. CTR. (Jan. 17, 2019), https://www.pewresearch.org/social-trends/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/ [https://perma.cc/5ZFR-MX5K].

18. *See* Parker et al., *supra* note 17; *see also* Abe Selig, *Generation Influence: Reaching Gen Z in the New Digital Paradigm*, WP ENGINE (Dec. 9, 2022), https://wpengine.com/resources/gen-z-2020-full-report/#Generation_Influence_An_International_Study_Comparing_Gen_Z_With_Other_Generations [https://perma.cc/JF3M-TCXP] (summarizing a study on Gen Z's influence and experience in the digital age conducted by The Center for Generational Kinetics).

social capital online. Part IV discusses retail investing in the age of online communication. Finally, Part V explores wireless investors' power to shift social norm paradigms relating to investing and voting.

I. RETAIL INVESTORS' APATHY

Retail investors traditionally consider the cost of their corporate governance engagement on an individual basis, the benefit of their corporate governance engagement on an individual basis, and their ability to determine an outcome on an individual basis. Small retail shareholders reason that other shareholders, typically with larger equity interests or a duty to vote, will make the best decisions for all shareholders.[19] Such an approach is grounded in the consideration that the opportunity cost of educating themselves to make informed voting decisions outweighs the benefit of doing so.[20] This phenomenon is known as free riding.[21]

Even when retail investors acknowledge that other shareholders' voting preferences result in outcomes that do not align with their own interests, retail investors typically refrain from voting as they believe that their vote would not be sufficient to vary the outcome. In other words, retail investors who act on an individual basis fear that their engagement with corporate governance would be costly and in vain. As a result, retail investors typically stay passive even if their interests differ from those of the institutional shareholders that are most likely to drive the vote.[22] Retail investors free ride on institutional investors' engagement and voting, and, as a measure of last resort, they rely on the "Wall Street walk" as their exit option.

Retail investors' behavior and beliefs with respect to apathy are grounded on a false premise—they consider themselves as necessarily solo actors. Thinking exclusively on an individual basis leads retail investors to refrain from exercising their power on corporations. It is this reasoning bias for individualism that informs retail investors' apathetic behavior. Different from the prisoners in the famous prisoner's dilemma, however, retail investors are not required to act in a context in which communication and cooperation are prohibited from the outset.[23]

In this Part, after reviewing the traditional reasons typically associated with investors' apathy, we look at apathy through a new lens—questioning the bias that retail investors' decisions ought to be made in a non-

19. CLARK, *supra* note 3, at 393.
20. *Id.* at 392.
21. *Id.*
22. *Id.* at 392–93.
23. *See infra* Part II.

cooperative environment, like those of the prisoners facing the prisoner's dilemma.[24] But wireless investors are overcoming that bias and are on the verge of causing a lasting paradigm shift in corporate governance.

A. *The Cost of Retail Investors' Participation Within a Non-Cooperative Context*

With respect to costs, the apathy of retail investors is largely credited to the fact that, for most, it is simply economically rational to stay uninformed and uninvolved in shareholder voting.[25] The financial incentives to monitor management paired with the costly process of being informed and actually voting tilt the cost-benefit analysis to the side of "too costly," resulting in deference to management or reliance on institutional investors to make decisions for all shareholders.[26] In other words, without coordination among shareholders, great costs result in retail investors' passivity.

Voting costs are multifaceted—chief among those are "the cost[s] of becoming informed, that is, of acquiring, processing, and assessing the implications of relevant information" as it relates to the vote.[27] To vote intelligently, information must be gathered as to the nature of shareholder rights in addition to that of "the underlying business of the issuer."[28] An investor must evaluate this information, bearing an additional cost.[29] In fact, "[b]oth gathering and assessing . . . information is costly."[30] In the current system, absent mass communication among retail investors, the cost to gather and assess information prohibits such investors from taking advantage of the benefits of voting their shares.[31]

The cost of staying informed and voting intelligently is driven up by several factors. It is partially attributable to securities regulation requirements, which have increased over the past decades, resulting in disclosure and proxy statements that are substantially more

24. *See infra* Part II.

25. Artem Meshcheryakov & Drew B. Winters, *Retail Investor Attention and the Limit Order Book: Intraday Analysis of Attention-Based Trading*, INT'L REV. FIN. ANALYSIS, May 2022, at 1, 2–3 (discussing how retail investors are commonly uninformed, and those that believe they are informed are trading more on "noise" than committed investigations); *see also* CLARK, *supra* note 3, at 390–92 (discussing benefits and costs of voting).

26. *See* Fairfax, *supra* note 2, at 1311.

27. Luca Enriques & Alessandro Romano, *Institutional Investor Voting Behavior: A Network Theory Perspective*, 2019 U. ILL. L. REV. 223, 231–32.

28. *See* Stephen J. Choi & Jill E. Fisch, *How to Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries*, 113 YALE L.J. 269, 271 (2003).

29. *Id.* at 271, 300.

30. *Id.* at 271.

31. *See* Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 50–51 (2017).

comprehensive.[32] New items on which shareholders vote, such as say-on-pay,[33] more shareholder proposals,[34] and contested director elections,[35] have resulted in a complex and voluminous task for shareholders willing to engage. For example, Apple's proxy statement increased from eighteen pages and only two proposals being submitted for shareholder vote in 1994,[36] to 132 pages (including appendices) and ten proposals in 2022.[37] Interestingly, reforms aimed at providing more information and power to shareholders benefit institutional investors while making engagement more burdensome for small retail investors who act individually. Such reform efforts further exacerbate the unevenness of the financial markets playing field, ultimately frustrating the mission of the Securities and Exchange Commission.[38]

Diversification of equity investments is another factor that increases the cost of exercising governance rights and engaging. The cost of being informed and exercising corporate governance rights is amplified by modern investment trends—with the average retail investor's portfolio being more diversified than in the past.[39] Shareholders, in the early to mid 1900s, participated much more significantly in corporate governance than today. For example, "[i]n 1961, *twenty thousand* shareholders showed up to AT&T's annual shareholder meeting in Chicago—more than the number of attendees at the opening of baseball season."[40] This was not an isolated instance, with occurrences of shareholders in the 1940s "being turned away . . . for a lack of space" and individuals driving hundreds of miles to participate in shareholder meetings.[41] Notably, at that time, most retail investors did not hold diversified portfolios of stock.[42]

32. *See* Kastiel & Nili, *supra* note 12, at 66.

33. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1899 (2010).

34. Bonnie G. Buchanan, Jeffry M. Netter, Annette B. Poulsen & Tina Yang, *Shareholder Proposal Rules and Practice: Evidence from a Comparison of the United States and United Kingdom*, 49 AM. BUS. L.J. 739, 740–43 (2012).

35. Kobi Kastiel & Yaron Nili, *"Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite*, 2017 WIS. L. REV. 19, 34–35.

36. Kastiel & Nili, *supra* note 12, at 69.

37. Apple Inc., Notice of 2022 Annual Meeting of Shareholders and Proxy Statement 59–98 (Schedule 14A) (Mar. 4, 2022).

38. *See generally* Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1025 (2009) (stating that the SEC perceives itself as the advocate for retail investors).

39. *See* Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 590 (2022).

40. *Id.* at 587.

41. *Id.* at 586–87.

42. *See id.* at 525 n.41 (showing average shareholder holding stock in, on average, 2.5 corporations in 1940) (citing TEMP. NAT'L ECON. COMM., 76TH CONG., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER: THE DISTRIBUTION OF OWNERSHIP IN THE 200 LARGEST NON-

By the 1960s and 1970s, however, the rise of intermediation and the shift away from retail investing came with the promotion of diversification as an investment strategy.[43] As diversification gained traction also among retail investors and retail investors became fully diversified, they could "rarely detect firms' ineffectiveness because of their inferior position in gathering and processing information."[44] An investor holding stock in numerous companies is faced with heightened information costs as well as heightened opportunity costs associated with voting shares in dozens of companies.[45] By multiplying the costs associated with informed voting, diversification has been leading retail investors to "give up" on corporate governance and focus on the mere financial dimension of investing.[46]

B. The Pro-Rata Benefits for Retail Investors

The costs associated with staying informed and voting are independent from an investment's size, but the benefits of informed voting extend to all shareholders pro rata.[47] So, absent coordination among shareholders, the cost-benefit analysis of free riding or voting ultimately depends on the size of a shareholder's equity investment in a given company. Unless the shareholder's interest is large enough to offset costs with the benefits that the shareholder can internalize, the incentives to free ride outweigh the incentives to vote. In other words, investors who hold small amounts of shares are likely better off free-riding, while the cost-benefit analysis tilts in the favor of participation for investors with larger amounts of shares.[48] As a result, investors' disengagement disproportionally appeals to holders of small amounts of shares. This, in turn, further exacerbates socioeconomic inequality due to the influence deriving from voting shares. Retail investors who have the right to vote a small number of shares tend not to vote at all.[49] So, institutional investors as well as individuals with share blocs advance their agenda in corporate governance with virtually no counterpoint.

FINANCIAL CORPORATIONS, at 17 (Comm. Print 1940)); N.Y. STOCK EXCH., SHARE OWNERSHIP IN AMERICA: 1959, at 5 (1959) (showing increase, by 1959, to the average shareholder holding stock in, on average, 3.5 corporations).

43. Haan, *supra* note 39, at 590.

44. Kunpeng Sun, Dan Wang & Xing Xiao, *Another Victory of Retail Investors: Social Media's Monitoring Role on Firms' Earnings Management*, INT'L REV. FIN. ANALYSIS, July 2022, at 1, 2.

45. Kastiel & Nili, *supra* note 12, at 60–61, 66.

46. *Id.* at 60–61, 66, 69.

47. Enriques & Romano, *supra* note 27, at 231–32.

48. Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. DAVIS L. REV. 605, 623 (2007).

49. Brav et al., *supra* note 9, at 500.

C. *Retail Investors' Governance Inconsequentiality Within a Non-Cooperative Context*

Due to the dissipated ownership of shares, retail investors "recognize that they have no influence in a corporation of hundreds of millions of dollars capital," thus considering their participation inconsequential.[50] The difficulty of aggregation is only exacerbated by the structure of ownership of many public corporations listed on the New York Stock Exchange (NYSE) today—one that is largely concentrated in the hands of institutional investors.

Fifty years ago, households directly owned almost 80% of U.S. corporate equity.[51] Such direct ownership has declined dramatically over the years, reducing by more than a half, so that today less than 40% of U.S. corporate equity is directly owned by households.[52] The remainder is held by institutional investors.[53] Further, the remaining non-institutional ownership is also somewhat concentrated in managerial and family ownership blocs.[54]

The concentration of ownership exacerbates the retail investor's sense of an inconsequential role in corporate governance, especially since most publicly traded companies operate on a majority rules model.[55] Defeat of any proposal supported by institutional investors, the founding family, or management would require opposing votes by a massive proportion of the retail shareholders.[56] Apathy is furthered as the "resulting need to obtain a very high percentage of public shareholder votes[] sharply reduces the probability of a successful battle and thus lowers the expected payoff."[57]

One contributing factor is the cost of coordination.[58] Collective action is largely impossible without the ability to communicate. Costs to

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50. Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1390–91 & n.21 (2008) (quoting Louis D. Brandeis, *On Industrial Relations*, *in* THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS. D. BRANDEIS 70, 77 (Osmond K. Fraenkel ed., 1934)).

51. *See* Amil Dasgupta, Vyacheslav Fos & Zacharias Sautner, *Institutional Investors and Corporate Governance* 4 (Eur. Corp. Governance Inst., Fin. Working Paper No. 700/2020, 2021), http://ssrn.com/abstract_id=3682800 [https://perma.cc/4FRJ-BD5D] (providing the specific household decline statistics from 80% to today's 38.3%); Charles R. Korsmo, *Selling Stock and Selling Legal Claims: Alienability as a Constraint on Managerial Opportunism*, 70 OKLA. L. REV. 215, 222 (2017) (providing evidence that fifty years ago households held roughly 85% of corporate equity, but since a shift in the 1970s, 1980s, and 2000s, corporate institutions now hold 70–80% of corporate equity).

52. Dasgupta et al., *supra* note 51, at 4; *see also* Korsmo, *supra* note 51, at 222.

53. Dasgupta et al., *supra* note 51, at 4.

54. Jeffrey N. Gordon, *Ties That Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1, 44–47 (1988); Ronald Anderson, Nan Li, David M. Reeb & Masud Karim, *The Family Firm Ownership Puzzle*, 2 REV. CORP. FIN. 679, 679 (2022).

55. *See* Bo Becker & Guhan Subramanian, *Improving Director Elections*, 3 HARV. BUS. L. REV. 1, 9–11 (2013) (discussing increase in majority voting in director elections).

56. Gordon, *supra* note 54, at 45–46.

57. *Id.* at 46.

58. *See* CLARK, *supra* note 3, at 390–96.

communicate and coordinate with large groups of dispersed shareholders arise to a greater degree than in smaller groups.[59] Efforts to organize or share costs among all members of the group are also more difficult when individual shareholders would not expect to accrue a beneficial return due to "free-rider" problems.[60]

II. RETHINKING RETAIL INVESTORS' APATHY

One model helpful to explain retail investors' apathy arises out of game theory—a subset of decision theory—which studies how a single rational agent can maximize their outcome, especially when facing uncertainty. Game theory has found application across fields of engineering, economics, psychology, computer science, and policy making.[61] Game theory, specifically, "is used to identify equilibria solutions from which no player is likely to deviate."[62] One model prevalent among game theory—the prisoner's dilemma—was developed by economists during the 1950s to model strategic operations of international politics during the Cold War.[63] Since then, the prisoner's dilemma has gained popularity as a model for the "social dilemma occur[ring] when agents individually seek higher payoffs . . . to the detriment of their collective interests."[64]

The prisoner's dilemma is illustrated by two people being charged with a violation of law and being separately held.[65] However, officials are faced with a quandary as there is not enough evidence to convict either person unless one or both confess.[66] The individuals are brought in for questioning and not permitted to communicate with each other before the officials explain to both that each person's respective sentence will depend both on their *own* confession or lack thereof and on *their co-criminal's confession* or lack thereof.[67] Simple rules govern the questioning. First, "if both confess, each will be fined one unit."[68] Second, "if neither confesses, both

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59. Gordon, *supra* note 54, at 46.

60. *Id.* at 44.

61. Lucas Kruitwagen, Kaveh Madani, Ben Caldecott & Mark H. W. Workman, *Game Theory and Corporate Governance: Conditions for Effective Stewardship of Companies Exposed to Climate Change Risks*, 7 J. SUSTAINABLE FIN. & INV. 14, 16 (2017).

62. *Id.*

63. *Id.* at 18; *see also* WILLIAM POUNDSTONE, PRISONER'S DILEMMA 8–9 (1993).

64. Kruitwagen et al., *supra* note 61, at 17.

65. A. W. Tucker, *The Mathematics of Tucker: A Sampler*, 14 TWO-YEAR COLL. MATHEMATICS J. 228, 228 (1983).

66. POUNDSTONE, *supra* note 63, at 118.

67. Anatol Rapoport, *Prisoner's Dilemma*, *in* THE NEW PALGRAVE: GAME THEORY 199, 199 (John Eatwell, Murray Milgate & Peter Newman eds., 1989).

68. Tucker, *supra* note 65, at 228. While Tucker uses fines and rewards, most iterations of the prisoner's dilemma provide for prison time. *Id.*; *see, e.g.*, POUNDSTONE, *supra* note 63, at 118

will go clear."[69] Third, "[i]f one confesses and the other does not," the individual who confesses will receive an award of one unit while the other "will be fined two units."[70]

To an omnipresent observer, the best decision is evident—if the prisoners were able to communicate, and neither confessed, they would both be cleared.[71] However, because the prisoners are separated and without the ability to communicate, they are faced with uncertainty—this uncertainty pushes both prisoners to likely confess, as it creates the next-best possible outcome regardless of what the other prisoner does.[72] Clearly, the ability to communicate determines whether two people are able to reach the optimal outcome for themselves or only the suboptimal outcomes.

The use of the prisoner's dilemma to explain behavior has been considered especially useful in analyzing collective action problems.[73] Collective action is necessary "when a group possesses a common interest or faces a common fate."[74] However, group interest to cooperate often conflicts with an individual's interest in defection, a conflict illustrated by the free-rider dilemma, where "each individual's inclination to free ride coexists with an exactly" adverse interest to collectively cooperate for the interest of the group, in which the individual is included.[75] Thus, the prisoner's dilemma is often helpful to explain suboptimal outcomes resulting from individual rational decisions when an individual would need to cooperate with another individual, but impossibility of communication prevents them from coordinating.[76]

Impossibility of communication hinders the ability to reach an optimal outcome. Retail investors could often implement and effect changes they care about, but when they fail to communicate, they settle for apathy even

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(explaining that over time the prisoner's dilemma came to "almost always concern[] prison terms"). Furthermore, different iterations of the prisoner's dilemma provide for varying prison time. *Compare* POUNDSTONE, *supra* note 63, at 118 (describing that both prisoners are to be sentenced to prison for a year, but if either prisoner A or B takes the deal and testifies against the other, then he will go free and his partner receives three years in prison, but if both prisoners testify against each other, then both must serve two years in prison), *with* Rapoport, *supra* note 67, at 199 (describing that both prisoners are to be sentenced to prison for six months, but if either prisoner A or B takes the deal to confess, he will go completely free and his partner will receive five years in prison, but if both prisoners confess, they will both receive two years in prison). In this Article, we have adopted Tucker's numbers as he originally articulated them. *See* POUNDSTONE, *supra* note 63, at 116–17 (explaining Tucker's role in developing the prisoner's dilemma).

69. Tucker, *supra* note 65, at 228.

70. *Id.*

71. *Id.*; *see also* Rapoport, *supra* note 67, at 199.

72. Rapoport, *supra* note 67, at 199.

73. Douglas D. Heckathorn, *Collective Action and the Second-Order Free-Rider Problem*, 1 RATIONALITY & SOC'Y 78, 97 (1989).

74. *Id.* at 78.

75. *Id.* at 79.

76. *Id.* at 97.

when that is a suboptimal outcome for them.[77] The parallels between the prisoners' decision-making and shareholders' decision-making are evident—the choice for each investor is to either become informed or remain uninformed as to the probable implications on shareholder welfare.[78] Because acquiring information is costly, an investor with a smaller stake will almost always find the advantages of becoming informed outweighed by the costs of doing so even if their vote would be decisive.[79]

Similarly, a retail shareholder with a more substantial investment whose vote is not single-handedly outcome determinative may find the cost of becoming informed inferior to the expected returns. Nevertheless, that shareholder still faces the problem of other shareholders being uninformed. This shareholder's vote, therefore, will still not be decisive unless the shareholder incurs the costs necessary to inform other shareholders.[80] The cost of informing other shareholders who would not benefit from becoming informed individually discourages relatively larger shareholders from engaging.[81] Thus, as a whole, public shareholders will likely remain uninformed, or by analogy to the prisoner's dilemma, confess—because there is no compulsory cost-sharing mechanism.

However, shareholders may have turned a new corner—effectively breaking "free" of the prisoner's dilemma through online coordination. Apathy is becoming increasingly less rational due to the progressive dissipation of the aggregation dilemma upon which the normative argument relies. The cost of coordination, traditionally, was high—including the cost of obtaining information regarding other shareholders' voting intentions, communicating among shareholders, and coordinating voting behavior.[82] Further, "[t]he greater the number of shareholders, the higher [the coordination costs]" become.[83] Online coordination, however, allows retail investors to lower the cost of participating in corporate governance and circumvent the costs of obtaining information in efforts to achieve their optimal outcome.

Before the internet allowed for efficient and inexpensive coordination, shareholders and corporations long grappled with coordination among shareholders and accessibility to corporate governance. For example, shareholders and corporations would sometimes clash over where

77. Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 14, at 81–82.

78. Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1575 (1989).

79. *Id.*

80. *Id.* at 1575–76.

81. *Id.* at 1576.

82. *See* Chiara Picciau, *The (Un)Predictable Impact of Technology on Corporate Governance*, 17 HASTINGS BUS. L.J. 67, 77 (2021).

83. *Id.* at 99.

shareholder meetings should be held.[84] Companies sometimes attempted to hold meetings in less populated locations to avoid dissenting shareholders.[85] In response, self-proclaimed independent shareholders like John and Lewis Gilbert, Wilma Soss, and Evelyn Davis advocated for companies to hold shareholder meetings in more accessible locations, like New York City.[86] Conversely, in the 1940s and 1950s, many large companies held regional meetings throughout the year to supplement annual and special meetings.[87] These regional meetings allowed shareholders who were unable to attend annual meetings to learn about companies by interacting with officers and engaging in Q&As.[88] Of course, a byproduct of regional meetings was also the ability to meet and interact with fellow shareholders.

One of the aspects of shareholder meetings is the impromptu interactions among shareholders and between shareholders and management.[89] Although not emphasized typically in literature, these interactions are crucial to shareholder engagement and corporate governance.[90] For example, shareholder activist James McRitchie has written about items he has learned from informal conversations at shareholder meetings, which can have an effect on voting and even future investing.[91] These items include instances where shareholders did not understand certain agenda items; a company's outsourcing of functions; and even a lack of succession planning.[92] Had he not partaken in these conversations in person at shareholder meetings, he would not be privy to this information.

Online communities allow shareholders to recreate a sense of spontaneous communication that resembles side conversations at regional and annual meetings, but with global access. The internet offers retail

84. *See, e.g.*, John Brooks, *Stockholder Season*, NEW YORKER, Oct. 8, 1966, at 159, 160–66.

85. *Id.* at 160.

86. *See id.* at 160, 162, 166, 181 (explaining Evelyn Davis complained about the 1966 AT&T meeting location in Detroit saying that "she had been forced to come all the way from New York by bus").

87. LEWIS D. GILBERT, DIVIDENDS AND DEMOCRACY 202 (1956).

88. *Id.* The regional meeting allowed management to personally meet shareholders from all over the United States. *See id.* at 205.

89. Steven Davidoff Solomon, *Online Shareholders' Meetings Lower Costs, but Also Interaction*, N.Y. TIMES DEALBOOK (May 31, 2016), https://www.nytimes.com/2016/06/01/business/dealbook/online-shareholder-meetings-lower-costs-but-also-interaction.html [https://perma.cc/2F37-Y3NH] (explaining that "at many small and midsize companies, the conversation continues as shareholders talk with management before and after the meeting").

90. Hoschett v. TSI Int'l Software, Ltd., 683 A.2d 43, 45 (Del. Ch. 1996) ("Certainly, the annual meeting may in some instances be a bother to management, or even, though rarely, a strain, but in all events it provides a certain discipline and an occasion for interaction and participation of a kind.").

91. James McRitchie, *Chat Rooms Missing at Shareholder Meetings*, CORPGOV.NET (Aug. 31, 2020), https://www.corpgov.net/2020/08/chat-rooms/ [https://perma.cc/8VW9-3565].

92. *Id.*

shareholders the opportunity to strategize and coordinate at a low cost.[93] Through repeated digital coordination, cooperation may overcome barriers presented by share dispersion.[94] Wireless investors lead the charge toward digital cooperation. Digital coordination and cooperation make investors' apathy obsolete.

III. WIRELESS INVESTORS & SOCIAL CAPITAL

Wireless investors' propensity to come together online and ability to coordinate on a global scale allow them to wield an extraordinary amount of power, particularly in overcoming issues typically associated with retail shareholding, mostly traceable to collective action problems. The power of individuals forming online communities has been displayed in multiple ways in recent years. In January 2021, retail investors shocked the world by using the Reddit community[95] wallstreetbets (WSB) to target short-selling activity by hedge funds on GameStop shares.[96] This coordination caused a surge in the share price and triggered significant losses for the institutional investors involved.[97] As such an effective collective action was unprecedented in finance, scholars have spent the following months and years attempting to explain how unrelated retail investors were able to, effectively, beat Wall Street out of billions of dollars.[98] Multiple elements combined organically, resulting in this unprecedented action. The most noteworthy element was these wireless investors' ability to coordinate online and form an unlikely "army" of mostly strangers who came together for a common cause.[99]

Gathering online for a common cause is not unique to the GameStop trading or even to investing. For years, activists have successfully used online venues to organize support, including in-person protests and

93. *See* Gabriel Uchechi Emeasoba, *The Fallacy of the Rational Apathy Theory: Minority Shareholder Electronic Participation in Nigerian Corporate Governance*, 9 J. CORP. GOVERNANCE, INS. & RISK MGMT. 243, 250–51 (2022).

94. *See id.*

95. Alexis Ohanian & Michael Sidgmore, *Community, Camaraderie, & Capital*, Community x Capital, at 18:17–19:00 (Aug. 2021), https://open.spotify.com/episode/0TjDdhhQGzlxF3RnusEouM?si=80a6c126ca524efc [https://perma.cc/T8AM-DD5Q] (discussing how Reddit communities were traditionally called "subreddits" but Alexis Ohanian, co-founder of Reddit, clarifies that they have since been changed to "communities" to better reflect the true meaning of the Reddit feature).

96. Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 14, at 59–60; Lorenzo Lucchini, Luca Maria Aiello, Laura Alessandretti, Gianmarco De Francisci Morales, Michele Starnini & Andrea Baronchelli, *From Reddit to Wall Street: The Role of Committed Minorities in Financial Collective Action*, 9 R. SOC. OPEN SCI. 1, 2–3 (2022), https://royalsocietypublishing.org/doi/full/10.1098/rsos.211488 [https://perma.cc/HYA8-KB3B].

97. Lucchini et al., *supra* note 96, at 3–4.

98. *See id.* at 2.

99. *See* Gramitto Ricci & Sautter, *The Wireless Investors Movement*, *supra* note 14.

demonstrations, for various movements.[100] In fact, the global nature of social media has empowered citizens across the globe to become networked and has "inspired large-scale transnational democratic movements."[101] The role of social media took on a new dimension in 2020 when the pandemic appeared initially to thwart the possibility of protests and demonstrations of the influential social movements of the time, such as the Black Lives Matter Movement.[102] The impossibility of being physically present did not hinder wireless generations' activism. Instead, social media was used to further social and racial justice issues. Demonstrations were held in the digital world including on digital games like Animal Crossing: New Horizons,[103] The Sims,[104] World of Warcraft, Grand Theft Auto, and NBA 2K20, among many others.[105]

Social demonstrations in digital games should not come as a surprise, as many individuals in the United States are gamers, including 96% of GenZ'ers and Millennials, 89% of GenX'ers, and 57% of Boomers.[106] For many, there is a blurring of the line between what one would think of as the online and offline worlds. In a Deloitte survey, gamers cited to games as satisfying emotional and social needs, including providing relaxation and self-expression, assisting in getting through "difficult time[s]," and staying connected and making connections with others.[107] As the Deloitte survey results suggest, gaming contributes to the formation of social ties among

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100. K. Hazel Kwon, Chun Shao & Seungahn Nah, *Localized Social Media and Civic Life: Motivations, Trust, and Civil Participation in Local Community Contexts*, 18 J. INFO. TECH. & POL. 55, 56 (2020).

101. *Id.*

102. *See, e.g.*, Frederikke Christiansen, *Online Activism Meets Digital Gaming: Protesters Are Now Taking to the Virtual Streets*, MASTERS OF MEDIA (Sept. 27, 2020), https://mastersofmedia.hum.uva.nl/blog/2020/09/27/online-activism-meets-digital-gaming-protesters-are-now-taking-to-the-virtual-streets/ [https://perma.cc/E887-WSK7].

103. Alexis Ong, *Animal Crossing: New Horizons Is Fast Becoming a New Way for Hong Kong Protesters to Fight for Democracy*, VG247 (Apr. 1, 2020), https://www.vg247.com/animal-crossing-new-horizons-is-fast-becoming-a-new-way-for-hong-kong-protesters-to-fight-for-democracy [https://perma.cc/9SAW-7PU9].

104. Ebonix • manifesting (@Ebonix), TWITTER (June 7, 2020, 9:47 PM), https://twitter.com/Ebonix/status/1269808276520284163 [https://perma.cc/4UB8-7M8G].

105. Daisy Schofield, *Black Lives Matter Meets Animal Crossing: How Protestors Take Their Activism into Video Games*, GUARDIAN (Aug. 17, 2020, 9:21 AM), https://www.theguardian.com/games/2020/aug/07/black-lives-matter-meets-animal-crossing-how-protesters-take-their-activism-into-video-games [https://perma.cc/99CZ-K5CJ].

106. KEVIN WESTCOTT, JANA ARBANAS, JEFF LOUCKS, KEVIN DOWNS, CHRIS ARKENBERG & BROOKE AUXIER, DELOITTE, 2022 DIGITAL MEDIA TRENDS, 16TH EDITION: TOWARD THE METAVERSE 13 fig.7 (2022), https://www2.deloitte.com/us/en/insights/industry/technology/digital-media-trends-consumption-habits-survey/summary.html [https://perma.cc/5WCN-KMUS]. For GenZ'ers, playing video games is their favorite form of entertainment. *Id.* at 9.

107. *See id.* at 14 fig.8.

participants which leads to both gaming social capital and real-world social capital.[108]

Social scientists have used the social capital theory to explore how social networks affect changes in society.[109] Robert Putnam defines social capital as "connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them."[110] Accordingly, trust is a key element of social capital.[111] Definitions of trust vary but they largely coalesce around a "willingness to rely on another party, coupled with a sense of vulnerability or risk if the trust is violated."[112] When interpersonal or social trust exists, it has been found to result in greater civic engagement, including higher participation rates in community and political organizations.[113]

Social media naturally leads to social capital formation as social media lends itself easily to discourse and bonding among like-minded individuals.[114] In fact, the very foundation of social media is the sharing of information.[115] Participants use social media to not only maintain existing social networks but to establish new ones, both of which include the sharing of personal information.[116] Social media users regularly share personal information, including their thoughts and experiences, and studies have shown that users trust others in their online social networks with their personal information.[117]

Trust arises on social media from several bases, including a shared membership in a social network.[118] Such a shared membership leads users to "attribute positive characteristics such as honesty, benevolence, integrity,

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108. *See* Logan Molyneux, Krishnan Vasudevan & Homero Gil de Zúñiga, *Gaming Social Capital: Exploring Civic Value in Multiplayer Video Games*, 20 J. COMPUT.-MEDIATED COMMC'N 381, 393–95 (2015) (finding that multiplayer gaming is associated with the formation of gaming social capital, which has a spillover effect into real-world social capital formation).

109. ROBERT D. PUTNAM, BOWLING ALONE: REVISED AND UPDATED: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 17 (2001).

110. *Id.*

111. *See* Kenneth Newton, *Trust, Social Capital, Civil Society, and Democracy*, 22 INT'L POL. SCI. REV. 201, 202 (2001).

112. Sonja Grabner-Kräuter, *Web 2.0 Social Networks: The Role of Trust*, 90 J. BUS. ETHICS 505, 506 (2009).

113. PUTNAM, *supra* note 109, at 94–95.

114. Christian Fieseler & Matthes Fleck, *The Pursuit of Empowerment Through Social Media: Structural Social Capital Dynamics in CSR-Blogging*, 118 J. BUS. ETHICS 759, 761 (2013).

115. *See* Grabner-Kräuter, *supra* note 112, at 506.

116. Sonja Grabner-Kräuter & Sofie Bitter, *Trust in Online Social Networks: A Multifaceted Perspective*, 44 F. SOC. ECON. 48, 48 (2015); Grabner-Kräuter, *supra* note 112, at 507 (stating that online social networks "support the maintenance of already existing social ties, but there are also networking services that support the formation of new connections with strangers, based on shared interests, political views, or activities").

117. Grabner-Kräuter, *supra* note 112, at 506.

118. *Id.* at 516.

and cooperativeness to other network members."[119] Trust evolves over time with more interactions among members. With more interactions, trust is based on past interactions or what is called knowledge- or experience-based trust.[120] As the trust among users grows, so does the sense of community and cohesion which in turns satisfies the human need for social relatedness. Social relatedness refers to behavior motivated by the need for "belonging, attachment, and care in relation to a group of significant others"—it is "the basic desire . . . for coherent integration with the social environment."[121]

By way of an example, the WSB subreddit has been described as having "a well-defined identity reinforced also by the common use of jargon (e.g. 'stonks' for stocks, 'tendies' for profits, and 'diamond hands' or 'paper hands' for people that hold stocks through turbulent times or sell them at the first loss, respectively)."[122] Specifically, an ethnographic study found that active members of WSB shared similar linguistic markets and reciprocated awards to express and reinforce the community's sense of identity.[123] Such a sense of identity and reciprocated awards enhances the trust and social relatedness among the group's participants.

Further, an analysis of the social interactions between users of the WSB community and the subsequent surges in GameStop shares indicated a strong influence of cooperative features—indicating that group goals and motivations may have been a factor in the GameStop trading success.[124] The interactions between the committed WSB users and the remainder of WSB users resulted in the ability of the group to act collectively.[125] Researchers found that the committed users, being a part of the core network of conversations, pre-dated the initial surge in GameStop shares, attracted more users, and triggered more events and discussions of commitment which led to the "growth" of the WSB team and made the subsequent GameStop event possible.[126]

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119. *Id.*

120. Grabner-Kräuter & Bitter, *supra* note 116, at 54.

121. Michael Sailer, Jan Ulrich Hense, Sarah Katharina Mayr & Heinz Mandl, *How Gamification Motivates: An Experimental Study of the Effects of Specific Game Design Elements on Psychological Need Satisfaction*, 69 COMPUTS. HUM. BEHAV. 371, 374 (2017).

122. Lucchini et al., *supra* note 96, at 3.

123. Christian J. Boylston, Beatriz E. Palacios & Plamen T. Tassev, WallStreetBets: Positions or Ban 5 (Jan. 28, 2021) (unpublished manuscript), https://arxiv.org/abs/2101.12110 [https://perma.cc/4ATW-R4TU].

124. Lucchini et al., *supra* note 96, at 6.

125. Researchers explained:

> These interactions occur over a rapidly evolving social network. . . . In these networks, users are connected if they submitted a comment in reply to the post or comment of another during the time-span considered. As new users join, the number of small disconnected components in the network increases . . . . The structural transformation of the network happens abruptly rather than gradually.

Id. (footnote omitted).

126. *Id.* at 2.

As was evident from WSB and GameStop, due to its global reach and ease of use, social media reduces transaction costs associated with gathering and coordinating actions, which in turn facilitates collectively acting toward a common goal.[127] Such reduced transaction costs include enhanced access to information.[128] This is particularly important for wireless investors. In a 2021 study, Millennial and Gen Z investors indicated Twitter, TikTok, Reddit, YouTube, Instagram, and Facebook were their most used sources of investing information.[129] Reliance on social media for information is not unique to investing information. In 2022, Google's internal data revealed that many GenZ'ers prefer to use TikTok and Instagram as general search engines as opposed to Google.[130] These generations do not just rely on social media for information but also use social media to gather commitment to causes dear to their hearts.

Online communities increase the social capital of a group as well as wireless investors' trust in each other. In-person social networks have been the driving force in creating changes in society.[131] With the ability to develop more social networks, through the use of the internet, corporate change can too be expeditiously brought forward. While accurate and digestible information must be conveyed in order to establish trust, once trust is established within an online forum, wireless investors will have the ability to rely on trust to collectively vote their shares in a manner that leads them to the optimal outcome.[132] Through mass communication on the internet, wireless investors do not only share the costs of gathering and assessing information, but they are able to reap the same benefits institutional investors do when voting their shares.[133] As trust in each other's opinions and the information conveyed increases, the amount, and more importantly, the cost, of gathering and transmitting information decreases.[134]

127. Fieseler & Fleck, *supra* note 114, at 761.

128. *See id.* at 771.

129. Jack Caporal, *Gen Z and Millennial Investors: Ranking the Most Used, Trusted Investing Tools*, MOTLEY FOOL (Aug. 3, 2021, 3:59 PM), https://www.fool.com/research/gen-z-millennial-investors-tools/ [https://perma.cc/24FZ-7368]. GenZ'ers say they relied most heavily on social media in the preceding thirty days with 91% indicating social media as their preferred source of investing information compared to 75% of Millennials. *Id.*

130. Samantha Delouya, *Nearly Half of Gen Z Is Using TikTok and Instagram for Search Instead of Google, According to Google's Own Data*, BUS. INSIDER (July 13, 2022, 12:48 AM), https://www.businessinsider.com/nearly-half-genz-use-tiktok-instagram-over-google-search-2022-7 [https://perma.cc/YBP4-BH46].

131. PUTNAM, *supra* note 109, at 17–18.

132. Gramitto Ricci & Sautter, *The Wireless Investors Movement*, *supra* note 14.

133. *See* Fisch, *supra* note 31, at 51.

134. *See* Fieseler & Fleck, *supra* note 114, at 761.

When trust is developed, individuals will feel compelled to act in a way that identifies them with the group and proves their belonging.[135] Just like a prisoner may not confess in order to prove belonging in a criminal community and conform to the social norm of not being a "rat" or "snitch," wireless investors will feel increasingly compelled to stick to the collective action. This is similar to what occurred during the 2021 GameStop trading when retail investors did not want to be identified as someone with "paper hands."[136]

IV. Retail Investing in the Age of Information

A. The New Information Infrastructure

Despite a widespread acceptance of retail investors' apathy, there is little question that investors' participation would be impactful. For example, in a survey of twenty-one contested elections, it was found that in 47.6% of the elections, "a change would have been theoretically feasible if voting turnout had been higher."[137] Accordingly, retail investors' voting could have changed the outcome in these contested elections.[138]

Traditionally, a retail investor has been required to "resort to publicly available or free resources to gather information."[139] This includes gathering company-related information through "published financial reports, news, or other public sources" on an individual basis—bearing the costs individually.[140] The internet, as opposed to traditional means of disseminating information, offers retail investors a far cheaper way to gather information as well as to spread information and to communicate.[141] It enables the creation of online forums and communities, which significantly reduce shareholders' costs of participation.[142] The internet also alleviates the cost of obtaining data due to many of the resources accessible via the internet being free.[143] Further, the internet permits reduced costs in

135. *See* Amartya Sen, *Goals, Commitment, and Identity*, 1 J.L. ECON. & ORG. 341, 349 (1985).
136. *See What Does 'Paper Hands' Mean?*, MYWALLST (Sept. 13, 2022), https://mywallst.com/blog/what-does-paper-hands-mean [https://perma.cc/2GJS-5GDR].
137. Kastiel & Nili, *supra* note 12, at 79.
138. *See id.* at 66 (discussing how retail investors' votes could alter election outcomes even by mobilizing only 10–15% of eligible voters).
139. Bilal Hafeez, M. Humayun Kabir & Udomsak Wongchoti, *Are Retail Investors Really Passive? Shareholder Activism in the Digital Age*, 49 J. BUS. FIN. & ACCT. 423, 427 (2022).
140. Bilal Hafeez, M. Humayun Kabir & Udomsak Wongchoti, Are Retail Investors Really Passive? Shareholder Activism in the Digital Age 7–8 (May 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4153726 [https://perma.cc/27GM-5KXA].
141. Hafeez et al., *supra* note 139, at 427, 429.
142. Dov Solomon, *The Voice: The Minority Shareholder's Perspective*, 17 NEV. L.J. 739, 753 (2017).
143. Hafeez et al., *supra* note 139, at 427, 429 & n.16.

transferring data, including documents, and allows the ease of "conducting personal and group communication among shareholders."[144]

Wireless investors are, in fact, utilizing these modern avenues to obtain information. Data compilations of Google searches during the three-week period leading up to votes on shareholder proposals indicated abnormally high searches, with more pronounced results where proposals included a negative or controversial tone.[145] Retail investors will not remain apathetic where it is not rational to do so—as is the case in many instances today through technology allowing for fast and free information at the retail investors' fingertips.

Wireless investors' aptitude for gathering online and sharing information in environments protected by the trust-based relations of these communities further facilitates the circulation of information. Moreover, Millennials and GenZ'ers are determined to deviate from the status quo and solve long-standing conflicts.[146] They allow their frustrations to be made known by becoming vocal in both their local communities and digital communities.[147] Over half of Millennials identify themselves as long-term activists[148] with a focus on making everyday change by becoming more politically involved, spending money with companies that mirror their own values, and speaking out when faced with injustice.[149] Millennials and GenZ'ers have developed a passion for resolving long-established conflict and flawed status quos tolerated by the preceding generations, specifically in facets where they feel the status quo has disproportionately impacted themselves and minorities.[150] Wireless investors are aware of the power of corporations and the effects of

144. Solomon, *supra* note 142, 753–54.

145. Hafeez et al., *supra* note 139, at 425.

146. DELOITTE, STRIVING FOR BALANCE, ADVOCATING FOR CHANGE: THE DELOITTE GLOBAL 2022 GEN Z & MILLENNIAL SURVEY 2 (2022), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/deloitte-2022-genz-millennial-survey.pdf [https://perma.cc/GG8B-JLS2] (discussing how Millennials and GenZ'ers worry about the state of the world and are fighting to reconcile commonly accepted issues within everyday life that create restraints).

147. Megan Carnegie, *Technology Has Given Young People A Louder Voice Than Ever Before. Gen Z Are Angry – And Unafraid to Speak Up*, BBC (Aug. 8, 2022), https://www.bbc.com/worklife/article/20220803-gen-z-how-young-people-are-changing-activism [https://perma.cc/26YF-ENAR]; Alec Tyson, Brian Kennedy, & Cary Funk, *Gen Z, Millennials Stand Out for Climate Change Activism, Social Media Engagement with Issue*, PEW RSCH. CTR. (May 26, 2021), https://www.pewresearch.org/science/2021/05/26/gen-z-millennials-stand-out-for-climate-change-activism-social-media-engagement-with-issue/ [https://perma.cc/3WGA-9YZV].

148. *Millennials Unhappy with Status Quo, Believe in Voting, Report Finds*, PHILANTHROPY NEWS DIG. (Mar. 9, 2018), https://philanthropynewsdigest.org/news/millennials-unhappy-with-status-quo-believe-in-voting-report-finds [https://perma.cc/J577-V62D].

149. Emily Mossburg, *For Millennials and Gen Zs, Social Issues Are Top of Mind—Here's How Organizations Can Drive Meaningful Change*, FORBES (July 22, 2021, 10:38 AM), https://www.forbes.com/sites/deloitte/2021/07/22/for-millennials-and-gen-zs-social-issues-are-top-of-mind-heres-how-organizations-can-drive-meaningful-change/?sh=2400cb09450c [https://perma.cc/2AZS-ZXZ8].

150. *See id.*

leveraging on that power.[151] Engaging with corporations through voting allows them to magnify their power as individuals.[152] They have already been engaging with corporations through their consumer[153] and employment choices[154] as well as through their investments and on social media.[155] Wireless investors will not fail to exert leverage on corporations through corporate governance.

New technologies may lower the information costs of exercising shareholder rights even further—Blockchain and smart contracts, for instance, are being discussed in the context of making "corporate documents and data more readily available," while "preserving the integrity and authenticity of the information."[156] Moreover, investing apps are playing a role in informing retail investors and in providing accessible financial education, making information even more accessible.[157] Apps like Robinhood have provided users and the general public with educational tools to be accessed online and on mobile phones, with programs such as Robinhood Learn and Robinhood Snacks.[158] Robinhood also has in-app education and information specifically for its customers, including access to financial news and interactive lessons.[159]

With easy access to information and communications facilitated by online forums and communities, retail investors can reach an optimal outcome—participating in the governance of corporations.

B. Individual and Collective Benefits of Online Communication and Coordination

Zohar Goshen places emphasis on the power of coordination by highlighting how prisoners reap the maximum benefits when they align their

151. Gramitto Ricci & Sautter, *The Wireless Investors Movement*, *supra* note 14.

152. Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 14, at 92–93.

153. DELOITTE, A CALL FOR ACCOUNTABILITY AND ACTION: THE DELOITTE GLOBAL 2021 MILLENNIAL AND GEN Z SURVEY 28 (2021), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/2021-deloitte-global-millennial-survey-report.pdf [https://perma.cc/789T-DTNH] (stating Millennials and GenZ'ers put their money where their values are as consumers).

154. *Id.* (reporting that Millennials and GenZ'ers make their values clear when making career choices).

155. *See* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Corporate Forum*, 102 B.U. L. REV. 1861, 1873 (2022) (proposing a forum for retail investors to engage with companies); Jill Goldsmith, *AMC Entertainment CEO Adam Aron Slams Spreaders of "FUD" (Fear, Uncertainty & Doubt) After Annual Meeting*, DEADLINE (July 30, 2021, 10:37 AM), https://deadline.com/2021/07/amc-entertainment-adam-aron-shareholders-reddit-1234806684/ [https://perma.cc/NL4B-FHRK] (discussing investors taking to social media to express grievances with AMC Entertainment).

156. Picciau, *supra* note 82, at 106; *see also* Christopher M. Bruner, *Distributed Ledgers, Artificial Intelligence and the Purpose of the Corporation*, 79 CAMBRIDGE L.J. 431, 435–36 (2020).

157. Gramitto Ricci & Sautter, *supra* note 1 (manuscript at 2).

158. Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Educated Retail Investor: A Response to "Regulating Democratized Investing*,*"* 83 OHIO ST. L.J. ONLINE 205, 215 (2022).

159. *Id.*

actions.[160] Similarly, retail investors yield the greatest benefit, individually and collectively, when they coordinate. Because of the imbalance between the quantity of shares owned by retail investors and those owned by institutional investors,[161] retail investors are more inclined to vote when their votes can determine the outcome.[162] However, retail investors are unable to predict the consequentiality of their participation through voting unless they communicate and coordinate. By communicating on a global scale retail investors can test the sentiment of fellow retail investors, anticipate the likelihood of an outcome-determinative participation, convince fellow retail investors to vote, and orchestrate collective action voting.

The ability to overcome the coordination problem through shareholder coordination and communication has already been documented in the context of institutional investors. Specifically, a recent study found that:

> [F]irms with high levels of ownership by cliques of institutional investors experience more direct intervention in the form of votes against bad management proposals. Evidence from a plausibly exogenous shock to the network of institutional investors suggest that this relationship between coordination among institutional investors and governance is causal.[163]

The results of the study, then, indicated that "[s]hareholder coordination increases governance via *voice* by overcoming the free rider problem . . . ."[164] Thus, this indicates that there is at least some causal relationship between shareholder coordination and implications within corporate governance. If retail investors coordinate and communicate, this trend would also likely result in governance implications through retail investors.

Thus, coordination and information-sharing online, engaging the collective power of the retail investors, will almost always yield retail investors' most optimal outcome, or receiving no jail time in the coordination dilemma. However, without online coordination and communication, retail investors will likely be outvoted by institutional investors. This leads to the suboptimal outcome of the coordination

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160. *See* Zohar Goshen, *Controlling Strategic Voting: Property Rule or Liability Rule?*, 70 S. CAL. L. REV. 741, 761 (1997).

161. In 2021, 70% of shares were owned by the institutional investor segment while 30% of shares were owned by the retail investor segment. BROADRIDGE & PWC, PROXYPULSE: 2022 PROXY SEASON PREVIEW 9 (2022), https://www.broadridge.com/proxypulse/_assets/docs/broadridge-proxypulse_2022-season-preview-and-2021-review.pdf [https://perma.cc/4TJU-YEBU].

162. Brav et al., *supra* note 9, at 498–500.

163. Alan D. Crane, Andrew Koch & Sébastien Michenaud, *Institutional Investor Cliques and Governance*, 133 J. FIN. ECON. 175, 195–96 (2019).

164. *Id.* at 175 (emphasis added).

dilemma by undertaking the costs associated with voting while failing to reap the benefits of implications within corporate governance, as is the case with both prisoners confessing and receiving jail time.

V. THE INCREASING INFLUENCE OF WIRELESS INVESTORS

The involvement of Millennials and GenZ'ers as stakeholders, investors, and shareholders signals that we are in the beginning stages of a shift in social norms. As we have described, the social norm among retail shareholders has been largely passive—both with respect to investing and to corporate governance participation. Since the early 1990s, individuals have mainly invested in stock indirectly, largely through mutual funds and pension accounts.[165] Moreover, individual investors who hold stock directly and, thus, have the right to vote at shareholder meetings traditionally have not voted.[166] Wireless investors have the power to radically change these social norms.

A. Emergence of Social Norms

James Coleman, utilizing social theory,[167] set forth two requirements for the emergence of a social norm: First, that a demand for the norm arises.[168] And, second, that there is a condition under which that demand will be realized.[169] The demand for a norm is explained through the existence of unregulated negative or positive externalities.[170] New social norms, thus, may arise from newly emerging externalities, such as regulating the consequence of new technology, or from the re-evaluation of existing externalities with new knowledge or value priorities, like the regulation of smoking bans as the dangers of secondhand smoke came into focus.[171] However, this demand alone is not sufficient—the second requirement for the emergence of a norm also requires that such a demand will be realized, as "[t]he norm will emerge, however, only when it is rational for group members to provide positive or negative sanctions."[172] Whether positive or negative sanctioning arises depends on the strength of social relationships

165. *See* EDWARD N. WOLFF, A CENTURY OF WEALTH IN AMERICA 122–24 (2017).

166. Brav et al., *supra* note 9, at 498–500.

167. Social theory is a subset of social science involving the "functioning of social systems of behavior," addressing "the question of the peaceful coexistence of man and society, as two intersecting systems of action." JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 1, 5 (1990).

168. *Id.* at 241.

169. *Id.*

170. Andreas Diekmann, *Emergence of and Compliance with New Social Norms: The Example of the COVID Crisis in Germany*, 34 RATIONALITY & SOC'Y 129, 131 (2022).

171. *Id.* at 131–32.

172. Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2149–50 (1996).

or "[*s*]*ocial connectedness*[, which] means that there will be (1) unintentional observation of group members' behavior; (2) opportunities for gossip; and (3) concern about esteem."[173] Once a norm becomes "sticky,"[174] individuals follow the norm and sanctions without engaging in an outcome-oriented rational calculus, such that the norm remains even where the demand that supported its origin diminishes.[175]

Social norms can and do decline under some conditions. Because the second condition for norm emergence relies on sanctions attributed to social connectedness, norms may diminish where social connectedness diminishes.[176] Further, a social norm may diminish where the payoffs for violating or reinforcing a norm change. While a norm may emerge where the benefits of adherence to the norm are high, such as the benefit of free riding in a collective action problem, this calculus may later change where the benefits of adhering to the norm decrease.[177] Thus, where the benefits of free riding later decrease, with either lowered costs or greater benefits, individuals may start considering outcomes once again and re-evaluate the benefits of adhering to a particular norm.[178] As more and more members violate a norm, such a phenomenon may have a "snowball effect" where others become encouraged to violate the norm, decreasing the members sanctioning violation of a norm, "thereby decreasing the odds of being punished for a norm violation or rewarded for following the norm."[179]

Specifically, individuals may change their behavior when they expect others will do the same.[180] This is dependent on the preferences of others as well as their actions becoming known.[181] Individuals have differing

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173. *Id.* at 2150 (emphasis added).

174. *See id.* Stickiness refers to the perpetuation of norms through the social sanctions attached to such norms, creating decisions based not on a rational calculation of a decision but repeated adherence to decisions and customs to avoid "feelings of embarrassment, anxiety, guilt, and shame that a person suffers by the prospect of violating them." *See* Jon Elster, *Norms of Revenge*, 100 ETHICS 862, 864 (1990). Thus, it follows that:

> [I]f norms can regulate expectations and behavior it is ultimately because they have a grip on the mind that is due to the strong emotions they can trigger. Even complex norms are simple to obey and follow, compared to the canons of rationality which often require us to make difficult and uncertain calculations.

Id. Thus, the adherence to norms and the social sanctions connected to doing so is often a mechanism of a reduced transaction cost, such that "[t]he operation of norms is to a large extent blind, compulsive, mechanical, or even unconscious." *Id.* This "grip on the mind" is what Hasen considers such a "stickiness," perpetuating norms even much later where the cost-benefit analysis for adherence may not be the same as it was when the norm emerged. *See* Hasen, *supra* note 172, at 2150.

175. Hasen, *supra* note 172, at 2149–50.

176. *See id.* at 2150.

177. *See id.* at 2151.

178. *Id.*

179. *Id.*

180. Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1264 (1999); CASS R. SUNSTEIN, HOW CHANGE HAPPENS 11 (2019).

181. *See* Eisenberg, *supra* note 180, at 1264; SUNSTEIN, *supra* note 180, at 6.

thresholds at which they will change their actions.[182] As more individuals' thresholds are met, more individuals act differently from the existing norm and a critical mass is formed which leads to a tipping point, thus changing the existing social norm.[183] In his book, *How Change Happens*, Cass Sunstein focused on the role of "norm entrepreneurs" in exposing the unreasonableness of existing social norms, in making preferences known, and in changing norms.[184] As an example, he pointed to musician Taylor Swift as a norm entrepreneur.[185] In 2017, Swift, a Millennial, testified regarding unwanted touching and, in turn, became a voice in the #MeToo Movement empowering other women, particularly of her generation, to speak out against sexual harassment and assault.[186]

B. Investing and Corporate Governance Social Norms

Like the individuals who amassed in the #MeToo Movement, a similar phenomenon can develop among new generations of investors to collectively act to alter investing norms and corporate governance norms.[187] In a movement that we first identified in *Corporate Governance Gaming: The Collective Power of Retail Investors* and in *The Wireless Investors Movement*, signals indicate that wireless investors will not only more actively manage their investments directly as opposed to investing solely through funds and relying on financial advisors, but also, they will take an active role in corporate governance.[188] More specifically, the norm of passivity in retail voting will shift so that retail investors will vote their corporate shares.

This shift in social norms regarding retail investor voting is like the shift that Melvin Eisenberg identified in his 1999 article, *Corporate Law and Social Norms*.[189] Eisenberg detailed the shift of institutional investors from

182. Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOCIO. 1420, 1436–37 (1978).

183. Eisenberg, *supra* note 180, at 1264; *see also* SUNSTEIN, *supra* note 180, at 8.

184. SUNSTEIN, *supra* note 180, at 8.

185. *Id.* at 8 n.25.

186. Melena Ryzik, *Taylor Swift Spoke Up. Sexual Assault Survivors Were Listening.*, N.Y. TIMES (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/arts/music/taylor-swift-sexual-assault.html [https://perma.cc/SB4B-H4DA].

187. Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 14, at 96; Gramitto Ricci & Sautter, *supra* note 1 (manuscript at 5).

188. *See* Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 14, at 54–55 (discussing Millennials and GenZ'ers as wireless investors and analyzing their involvement in shifting the corporate governance status quo by investing directly and using their voting power to change corporate governance to mirror their values); Gramitto Ricci & Sautter, *The Wireless Investors Movement*, *supra* note 14 (describing the dynamics that lead to the formation of social movements of investors).

189. Eisenberg, *supra* note 180.

what he deemed a passivity norm to an activity norm.[190] In the 1960s and 1970s, institutional investors were passive, meaning that they did not act against management.[191] If institutional investors did not like management, they would sell their shares but otherwise they supported management.[192] However, institutional investors changed course and became willing to oppose management while remaining shareholders.[193] Among the several factors that led to this norm shift was an increase in institutional shareholdings and assets under institutional investors' control.[194] Moreover, critical mass played a role in the shift.[195] When it became clear to institutional investors that other institutional investors would become more active in opposing management in some cases, it caused other institutional investors to also act.[196]

The retail investing norm shift from passive investing and voting to active investing and voting is already underway. Millennial and Gen Z investors have accounted for the majority of new brokerage accounts, with most using commission-free trading apps to invest directly in corporate stocks.[197] These investors are sharing their investing preferences on social media and relying on social media to obtain investing information.[198] But not only are they sharing investing information on social media, they also are sharing their voting preferences and encouraging others to vote.[199]

C. *Corporate Governance Engagement and Political Participation*

The social norm shift with respect to corporate governance engagement may track the expected norm shift in political election participation. In the context of political elections, over the next thirty years, GenZ'ers are set to "lead a resurgence of civic participation" and will cause "US citizens [to] be among the most active voters in the world."[200] These statistics are crucial,

190. *Id.* at 1278.
191. *Id.* at 1283–87 (discussing the historical evolution from the norm of passivity).
192. *Id.* at 1283.
193. *Id.* at 1283–87.
194. *Id.* at 1284.
195. *Id.* at 1263–64.
196. *Id.* at 1287.
197. Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 14, at 75; Gramitto Ricci & Sautter, *supra* note 1 (manuscript at 2–3).
198. Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799, 1821 (2022).
199. *See* Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 14, at 83–88 (analyzing Millennials and GenZ'ers sharing investing information on social media platforms such as Reddit); *see also* Gramitto Ricci & Sautter, *supra* note 1 (manuscript at 5) (discussing Millennial and Gen Z retail investors' trend to discuss annual shareholder meeting voting virtually and persuade others to vote as well).
200. JOHN DELLA VOLPE, FIGHT: HOW GEN Z IS CHANNELING THEIR FEAR AND PASSION TO SAVE AMERICA 198 (2022).

as a recent study of retail investor voting found that "[s]hareholder turnout in corporate elections is positively associated with aggregate turnout in the shareholder's county in political elections . . . ."[201] While there is some debate as to whether political and shareholder voting can properly be analogized,[202] a middle-ground approach is taken by some and is likely the most helpful for the purposes of this analysis.[203] Critically, the analogy of corporate and shareholder voting is relevant because the theory of norm emergence may be applied to political voting to shine valuable light on the wireless investor's evolving role within corporate governance. It may explain how increased shareholder participation norms will evolve in the future. Thus, GenZ'ers are not only set to lead the charge in political voting but also in corporate voting.

Applying norm emergence theory, Coleman has assessed that the choice to vote, or not doing so, fits squarely within the norm emergence framework, in that the choice to vote acts as a social norm.[204] Applied broadly, Coleman assumes that there is a system of actors, each of whom has an interest in the outcome of an election, but a negative interest in the actual act of voting.[205] Because of the nature of elections, each actor has only a small fraction of control over the election through their individual

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201. *See* Brav et al., *supra* note 9, at 493.

202. Some have considered the two similar, building analogies upon one another on the premise that:

> Like civic governance, corporate governance has many dimensions, but there are good reasons to single out voting rights as its foundation stone. Voting rights necessarily define a baseline of power relations. In and of themselves, of course, they do not do so completely or sufficiently, but in the first instance they structure relations among individuals.

Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1354 (2006) (footnote omitted). However, others believe this analogy a "seductive comparison," arguing that "[c]omparisons of this kind are common and tempting. But corporations and political states are marked by differences so fundamental that it is dangerous to extrapolate lessons from one realm to the other." Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1397 (2006) (footnote omitted). Rodrigues points out that:

> Four key contrasts between the corporation and the state demonstrate why: (1) investing in a corporation is a completely voluntary endeavor; (2) representative democracy plays only a limited role in a corporation; (3) the shareholder vote, with the important exception of takeovers, is generally an empty exercise; and (4) shareholders have an important power that political voters lack: the power of easy exit through the sale of their shares—that is, the power to leave their polity.

Id. at 1397–98.

203. J. W. Verret, *Pandora's Ballot Box, or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Re-Examined*, 62 BUS. LAW. 1007, 1052 (2007). Regarding the comparison between political voting and corporate voting, J. W. Verret suggests that "[a]ll one can do is keep the different objectives of the two spheres in mind throughout the comparison, and remain prepared to alter or abandon principles from civic democracy when comparison is inappropriate." *Id.*

204. COLEMAN, *supra* note 167, at 291.

205. *Id.*

vote.[206] Because of this, each actor's action becomes of interest to all other actors, such that the action of voting has externalities.[207] Thus, the demand for a voting norm will arise—in that the outcome of a vote becomes a collective action dilemma.[208] However, as discussed, such a demand alone is not sufficient. There must be "the existence of social relationships among potential beneficiaries of the norm."[209] According to Coleman, "[w]hen those conditions are met, there will be a general transfer of rights of control over the action of voting or not voting, by each to all."[210] However, some have argued that several of the conditions under which a norm may diminish have occurred in the context of political voting, resulting in lower turnouts.

Hasen, assessing a trend of low voter turnout in the late 1990s[211] under norm emergence theory, observed that "[o]nce a voting norm arises, the theory predicts it should remain stable unless social connectedness decreases or the payoff for free-riding increases to such an extent that obeying the norm becomes an outcome-oriented calculation."[212] Hasen then argued that society at the time experienced a period of decreasing social connectedness, in that "many people do not know even three of their neighbors."[213] Further, Hasen observed that Americans at the time worked more and had less time for leisure, such that "[t]he extent to which voting [had to] be 'scheduled in' to a busy day [led] to renewed outcome-oriented thinking about voting, creating conditions for the norm's erosion."[214]

However, the conditions Hasen identified as attributing to an eroding voting norm regarding lower turnout in political elections during the 1990s provide valuable insight. The opposite trends are occurring today in the context of shareholder voting. So, shareholder voting is set to increasingly become the norm among wireless investors, challenging existing social conventions and ideas traditionally ingrained in corporate behavior. The internet has created the infrastructure that facilitates an unprecedented global scale social connectedness among shareholders. In this framework, the payoffs of voting increase substantially due to declining information costs. This works to significantly strengthen the norm of voting among retail

206. *Id.*
207. *Id.*
208. *See id.*
209. *Id.*
210. *Id.*
211. The year 1996 represented a turnout of 51.7%, the lowest national average since the 1920s. Turnout increased slowly but remained low in 2000 at 54.2% before increasing to 60.1% in 2004. Michael P. McDonald, *National Turnout Rates 1789–Present*, US ELECTIONS PROJECT, https://www.electproject.org/national-1789-present [https://perma.cc/5CV2-GTRM] (last visited Mar. 3, 2023).
212. Hasen, *supra* note 172, at 2154.
213. *Id.* at 2154–55.
214. *Id.* at 2155.

investors and create avenues for unprecedented shifts in corporate governances.

The ability for wireless investors to coordinate and communicate—identified previously as an essential condition for breaking free of the rational apathetic prisoner's dilemma—has also been pivotal in creating conditions to support the emergence of a voting norm among wireless investors.[215] The internet, then, aids in both creating social connectedness, through networks, and creating likely the most expansive mechanism for communication in existence.

D. Communities and Norm Generation

Networks have been described as "the building blocks of norm-generating communities."[216] Norm emergence requires a community of some kind, and no community can exist without networks through which communication, social norms, and social cues are transferred.[217] Directly relevant to the emergence of a voting norm, "[r]esearch indicates that more closely interconnected social networks generate mimetic behavior because tighter networks facilitate the transmission of both ideas and norms."[218] Thus, the wide reach of the internet has created conditions conducive to increased voting behavior to extend beyond geographic borders.

Since the beginning of history, networks have been created by and through facilitated trust between members.[219] As discussed previously in the context of collective action among wireless investors, growing trust created through online communities has also worked to support conditions creating a voting norm among retail investors.[220] While this trust was created for the vast majority of history through face-to-face interactions, the internet has allowed digital networks to form and even flourish in challenging social norms.[221] While the long-term implications of the internet and its ever-expanding influence are in their infancy, early indications appear that digital networks do, in fact, facilitate trust, trustworthiness, and social capital.[222] Specifically, "the research seems to show that digital networks help to build weak ties, disintermediate engagement, communicate norms, strengthen the ability to coordinate efforts of a network, offer new modes of engagement,

215. *See supra* Part IV.B.
216. Raymond H. Brescia, *The Strength of Digital Ties: Virtual Networks, Norm-Generating Communities, and Collective Action Problems*, 122 DICK. L. REV. 479, 482 (2018).
217. *Id.*
218. Langevoort, *supra* note 38, at 1035.
219. Brescia, *supra* note 216, at 483.
220. *See supra* Part III.
221. Brescia, *supra* note 216, at 483.
222. *Id.* at 528.

amplify network effects, lower transaction costs, and facilitate effective crowdsourcing."[223]

Beyond the factors identified previously as attributing to lower voting costs for wireless investors, there are a few trends among wireless investors today that relate directly to the inverse relationship between voting costs and the strengthening of a voting norm. First, again parallel to the concept of political voting, research has shown a "strong empirical connection between political knowledge and political participation."[224] Related to social norms, however, research has specifically shown that "people whose social networks are populated with people who have greater political expertise are more likely to participate in politics."[225] Further, there seems to be a connection between political talk and political participation.[226] Finally, individuals are more likely, at least somewhat, to engage in information-seeking measures where voting information prompts include references to other connected social media users who reported voting, compared to prompts including no references to social connections.[227] Thus, even where voting information is not spread directly via social networks, indications that others within a social network have sought out information regarding the vote led to an increase in users seeking out their own information.[228]

While there is far less data considering whether information costs are lowered via social networks in the context of shareholder voting, there are at least some indications this trend has similarly occurred among retail investors and may lead to increased shareholder voting turnout. Online communities like r/wallstreetbets, developed to facilitate discussion on wireless investors' participation in the stock market,[229] appear to act as a mechanism for shareholder voting discussion and are potentially responsible for the emergence of a social norm of voting among its users. For instance, users have posted to engage members of the community to discuss their voting decisions, stating "I just got my proxy vote for the 2022 Annual Meeting. How are y'all going to vote? If there's one company that

223. *Id.* (footnote omitted).
224. David E. Campbell, *Social Networks and Political Participation*, 16 ANN. REV. POL. SCI. 33, 40 (2013).
225. *Id.*
226. *Id.*
227. Robert M. Bond, Christopher J. Fariss, Jason J. Jones, Adam D. I. Kramer, Cameron Marlow, Jamie E. Settle & James H. Fowler, *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 489 NATURE 295, 296 (2012).
228. *Id.* at 295.
229. Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 14, at 59–60.

the proxy votes will actually make a difference, it's probably GME."[230] Similarly, instances of information being disseminated to users with less investment knowledge are also present, including one post informing users that "[i]f this year's timeline resembles last year's, then you *might* have to be a GME shareholder by either April 7th or 14th to vote in the annual meeting where the stock dividend vote will occur."[231] Further, users have not shown to be just passive as to obtaining peer-to-peer investment information, with comments on posts asking questions like "I've never understood what those votes are for. I get notices and ultimately end up missing them. What am I missing out on? (Really asking for those who know and want to share the knowledge),"[232] and receiving responses stating:

> One of your key rights as a shareholder is the right to vote your shares in corporate elections. Shareholder voting rights give you the power to elect directors at annual or special meetings and make your views known to company management and directors on significant issues that may affect the value of your shares.[233]

Notably, on a post discussing AMC's shareholder vote on March 20, 2021, one user stated: "[t]his is the first time I feel voting on a[n] annual meeting means something. No other stock has given me that feeling."[234] Thus, the r/wallstreetbets community, among many other purposes, has seemingly evolved into a peer-to-peer information-sharing and information-seeking mechanism for wireless investors, potentially resulting in increased turnout and individual information-seeking, as has been the case in political elections.

Accordingly, GenZ'ers are not only set to lead the charge in political voting but also in corporate voting. If wireless investors, led by GenZ'ers, successfully shift the paradigm from not voting in corporate elections to

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230. u/AnonymousPotato6, *GME - How Are You Voting?*, REDDIT (Apr. 29, 2022, 7:25 AM), https://www.reddit.com/r/wallstreetbets/comments/uekrsv/gme_how_are_you_voting/ [https://perma.cc/B5B7-XTXK].

231. u/OB1KENOB, *GME - You MIGHT Have to Be a Shareholder by Early or Mid-April to Vote on the Stock Dividend Plan in the Annual Meeting in June*, REDDIT (Apr. 2, 2022, 3:02 PM), https://www.reddit.com/r/wallstreetbets/comments/turtay/gme_you_might_have_to_be_a_shareholder_by_early/ [https://perma.cc/6G3B-T8P8].

232. u/Capt_Draconn, *What Does This AMC Shareholder Meeting Rule Mean for Counting Synthetic Shares?*, REDDIT (June 3, 2021, 5:49 PM), https://www.reddit.com/r/wallstreetbets/comments/nrpzsx/comment/h0hy47m/?utm_source=share&utm_medium=web2x&context=3 [https://perma.cc/6EMR-56JL].

233. u/blast4310, *What Does This AMC Shareholder Meeting Rule Mean for Counting Synthetic Shares?*, REDDIT (June 3, 2021, 5:51 PM), https://www.reddit.com/r/wallstreetbets/comments/nrpzsx/comment/h0hybet/?utm_source=share&utm_medium=web2x&context=3 [https://perma.cc/6EMR-56JL].

234. u/Navi79, *AMC Voting Megathread for Saturday, March 20th, 2021*, REDDIT (Mar. 24, 2021, 1:45 AM), https://www.reddit.com/r/wallstreetbets/comments/m97v39/comment/gs0t804/?utm_source=share&utm_medium=web2x&context=3 [https://perma.cc/7D6G-VV9G].

voting, they will establish a new social norm. Under this new paradigm, every citizen who holds corporate shares with voting rights will feel that they "ought" to vote. Further, investing without exercising voting rights in corporate governance would be frowned upon.

E. Risks and Guardrails

The transition, from rational apathy to an informed and coordinated emergence of retail investors within corporate governance, does not come without risks. One such risk is that information gathered online comes with the potential for overreliance and misinformation. Further, such a transition is not without costs of its own—retail investors may incur transition costs in becoming informed and potentially make poor investment decisions while society as a whole may also incur costs as the entirety of the financial marketplace adjusts to make room for retail investors. These costs will likely yield greater long-term benefits, as retail investors—even those making what may be poor investment decisions—will in turn gain experience and knowledge of the securities markets and acquire an experiential education. Further, the transition costs for society as a collective will also likely be alleviated in that such a transition has the opportunity to upset the status quo system, based on centralized power and reduced personal agency, currently perpetuating inequality.

As anticipated, while the internet allows vast opportunities in terms of corporate governance, it also gives way to risks of misinformation and overreliance. Social media and online forums carry an inherent risk of inaccurate or deceptive information, potentially requiring mechanisms for fact-checking or verification.[235] Misinformation, or "fake news," has been found to impact stock prices, at least temporarily.[236] Further, there are risks not only of the substance of misinformation, but at the speed and ability it may spread.[237] Despite this, there are many mechanisms available to act as guardrails to risks of misinformation.

Similarly, a corporate forum, acting as a centralized venue on a company's website where shareholders can easily gather information and ask questions, offers the opportunity for companies themselves to rectify misinformation and disinformation—a powerful fact-checking toolkit.[238] Not only would such a proposal offer retail investors a cost-effective and efficient way to gather information, but it would also allow corporations an

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235. *See* Gramitto Ricci & Sautter, *supra* note 1 (manuscript at 14).

236. Marina Niessner, *Does Fake News Sway Financial Markets?*, YALE INSIGHTS (June 27, 2018), https://insights.som.yale.edu/insights/does-fake-news-sway-financial-markets [https://perma.cc/V8WE-QT59].

237. Gramitto Ricci & Sautter, *supra* note 155, at 1872.

238. *Id.*

opportunity to alleviate public relations costs, in mitigating misinformation spread online, and allow for increased investment in disseminating accurate and easily digestible information to their shareholders.

Despite these risks and potential guardrails, there is no way around the inevitable costs, undertaken by individuals and society, as retail investors transition into the realm of corporate governance. As for individual investors, there is certainly a risk of financial loss in making financial decisions. In fact, "[m]ounting evidence demonstrates that retail investors make predictable, costly mistakes. They save too little, they trade too frequently, they buy high and sell low, they invest in fad instruments they do not understand, and they pay excessive fees."[239] However, these financial losses may not be without use—financial losses, if a result of educated financial decisions, may lead to increased experience and knowledge of the securities market. Thus, the financial loss may yield an experiential gain. In fact, this phenomenon has been documented, with at least one study indicating that:

> [I]t is relatively easy for investors to identify excessive trading activity, understand the nature and resulting costs of the mistake, and avoid it in the future. . . . In light of the significant underperformance of individual investors, our findings suggest that learning from investment mistakes helps individual investors to close to some extent the performance gap to the overall market.[240]

Retail investors may initially undertake some financial loss in the process of obtaining investing literacy. This negative experience, however, does not always come without a non-monetary benefit. In fact, such financial loss could come with significant educational advantages. As the saying goes, "what doesn't kill you makes you stronger." Analogously, mistakes rooted in inadequate investing education can foster investing literacy with positive long-term ramifications.

Further, society as a whole may be impacted by the emergence of the retail investors' newfound engagement within the financial market. Financial institutions will be required to adapt, potentially altering their "customer acquisition strategy, product mix, pricing, risk management, compliance protocols, and processes for anticipating and meeting funding requirements."[241] Additionally, such a change may result in a period of

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239. Jill E. Fisch & Tess Wilkinson-Ryan, *Why Do Retail Investors Make Costly Mistakes? An Experiment on Mutual Fund Choice*, 162 U. PA. L. REV. 605, 606 (2014) (footnote omitted).

240. Maximilian Koestner, Benjamin Loos, Steffen Meyer & Andreas Hackethal, *Do Individual Investors Learn from Their Mistakes?*, 87 J. BUS. ECON. 669, 701 (2017).

241. DELOITTE CTR. FOR FIN. SERVS., DELOITTE, THE RISE OF NEWLY EMPOWERED RETAIL INVESTORS: HOW THEY'RE CHANGING CUSTOMER EXPECTATIONS AND INVESTING DYNAMICS 2

instability in the financial market, in that "[c]ertain actions of retail investors can raise concerns about market functioning. Sudden bursts of trading activity can push prices far away from fundamental values, especially for less liquid securities, thus impairing their information content."[242]

Despite such a cost, however, the costs undertaken by society will likely yield far greater benefits. Retail investors' increased influence within corporate governance has the potential to challenge longstanding systems and ideas, based on centralized power and reduced personal agency, increasingly exacerbating inequality. The divergence of institutional investors' and individuals' interests causes an agency problem.[243] Allowing financial intermediaries to exercise almost exclusive power over corporate governance "raises an additional complexity in that those who act on behalf of institutions may not fairly represent the views of those whose economic interests they are charged with serving."[244] Removing this centralized power, from the hands of institutional investors, creates an avenue to combat inequality by allowing individuals, as investors, to influence corporate governance, decentralizing long-standing power in the hands of few to reflect the views of many.

CONCLUSION

Game theory offers a new explanation of traditional investors' apathy. Although investors know that they would be better off voting the shares they own, their traditional inability to communicate and coordinate collective endeavors has been driving them toward the suboptimal option of nonengagement. A new information technology landscape combined with the habit of Millennials and GenZ'ers to "hang out" online, however, make circulation of information and coordination on a global scale the new paradigm. The substantial change of context in which retail investors operate is set to determine a new norm in investing and corporate governance. Staying apathetic will no longer be rational, and investors will finally strive to reach the optimal outcome rather than settle for a suboptimal one.

(2021), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/financial-services/us-the-rise-of-newly-empowered-retail-investors-2021.pdf [https://perma.cc/Y5ZJ-8BEB].

242. Sirio Aramonte & Fernando Avalos, *The Rising Influence of Retail Investors*, BIS Q. REV., Mar. 2021, at 6, 6–7.

243. *See* Jill E. Fisch, *Mutual Fund Stewardship and the Empty Voting Problem*, 16 BROOK. J. CORP. FIN. & COM. L. 71, 84 (2021).

244. *Id.* at 95.