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FOREWORD

ROBERT J. JACKSON, JR.,\* EDWARD B. ROCK,\*\* &  
ELIZABETH R. CRIMMINS\*\*\*

This Foreword introduces a new partnership, between the *Journal of Law & Business* and the NYU School of Law's Institute for Corporate Governance and Finance (ICGF), focused on insights from key players at the important intersection of business and law. In keeping with NYU's long tradition in this area, the Institute will host a distinguished jurist or lawmaker for a lecture to the NYU community including students, faculty, alumni, and the ICGF board and friends. The *Journal* will publish the remarks for reflection by the bar and bench alike, preceded by a *Foreword* putting the lecture in context. In launching our new project, we are particularly privileged to feature the insights of Delaware's Chief Justice, Collins J. Seitz, Jr.

The *Journal of Law & Business* is one of NYU School of Law's most innovative academic journals, providing a forum for dialogue and analysis of current issues, ideas, and problems at the intersection of law and business. The *Journal* aims to contribute to both academic and professional debates at the center of our markets, publishing work from both professors and practitioners. And so the *Journal* often publishes pieces analyzing corporate law developments in the Na-

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\* Pierrepont Family Professor of Law and Co-Director of the Institute for Corporate Governance and Finance, New York University School of Law; Commissioner, U.S. Securities and Exchange Commission, 2018–2020.

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\*\*\* Editor-in-Chief, *Journal of Law & Business*, 2022–2023; J.D., New York University School of Law, 2023; B.B.A., University of Notre Dame, 2018.

tion's most renowned corporate-law courts: the Delaware judiciary.<sup>1</sup>

The Institute for Corporate Governance & Finance was founded by NYU Law Professor Edward Rock in 2017 to convene conversations among leaders in law and finance in New York to identify and debate the issues that will define the future of law and business.<sup>2</sup> During the Institute's first public program, in 2017, NYU Law graduate Martin Lipton unveiled his *New Paradigm for Corporate Governance*, with commentary from Delaware's Chief Justice, Leo Strine, Robert Schumer of Paul, Weiss, and Matthew Mallow of Blackrock. The debate that followed focused on the complex ecosystem in which activist shareholders, institutional investors, and firms do their work.<sup>3</sup>

The NYU School of Law's deep connection with the Delaware judiciary builds upon the work of William Allen, our late, beloved NYU colleague, who served as Chancellor of Delaware's Court of Chancery from 1985 through 1997 and who will forever be remembered for his landmark contributions to the Nation's business law.<sup>4</sup> After leaving the bench, Chancellor

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1. See, e.g., Mary Siegel, *Going Private: Three Doctrines Gone Astray*, 4 N.Y.U. J.L. & Bus. 399 (2008) (analyzing Delaware doctrine on going-private transactions); Matteo Gatti, *Did Delaware Really Kill Corporate Law? Shareholder Protection in A Post-Corwin World*, 16 N.Y.U. J.L. & Bus. 345 (2020) (assessing *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015)); Mark Lebovitch & Laura Gundersheim, "Novel Issues" or A Return to Core Principles? Analyzing the Common Link Between the Delaware Chancery Court's Recent Rulings in *Option Backdating and Transactional Cases*, 4 N.Y.U. J.L. & Bus. 505 (2008).

2. *Institute for Corporate Governance & Finance*, NYU SCHOOL OF LAW, <https://www.law.nyu.edu/centers/icgf> (last visited Apr. 17, 2023).

3. NYU School of Law, *A New Paradigm for Corporate Governance?*, YOUTUBE (Mar. 9, 2017), [https://www.youtube.com/watch?v=ezm\\_WsFrgzk](https://www.youtube.com/watch?v=ezm_WsFrgzk); see also Martin Lipton, *Corporate Governance: The New Paradigm*, HARVARD L. SCH. FORUM ON CORP. GOVERNANCE (Jan. 11, 2017), <https://corpgov.law.harvard.edu/2017/01/11/corporate-governance-the-new-paradigm>; Edward Rock, *For Whom is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 BUS. LAW. 363 (2021).

4. The Chancellor issued more than 500 judicial opinions, including several seminal decisions that today guide corporate directors in boardrooms—as well as law students and practitioners alike—in determining when directors' decisions deserve deference. *Gagliardi v. Trifoods Int'l*, 683 A.2d 1049, 1052 (Del. Ch. 1996) (providing the canonical argument that diversified "[s]hareholders don't want (or shouldn't rationally want) directors to be risk averse . . . . But directors will tend to deviate from this rational acceptance of corporate risk if in authorizing the corporation to undertake a



Allen became the founding Director of NYU's Pollack Center for Law and Business. That connection continues: Just this year, students had the opportunity to take classes with both Lori W. Will and Travis Laster, Vice Chancellors of the Delaware Court of Chancery.<sup>5</sup>

So it is fitting that the Institute so often hosts lectures from leading Delaware jurists. In 2018, former Chief Justice Leo Strine came to NYU to identify what he famously called the "fiduciary blind spot": the illegitimate use of working Americans' savings for corporate political spending.<sup>6</sup> The next year, Chancellor Andre Bouchard visited NYU Law to share his view on two recent cases, *Corwin v. KKR Financial Holdings*<sup>7</sup> and *In re Trulia, Inc. Stockholder Litigation*<sup>8</sup> and the corporate-law progeny each decision produced.<sup>9</sup> Both lectures commanded the attention of decisionmakers in legislatures and boardrooms alike, reflecting as they did the most pressing questions facing corporate boards around the world.

This year's lecture, by Delaware Chief Justice Seitz, is no less impactful. In the pages that follow, the Chief Justice challenges us to consider the institutional importance—and, really, the meaning—of being an independent director in the modern corporation. As the Chief Justice reminds us, Delaware law and its judiciary rely on the independence of counsel and directors to do its important work. Like the lectures that

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risky investment, the directors must assume some degree of personal risk relating to *ex post facto* claims of derivative liability for any resulting corporate loss").

5. See Corporate and M&A Litigation: A Delaware Law Primer, NYU LAW, <https://its.law.nyu.edu/courses/description.cfm?id=31351> (last visited Apr. 21, 2023) (describing course taught by Lori W. Will); Iconic Delaware Cases Seminar, NYU LAW, <https://its.law.nyu.edu/courses/description.cfm?id=32472> (last visited Apr. 21, 2023) (describing course taught by Travis Laster).

6. Leo E. Strine, Jr. *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007 (2020); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010).

7. *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980 (Del. Ch. 2014).

8. *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016).

9. NYU School of Law, *2019 Distinguished Jurist Lecture: Chancellor Andre Bouchard*, YOUTUBE (Nov. 13, 2019), <https://www.youtube.com/watch?v=YLO2knjEM5E>.

preceded it—and those that will follow—we expect that the lessons from the Chief Justice’s remarks will point the way forward for corporate-law practitioners, scholars, and students alike.

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A DECLARATION OF INDEPENDENCE:  
COMMITTEES, CONFLICTS, AND THE COURTS

CHIEF JUSTICE COLLINS J. SEITZ, JR.\*

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INTRODUCTION

Thank you, Dean McKenzie, for that kind introduction and for inviting me to speak this evening. I am honored to be in the company of other luminaries of the Delaware judiciary who have offered remarks for this lecture—former Chancellor and Chief Justice Leo Strine, and former Chancellor Andy Bouchard. I want to talk about an area of corporate law that is a bread-and-butter issue for the Delaware Court of Chancery and the Delaware Supreme Court: independence and its special place in our law.

Why does independence matter? Consider some examples outside corporate law where we value independence. Take doctors for instance. Physicians care for patients but also have paid consulting and speaking arrangements.<sup>1</sup> Doctors

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\* Chief Justice of the Delaware Supreme Court.

1. See, e.g., World Medical Association, *The WMA International Code of Medical Ethics* (Dec. 13, 2022) (“The physician must practise with conscience, honesty, integrity, and accountability, while always exercising independent professional judgement and maintaining the highest standards of profes-

conduct research studies to help develop new pharmaceuticals or medical devices, invest in biotechnology companies, or own testing facilities or treatment centers that provide healthcare services. While these activities are essential to advancing medical science and improving patient care, the financial benefits physicians receive from these arrangements raise potential conflicts of interest.<sup>2</sup> One need only look at opioids, financial incentives, and prescribing practices to realize that something was broken with how conflicts of interest were managed.<sup>3</sup> Without robust ethical guidelines and disclosure requirements, how can the public have confidence that when a physician prescribes a drug for a patient or implants a medical device, the physician is motivated by the patient's best interests and not by expensive trips to exotic locations paid for by a drug company or a medical device manufacturer?

We demand independence of our judiciary. The Delaware Judge's Code of Judicial Conduct ("the Code") defines independence as "a judge's freedom from influence or controls other than those established by law."<sup>4</sup> According to the Code, "[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards, so that the judiciary's integrity, independence, and impartiality may be preserved."<sup>5</sup>

We also require a degree of independence of attorneys. Although attorneys have a duty to represent their clients zealously,<sup>6</sup> they also have a duty to the Court, such as the duty of candor.<sup>7</sup> A lawyer may not lie for a client<sup>8</sup> and in certain cir-

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sional conduct."), <https://www.wma.net/policies-post/wma-international-code-of-medical-ethics>.

2. See INST. OF MED. OF THE NAT'L ACAD.'S, *Conflict of Interest and Medical Practice*, in CONFLICTS OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE 166, 166–67 (2009).

3. See Jonathan H. Marks, *Lessons from Corporate Influence in the Opioid Epidemic: Toward a Norm of Separation*, 17 J. BIOETHICAL INQUIRY 173, 175, 180 (2020).

4. DEL. JUDGES' CODE OF JUDICIAL CONDUCT, Terminology (2008).

5. DEL. JUDGES' CODE OF JUDICIAL CONDUCT R.1.2(B) (2008).

6. See DEL. LAWYERS' R. PROF'L CONDUCT pmbl. (2008).

7. See DEL. LAWYERS' R. PROF'L CONDUCT R.3.3.

8. See *id.* at R.3.3, R.4.1.

cumstances, must withdraw from representation.<sup>9</sup> A lawyer also has a singular duty to the client even if the fees are paid by another.<sup>10</sup>

While some degree of independence is essential to well-functioning professions, it is also important to acknowledge that lawyers and judges are human beings. It might come as a surprise to some, but judges socialize with lawyers. We appoint lawyers to committees, lawyers defend us when we are sued, and they draft our wills. In response to potential conflicts of interest, judges have engineered ways to address the appearance of impropriety.<sup>11</sup>

Although directors are not subject to professional regulation like judges and lawyers, they can be called upon to exercise independent judgment and to evaluate the strengths and weaknesses of legal claims that might be asserted by the corporation against board members and others. And, like judges, directors have relatives and friends. They own property, make financial investments, and have other business activities. They have acquaintances who may be classmates, professional associates, or business contacts. They also hold memberships in clubs and other organizations and have political affiliations. It is a fact of life that “business dealings seldom take place between complete strangers” and “it would be a strained and artificial rule which required a director to be unacquainted or uninvolved with fellow directors in order to be regarded as independent.”<sup>12</sup>

Under Delaware law, when dealing with director independence questions, we start with a presumption that directors approach their duties with professionalism and integrity.<sup>13</sup> Directors are typically accomplished people. They might serve on more than one board and make decisions for some of the largest corporations in the world. And to serve as an independent director on a listed company board, they are subject to stock

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9. *See id.* at R.1.16.

10. *See id.* at R.1.8(f).

11. *See generally* DEL. JUDGES' CODE JUDICIAL CONDUCT Canon 3 (2008).

12. *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1442 (N.D. Cal. 1994).

13. *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004) (“[D]irectors are entitled to a presumption that they were faithful to their fiduciary duties.”).

exchange independence requirements.<sup>14</sup> According to the NYSE requirements, an “Independent Director” is one whom the board “affirmatively determines” has no “materiality relationship” with the company “either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company.”<sup>15</sup> For the NASDAQ, an “Independent Director” means one who is not an executive officer or employee of the company and who, in the board’s opinion, has no relationship which would “interfere with the exercise of independent judgment” in carrying out director responsibilities.<sup>16</sup> In other words, for listed companies, an independent director cannot have a material relationship with a company, is not part of the executive team, and is not involved in its day-to-day operations.

The stock exchange listing requirements are a start, but they do not recognize situational conflicts that might affect a director’s independence. Delaware courts have not given substantial weight to the stock exchange independence requirements when assessing a director’s independence.<sup>17</sup> The lack of deference is unsurprising because the independence inquiry is not a one size fits all proposition. It is highly contextual. And the regulations fail to consider other personal and professional connections between directors that lie outside the company’s day-to-day operations.

One of the most influential Delaware Supreme Court decisions addressing director independence is *Beam v. Stewart*.<sup>18</sup> In that 2004 case, a stockholder of Martha Stewart Living Omnimedia filed a derivative action against Martha Stewart

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14. See NYSE Listed Company Manual § 303A.02; see also NASDAQ, Inc. Marketplace Rule § 5605(a)(2).

15. NYSE Listed Company Manual § 303A.02.

16. NASDAQ, Inc., Marketplace Rule § 5605(a)(2).

17. See, e.g., *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015) (“[A] board’s determination of director independence under the NYSE Rules is qualitatively different from, and thus does not operate as a surrogate for, this Court’s analysis of independence under Delaware law . . . .”); see also *In re Ezc Corp Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at \*36 (Del. Ch. Jan. 25, 2016) (“The independence standards established by stock exchanges and the requirements of Delaware law, such that a finding of independence (or its absence) under one source of authority is not determinative for purposes of the other . . . .”).

18. *Beam*, 845 A.2d at 1040.

and five board members.<sup>19</sup> The stockholder alleged that Stewart, who controlled over 94% of the vote, breached her fiduciary duties by illegally selling ImClone stock for her personal account based on inside information and thereby damaging the company's reputation.<sup>20</sup> Two days after Stewart sold all her ImClone stock holdings, news broke that the FDA would not review ImClone's application for its cancer drug, the leading drug in ImClone's pipeline.<sup>21</sup>

We know that Martha Stewart faced criminal prosecution for her actions at the time. Due to her prominent media profile, the criminal case received widespread attention.<sup>22</sup> Stewart was convicted for criminal conduct and ended up serving a 5-month prison sentence and 5 months of home confinement.<sup>23</sup> A stockholder filed a derivative suit and claimed that her criminal actions harmed the company bearing her name. Because it was a derivative action, meaning the stockholder sued on behalf of the corporation, the stockholder also alleged that he could pursue the litigation on behalf of the corporation without the board's involvement because a majority of the board was not independent of Stewart.<sup>24</sup> Not unexpectedly, personal and professional relationships abounded among the board members and Stewart. In hearing the case, the Delaware Supreme Court had to sort through the conflicts.

In addressing whether a pre-suit demand on the board was excused because the board members were not independent of Stewart, Chief Justice Veasey wrote that a "key principle" in the director independence inquiry is that "directors are entitled to a presumption that they were faithful to their fiduciary duties."<sup>25</sup> The Court also observed that a director is con-

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19. *See id.* at 1044.

20. *Id.*

21. *See* Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 833A.2d 961, 968 (Del. Ch. 2003).

22. *See, e.g.,* Constance L. Hays, *Prosecuting Martha Stewart: The Overview; Martha Stewart Indicted by U.S. On Obstruction*, N.Y. TIMES (June 5, 2003), <https://www.nytimes.com/2003/06/05/business/prosecuting-martha-stewart-overview-martha-stewart-indicted-us-obstruction.html>.

23. *See* Constance L. Hays, *Prosecuting Martha Stewart: 5 Months in Jail, and Stewart Vows, 'I'll Be Back'*, N.Y. TIMES (July 17, 2004), <https://www.nytimes.com/2004/07/17/business/martha-stewart-s-sentence-overview-5-months-jail-stewart-vows-ll-be-back.html>.

24. *See* Beam, 845 A.2d at 1049.

25. *Id.* at 1048.

sidered independent when a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences.<sup>26</sup> Because the independence inquiry is a highly contextual and fact-specific determination, the assessment, according to the Court, is made in the context of a particular transaction or event.<sup>27</sup>

The Delaware Supreme Court in *Beam v. Stewart* addressed head-on the personal and professional relationships that might affect a director's independence. First, it rejected a structural bias argument, meaning pre-existing professional and social relationships or ones that naturally develop among board members impeded independent decision-making and rendered the board as a whole lacking independence from Stewart.<sup>28</sup> The Court reasoned that, although structural bias is a concern, the Court of Chancery has broad discretion to review in a particular case the specific facts pointing to bias.<sup>29</sup> In each case the court can decide whether the structural bias rises to the level that a majority of the board is compromised in its decision-making.<sup>30</sup> In other words, rather than adopt a bright line rule, the Delaware Supreme Court, as it often does, empowered the Court of Chancery to take a holistic view of the independence question in the context of a particular case.<sup>31</sup>

Also, in observations about relationships between the defendants and decision-makers, the Court found the allegations that Stewart and the other directors moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as "friends," were insufficient, without more, to rebut the presumption of a majority of the board's faithfulness to its fiduciary duties.<sup>32</sup> While a personal friendship or "outside business relationships" are relevant to a demand futility inquiry, the Court held that a materiality standard must be satisfied by showing that the relationship is of a "bias-producing" nature.<sup>33</sup> In the Delaware Supreme Court's view, the personal and pro-

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26. *See id.* at 1049.

27. *See id.*

28. *See id.* at 1050–51.

29. *Id.* (citing *Aronson v. Lewis*, 473 A.2d 805, 815 n.8 (Del. 1984)).

30. *See id.* at 1051.

31. *See id.* at 1050.

32. *See id.* at 1051.

33. *Id.* at 1050.



fessional relationships pled in the *Stewart* case were insufficient to infer that the directors considering a demand may have been beholden to Stewart.<sup>34</sup>

Finally, the Delaware Supreme Court noted that the stockholder could have requested books and records from the corporation before filing suit to bolster its bias allegations.<sup>35</sup> The stockholder could have explored the nomination process, personal and financial connections between the directors and Stewart, and other information relevant to independence.<sup>36</sup> Because the stockholder did not take advantage of the tools at hand, the thinness of the pleading doomed the complaint to dismissal.<sup>37</sup>

*Stewart* is the starting point for many independence inquiry decisions involving personal and professional relationships. The Delaware Supreme Court recognized that independence depends on context, personal and professional relationships standing alone were not disqualifying, and it is up to the court in each case to decide how close is too close. Ultimately, the court was willing to accept some degree of personal and professional connections in the director independence inquiry and the trend in recent cases is to scrutinize those personal and professional relationships more closely.

## I.

### INDEPENDENCE IN THREE CONTEXTS

Next, we look at the independence question in recurring contexts under Delaware law: (1) the work of a board committee formed to negotiate and review a transaction with a controlling stockholder; (2) Court of Chancery Rule 23.1 and the demand review committee; and (3) the special litigation committee and its authority to dismiss derivative litigation brought by a stockholder.

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34. *See id.* at 1052–54 (“That is not to say that personal friendship is always irrelevant to the independence calculus. But, for presuit demand purposes, friendship must be accompanied by substantially more in the nature of serious allegations that would lead to a reasonable doubt as to a director’s independence.”).

35. *See id.* at 1056–57.

36. *See id.*

37. *See id.* at 1057.

### A. *Controlling Stockholder Transactions*

Taking the transaction committee first, a transaction approved by a majority of independent and disinterested directors will typically get deferential business judgment review by the Court of Chancery.<sup>38</sup> But a transaction approved by a majority of interested or conflicted directors will merit entire fairness review, described as the most stringent form of review under Delaware law.<sup>39</sup> Although not outcome determinative, surviving entire fairness review is a steep hill to climb. When a transaction involves a controlling stockholder, the board independence inquiry is center stage.

To avoid automatic entire fairness review of a controller transaction and the inevitable litigation that follows such transactions, our Court in *Kahn v. M & F Worldwide Corp* (“MFW”) gave transaction planners a path to business judgment review of the transaction.<sup>40</sup> The court would apply the business judgment standard of review if the negotiations replicated arm’s-length bargaining by a board committee representing the minority’s interests.<sup>41</sup>

We held that a controller in a squeeze-out transaction can secure business judgment review if the transaction meets the following requirements:

- (i) the controller conditions the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of

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38. See *Grobow v. Perot*, 539 A.2d 180, 190 (Del. 1988), *overruled on other grounds by* *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (“Approval of a transaction by a majority of independent, disinterested directors almost always bolsters a presumption that the business judgment rule attaches to transactions approved by a board of directors that are later attacked on grounds of lack of due care.”).

39. See *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013).

40. See *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014), *overruled on other grounds by* *Flood v. Synutra Int’l, Inc.*, 195 A.3d 754 (Del. 2018).

41. See *id.* at 644.

the minority is informed; and (vi) there is no coercion of the minority.<sup>42</sup>

Two recent decisions from the Court of Chancery dealt with the independence question in the context of a controlling stockholder transaction that the board claimed was subject to *MFW* protections. In the first decision, *City Pension Fund for Firefighters & Police Officers in City of Miami v. The Trade Desk, Inc.* (“*The Trade Desk*”), the court confronted a challenge to a certificate of incorporation amendment proposed by the controlling stockholder that extended the duration of its dual-class stock structure and therefore its controlling position.<sup>43</sup> The board appointed a special committee to negotiate and review the transaction.<sup>44</sup> After approval, minority stockholders filed suit and challenged the transaction as unfair.<sup>45</sup> The court granted the motion to dismiss the complaint after finding that the *MFW* conditions had been satisfied.<sup>46</sup> The court found dispositive that the stockholder challenged only the independence of the special committee chair, leaving two special committee members unscathed.<sup>47</sup> Because the court typically reviews the independence question on a director-by-director basis, a majority of the special committee was essentially conceded to be independent.<sup>48</sup>

Hoping to get around the challenging fact that a majority of the special committee was independent, the stockholder claimed that the special committee labored under a “controlled mindset,” meaning that the committee members’ board service was material to the members and by ingratiating themselves with the controller they would ensure their continued service.<sup>49</sup> This controlled mindset theory sounds like another way of describing the structural bias rejected in *Beam v. Stewart*.<sup>50</sup>

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42. *Id.* at 639.

43. *City Pension Fund for Firefighters & Police Officers in City of Miami v. The Trade Desk, Inc.*, 2022 WL 3009959, at \*1 (Del. Ch. July 29, 2022).

44. *See id.* at \*4.

45. *See id.* at \*8.

46. *See id.* at \*23.

47. *See id.* at \*11–12.

48. *Id.*

49. *Id.*

50. *Compare The Trade Desk*, 2022 WL 3009959, at \*14–16 *with Beam*, 845 A.2d at 1050–51 (“The facts alleged by *Beam* regarding the relationships

According to the court, the theory was not enough by itself.<sup>51</sup> The complaint lacked allegations that the controller interfered or pressured the committee members.<sup>52</sup> The court also was unpersuaded by an “infection” theory, meaning that the director who lacked independence infected the special committee process.<sup>53</sup> Under either the controlled mindset or the infection theory, the court found that the stockholder merely disagreed with the committee’s decision on the merits rather than meaningfully attacking the committee’s independence.<sup>54</sup>

By contrast, the Court of Chancery in *In re Dell Technologies* found that the special committee set up to negotiate a share conversion right lacked independence from Michael Dell and the company’s private equity owner.<sup>55</sup> The case involved a post-closing challenge to a negotiated redemption of its Class V shares by Dell Technologies Inc., a company controlled by Michael Dell and private equity firm Silver Lake.<sup>56</sup> Dell’s board of directors established a two-member Special Committee to negotiate a redemption of the Class V shares.<sup>57</sup> The eventual redemption was approved by both a special committee and the minority stockholders.<sup>58</sup> After litigation was filed, the defendants sought the protections of *MFW*. At the pleading stage, the Court of Chancery found that *MFW* could not be used to obtain business judgment review of the transaction. Instead, the “entire fairness” standard of review would apply.<sup>59</sup>

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between Stewart and these other members of MSO’s board of directors largely boil down to a ‘structural bias’ argument, which presupposes that the professional and social relationships that naturally develop among members of a board impede independent decisionmaking.”).

51. See *Trade Desk*, 2022 WL 3009959, at \*11.

52. See *id.* at \*17.

53. See *id.* at \*13–14.

54. *The Trade Desk, Inc.*, 2022 WL 3009959, at \*14 (“Plaintiff has not pleaded sufficient facts alleging that Buyer’s conduct dominated or subverted the Special Committee process so as render the entire committee defective, even if she was determined to be lacking in independence.”).

55. See *In re Dell Techs. Inc. Class V S’holders Litig.*, 2020 WL 3096748, at \*35–38 (Del. Ch. June 11, 2020).

56. See *id.* at \*1.

57. See *id.*

58. See *id.* at \*2.

59. See *id.* at \*44.

Regarding independence, the court viewed the company's committee members as potentially not independent due to extensive business co-investments and connections with Michael Dell and Silver Lake, as well as personal connections based on membership in the same exclusive golf clubs (which featured prominently in the decision).<sup>60</sup> In the case of one director, the court relied on a transitive view of a lack of independence, meaning that the business and personal connections with the best friend of the controller rather than the controller himself were relevant to the independence inquiry.<sup>61</sup> One committee member and the managing partner of Silver Lake were also "platinum" donors, donating over \$25,000 per year to the University of Georgia.<sup>62</sup> These relationships, said the court, "taken as whole," made it reasonably conceivable that the committee members' ability "to engage in hard-nosed bargaining as a member of the Special Committee" was compromised.<sup>63</sup>

#### B. Demand Review Committee

Turning to the demand review committee, there are a wealth of cases addressing committee independence after *Beam v. Stewart*. A few recent cases stand out for showing different outcomes depending on the facts.

For context, Court of Chancery Rule 23.1(a) requires that a stockholder seeking to assert a claim on behalf of the corporation must first, before filing suit, make a demand on the board of directors that the board pursue the claim.<sup>64</sup> This is a product of Delaware statutory law and specifically §141 of the Delaware General Corporation Law that concentrates the power to manage the business and affairs of the corporation in the board of directors.<sup>65</sup> However, the demand requirement is excused when it would be futile to make a demand on the

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60. *See id.* at \*36–37.

61. *See id.* at \*37–38 (referencing Green's relationships with Dell's best friend Joseph Tucci).

62. *See id.* at \*36.

63. *See id.* at \*43.

64. Ct. Ch. R. 23.1(a) ("[t]he complaint shall . . . allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors . . . and the reasons for the plaintiff's failure to obtain the action or for not making the effort.").

65. DEL. CODE ANN. tit. 8, §141.

board because a majority of the board is either interested or lacks independence.<sup>66</sup> For brevity's sake, our focus will be on the issue of independence.

In *Sandys v. Pincus*, a Delaware Supreme Court case, the plaintiff alleged derivative claims that certain top managers and directors at Zynga, including its former CEO, Chairman, and controlling stockholder, were given an exemption to the company's standing rule preventing sales by insiders until three days after an earnings announcement.<sup>67</sup> According to the plaintiff, top Zynga insiders sold millions of shares of stock at \$12 per share for \$236.7 million as part of a secondary offering before Zynga's April 26, 2012 earnings announcement.<sup>68</sup> Immediately after the earnings announcement, the market price dropped 9.6% to \$8.52 per share.<sup>69</sup> Three months later, following the release of additional negative information, which the plaintiff alleges was known by Zynga management and the board when it granted the exemption, Zynga's market price declined to \$3.18 per share, a decrease of 73.5% from the \$12.00 per share offering price.<sup>70</sup>

The plaintiff alleged that the insiders who participated in the sale breached their fiduciary duties by misusing confidential information when they sold their shares while in possession of adverse, material non-public information.<sup>71</sup> It was also alleged that demand on the board was futile because a majority of the board lacked independence from the defendants.<sup>72</sup>

Our Court in a split decision reversed the Court of Chancery's independence determination and found that certain directors of Zynga were not independent because of personal and professional connections to the company's controlling stockholder.<sup>73</sup> Along with other connections, we found that the co-ownership of an airplane by a director and the investigation target was so unusual in nature as to demonstrate actual bias since it "requires close cooperation in use, which is suggestive of detailed planning indicative of a continuing, close

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66. See *Zapata v. Maldonado*, 430 A.2d 779, 787–89 (Del. 1981).

67. See *Sandys v. Pincus*, 152 A.3d 124, 126–27 (Del. 2016).

68. *Id.* at 127.

69. *Id.*

70. *Id.*

71. *Id.*

72. See *id.* at 126.

73. See *id.* at 134.

personal friendship.”<sup>74</sup> This has come to be known in plaintiff circles as “the airplane rule,” where if you co-own an airplane, you start out behind in the independence inquiry.<sup>75</sup> The *Sandys* decision has been viewed as part of a continuing shift by the Delaware judiciary to scrutinize personal and business relationships more closely.<sup>76</sup>

From airplanes, we move to ice cream. In *Marchand v. Barnhill*, the plaintiffs asserted a derivative claim against the directors for lack of oversight under the famous *Caremark*<sup>77</sup> decision by Chancellor Allen.<sup>78</sup> Blue Bell sold ice cream contaminated with listeria resulting in the sickness and death of consumers.<sup>79</sup> The plaintiffs filed suit and claimed a lack of board oversight of the corporation’s essential operations because the Blue Bell board allegedly failed to implement any system to monitor Blue Bell’s food safety performance or compliance.<sup>80</sup>

In response to the defendants’ motion to dismiss for failure to make a demand on the board before filing suit, the Court of Chancery found that the Blue Bell board was independent by one director, a director that had previously worked for Blue Bell.<sup>81</sup>

We reversed and found that the director declared independent by the Court of Chancery could not impartially de-

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74. *See id.* at 130.

75. *See* Steven M. Haas, *Co-Ownning an Airplane and Other Things that May Affect Director Independence*, HUNTON & WILLIAMS (Feb. 2017), <https://www.huntonak.com/en/insights/co-owning-an-airplane-and-other-things-that-may-affect-director-independence.html>.

76. *See, e.g.*, Timothy R. Dudderar & Tyson J. Prisbrey, *Delaware Insider: Sandys v. Pincus: Personal Relationships and Director Independence*, BUS. L. TODAY, January 2017, at 1, 3 (“*Sandys* . . . provides some additional clarity regarding the types of unique personal relationships that can alone affect director independence.”); Nathan P. Emeritz, *Independence Issues in the Entrepreneurial Ecosystem*, BUS. L. TODAY, May 2017, at 1, 6 (highlighting *Sandys* to note that “corporate practitioners should be cognizant of the Delaware judiciary’s focus on [personal] connections”); DEBORAH A. DEMOTT, *SHAREHOLDER DERIV. ACTIONS L. & PRAC.* § 5:13 (2022–2023) (citing *Sandys* to highlight “the importance of considering all particularized facts alleged about [personal] relationships in their totality”).

77. *See In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

78. *See* *Marchand v. Barnhill*, 212 A.3d 805, 807–08 (Del. 2019).

79. *See id.* at 807.

80. *See id.*

81. *See id.* at 808.

cide whether to sue members of the Kruse family, who founded Blue Bell, because the family had been instrumental in this director's career success, which included 28 years at the company, becoming chief financial officer and being elected a director.<sup>82</sup> The Kruse family also led a campaign that resulted in over \$450,000 being donated to a local college, which resulted in the naming of a building after the director.<sup>83</sup> The Court explained that Delaware law "cannot ignore the social nature of humans or that they are motivated by things other than money, such as love, friendship, and collegiality."<sup>84</sup>

By contrast, our Court in the 2021 decision *United Food & Commercial Works Union v. Zuckerberg* differentiated between "thin" as opposed to "thick" friendships or relationships.<sup>85</sup> A plaintiff filed suit claiming that the Facebook board of directors breached its fiduciary duties by approving a stock reclassification proposal that would have allowed Facebook founder Mark Zuckerberg to retain voting control of Facebook even after donating a significant portion of his shares to charitable causes.<sup>86</sup> The Court of Chancery dismissed the plaintiff's claim for failure to make a demand on the board before filing suit.<sup>87</sup>

The *Zuckerberg* decision is best known for a restatement of the demand futility test before bringing shareholder derivative claims.<sup>88</sup> Part of the test addresses the independence of the board that would review a demand.<sup>89</sup> The plaintiff alleged that a majority of the directors on the Demand Review Board lacked independence from Zuckerberg.<sup>90</sup> We affirmed the Court of Chancery.<sup>91</sup> As we noted in *Beam v. Stewart*, to show a lack of independence the plaintiff must satisfy a materiality standard.<sup>92</sup> The plaintiff must allege that "the director in question had ties to the person whose proposal or actions he or she

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82. *Id.*

83. *Id.*

84. *Id.* at 818.

85. *See* *United Food & Com. Works Union v. Zuckerberg*, 262 A.3d 1034, 1061 (Del. 2021) (detailing how levels of friendship differ in the weight the court accords them).

86. *See id.* at 1046.

87. *See id.* at 1046–47.

88. *See id.* at 1059 (outlining the restatement of the demand futility test).

89. *See id.*

90. *See id.* at 1056.

91. *See id.* at 1064.

92. *See id.* at 1061; *see also* *Beam*, 845 A.2d at 1050.



is evaluating that are sufficiently substantial that he or she could not objectively discharge his or her fiduciary duties.”<sup>93</sup> The relationship must be of a bias-producing nature.<sup>94</sup> Friendships and financial ties, without more, are not disqualifying.<sup>95</sup>

In addressing demand futility, we found that a majority of the directors were independent of Zuckerberg.<sup>96</sup> For one director, Peter Thiel, the plaintiff alleged that Thiel harbored a “sense of obligation” to Zuckerberg for not removing Thiel from the Facebook board in the face of public scandal.<sup>97</sup> The defendants countered that the plaintiffs failed to allege that remaining a Facebook director was “financially or personally material to Thiel.”<sup>98</sup>

Our Court agreed with the Court of Chancery that, given Thiel’s wealth and stature, “[t]he complaint does not support an inference that Thiel’s service on the Board is financially material to him. Nor does the complaint sufficiently allege that serving as a Facebook director confers such cachet that Thiel’s independence is compromised.”<sup>99</sup> Finally, the Court also was not persuaded by a “founder bias” theory without more specific allegations to back it up.<sup>100</sup>

### C. *Special Litigation Committee*

In the last category of cases, Special Litigation Committees (SLC), it is fair to say that independence is scrutinized with more rigor. The SLC springs from the Delaware Supreme Court’s early decision in *Zapata v. Maldonado*.<sup>101</sup> In that case, the court allowed an SLC to gain dismissal of pending derivative litigation if certain conditions are met.<sup>102</sup>

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93. *See Zuckerberg*, 262 A.3d at 1061.

94. *See id.*

95. *See id.*

96. *See id.*

97. *Id.* at 1063.

98. *Id.* at 1063.

99. *Id.* (quoting *United Food & Com. Workers Union v. Zuckerberg*, 250 A.3d 862, 898 (Del. Ch. 2020)).

100. *See id.* at 1063 (“[A] director’s good faith belief that founder controller maximizes value does not raise a reasonable doubt that the director lacks independence from a corporation’s founder.”).

101. *See Zapata v. Maldonado*, 430 A.2d 779, 785 (Del. 1981) (“[A]n independent committee possesses the corporate power to seek the termination of a derivative suit.”).

102. *See id.* at 787.

Unlike a demand review committee, the SLC arises when demand is futile and is a final way for the board to retain control of a derivative suit.<sup>103</sup> In other words, even if a board is deemed to lack independence after derivative litigation has been filed on behalf of the corporation, the board can still take control of the litigation from the stockholder by appointing an SLC.

An SLC has the power to investigate and to evaluate whether the suit should be pursued on behalf of the corporation. That inquiry requires the SLC to consider not just the merits of the claims but also the costs to the corporation of pursuing the litigation and other factors.

In the *Zapata* decision, the Court approved of the conflicted board appointing the SLC members.<sup>104</sup> But the Court recognized that because a conflicted board appoints the SLC, and the SLC has the power to obtain dismissal of the litigation, more substantial guardrails were needed than in the demand review context.<sup>105</sup>

The heightened scrutiny in the context of an SLC includes a summary judgment standard that must be met by the SLC, meaning the SLC bears the burden to show that the committee was independent and had reasonable bases for its findings and recommendations.<sup>106</sup> For each SLC member, the court asks whether the SLC member would be more willing to risk her reputation than the personal or professional relationship with the director subject to investigation.<sup>107</sup> “If the court determines either that the committee is not independent or has not shown reasonable bases for its conclusions,” the motion is denied and litigation control reverts to the stockholder.<sup>108</sup>

Next, we turn our focus on a recent decision in the SLC context that can be fairly characterized as a close call. Indeed, the Chancellor has used the words “close call” in several recent opinions, and one can understand why after reviewing the facts of many of these cases.

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103. *See id.* at 787–88.

104. *See id.* at 786.

105. *See id.* at 786–87.

106. *See id.* at 787–88.

107. *See id.*

108. *See id.* at 789.

In *Diep on behalf of El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners* (“*El Pollo Loco*”), after the Court of Chancery denied a motion to dismiss for failure to make a demand, meaning the litigation could proceed, the board appointed a three director SLC to review claims brought against the company for insider trading by board member-investors who sold stock at a substantial profit just before the release of a negative earnings outlook.<sup>109</sup> Not unexpectedly, two of the three SLC members had business and social relationships with the individual defendants and the other director’s independence was not challenged.<sup>110</sup>

An important circumstance dominated the analysis. Two of the SLC members were on the board when a motion to dismiss was filed.<sup>111</sup> The motion filed by the defendants raised not just the failure to make a demand; it also moved to dismiss on the merits.<sup>112</sup> The plaintiff alleged that two of the three SLC members were not independent because they had prejudged the subject matter of the SLC investigation by approving a move to dismiss those claims for lack of merit.<sup>113</sup> In other words, when the company moved to dismiss the litigation, they staked out their position that the claims were without merit.

A majority of the Delaware Supreme Court rejected that contention, holding that the record did not show that the two SLC members had “approved or participated in a substantive way in the decision to file the motion to dismiss.”<sup>114</sup> Noting that “independence is a fact-specific determination made in the context of a particular case,” the majority recited what it considered to be the relevant facts.<sup>115</sup> At a board meeting, the directors, including the two SLC members, had received:

“an update regarding ‘pending litigation’” . . . . The minutes [of the meeting] d[id] not mention the motion to dismiss. . . . [T]he record is devoid of evidence that [one of the two SLC members] was in-

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109. *Diep ex rel. El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C.*, 280 A.3d 133, 136–37 (Del. 2022).

110. *See id.* at 146–147.

111. *See id.*

112. *See id.* at 146.

113. *See id.*

114. *Id.* at 153.

115. *Id.* at 152–53.

volved in any discussion about, or approved the filing of, the motion to dismiss. [The other SLC member] . . . was “sure” there “would have” been a “litigation update” and “discussion” on the subject, but “did not recall the details of it.” Although [that second SLC member] did not recall anyone objecting to the motion, he did not say he “approved of its filing.”<sup>116</sup>

The majority concluded that “these facts do not raise a material question of fact about whether [the two SLC members] prejudged the merits of the suit because they were exposed to a litigation review that included a less than in-depth discussion of the motion to dismiss.”<sup>117</sup>

The dissent took a contrary view. It viewed the record as “show[ing] more than just [the two SLC members’] mere presence on the Board when the 2016 Motion [to Dismiss] was filed.”<sup>118</sup> According to the dissent:

The motion [to dismiss] was discussed with the Board and that no director objected to its filing. [One SLC member] specifically stated that he did not object to its filing. The logical conclusion is that the Board, at least tacitly, approved and authorized filing the 2016 Motion after discussion. . . . The 2016 Motion was obviously authorized by someone. Given that a corporation acts through its board of directors, and given that the motion was the subject of a Board discussion, the record suggests that the Board authorized it.<sup>119</sup>

## II.

### DISCUSSION

Ok, enough about cases. It is now the time when I am required to say something profound.

First, these are hard cases. They are highly situational and depend on the materiality of the financial entanglements and the number and depth of the business and personal connections between the independent directors and the defendants.

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116. *Id.* at 153.

117. *Id.* at 154.

118. *Id.* at 168 (Valihura, J., dissenting).

119. *Id.* at 168 (Valihura, J., dissenting).

They are also uncomfortable because we tend to think instinctively, like judges and lawyers, that conflicts are inherently bad.

Second, I think it is accurate to say that there has been a trend in the cases to place a greater emphasis on non-economic factors in the independence analysis. As one paper has summed it up, the Delaware courts are taking a closer look at factors such as “length of service on a board or committee, levels and types of director compensation and the robustness of the nominating committee and its nominating process,”<sup>120</sup> philanthropic, professional, personal, familial and any other type of connections between directors that could create ‘an unacceptable risk of bias.’”<sup>121</sup>

Third, the trend towards greater scrutiny in controller transactions might be traced to the significant cleansing powers given to independent committees evaluating conflicted transactions. Like an SLC, who can move to terminate litigation, the board can structure an independent special committee process to invoke *MFW* protections. As noted earlier, an effective independent committee process can shield a conflicted transaction from entire fairness review, effectively immunizing the transaction from court review.

Fourth, a demand review committee has a great deal of power in that it can also consider factors other than the merits of the claims to assess whether claims should be pursued. It is unclear whether time, expense, and distraction of the board and management should trump valid claims, but we have recognized that it is one factor to consider when evaluating a demand.<sup>122</sup>

And fifth, to my mind there has been a trend in litigated cases to test the limits of the court’s willingness to allow conflicts. In other words, boards are appointing directors to independent committees with material business and personal conflicts to see if they can run the litigation gauntlet.

*El Pollo Loco* is a prime example of such limits-testing. Instead of seeing what can be gotten away with, it will be far

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120. Jeremy J. Kobeski, *In re Oracle Corporation Derivative Litigation: Has A New Species of Director Independence Been Uncovered?*, 29 DEL. J. CORP. L. 849, 849 (2004).

121. *Id.* at 867 (quoting Shearman & Sterling, LLP, *In re Oracle Corp. Derivative Litigation: Possible Implications for Director Independence*, Client Publication, July 2003, at <http://www.shearman.com>).

122. See *Zuckerberg*, 262 A.3d at 1056.

more cost-effective and beneficial in the long run if boards and their legal advisors keep in mind that the goal is to have a committee of directors that can replicate arm's-length bargaining to protect minority stockholders and in the case of claims brought on behalf of the corporation against the board and others, have a committee that can dispassionately evaluate the claims and decide without outside influence whether the claims should be pursued.

What are some suggestions to address the independence question? In a recent paper, Professor Lucian A. Bebchuk proposed that, when it comes to controlled company transactions, to induce independent directors to perform their oversight role, some independent directors should be accountable directly to public investors.<sup>123</sup> Professor Bebchuk argues that “[t]his can be achieved by empowering investors to determine or at least substantially influence the election or retention of these directors.”<sup>124</sup>

These “enhanced-independence” directors would play a key role in vetting “conflicted decisions,” where the interests of the controller and public investors substantially diverge without possessing a special role concerning other corporate issues.<sup>125</sup> According to Professor Bebchuk, enhancing the independence of some directors would improve the protection of public investors without undermining the ability of the controller to set the firm’s strategy.<sup>126</sup> This separate class of directors would (i) lack the incentives produced by the controller’s influence over the directors’ appointment and retention and (ii) have some incentives that flow from making the directors accountable to public investors.<sup>127</sup> The practicality of this approach is untested but it has been suggested.

Another idea is to have a pool of independent directors that could be appointed to a board for the limited purpose to address heightened independence problems. I know retired judges have been used in this capacity. It has also been suggested that when the special committee is at high risk of an unfavorable outcome on the demand review front, the board

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123. Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1272 (2017).

124. *Id.*

125. *See id.* at 1274.

126. *See id.*

127. *Id.* at 1296–97.

might skip the motion to dismiss for failure to make a demand and go straight to the appointment of a special litigation committee. One advantage of such a strategy is avoiding an unfavorable judicial decision with negative statements that must be taken as true for purposes of the motion to dismiss.

What does the Model Business Corporation Act (MBCA) say about director independence? Its definitions do not materially advance the debate. The MBCA speaks in terms of “qualified directors” depending on the action taken.<sup>128</sup> A qualified director, for independence purposes, does not have a material relationship with another involved director where material means a familial, financial, professional, employment, or other relationship that would be reasonably expected to impair the director’s judgment.<sup>129</sup> It also lists circumstances that are not automatically disqualifying of nomination to the board such as service on another board with the target director or individual and status as a named defendant.<sup>130</sup>

These proposals are a means to achieve what the board can do through its own appointment process by selecting individuals with non-material financial and personal connections to serve on special committees or to have independent directors select the independent directors to serve on a committee. In such a scenario, it may be necessary to appoint new board members to fill this role. In addition to using common sense, here are some other measures that can be taken to increase the odds of an independence finding by a Delaware court:

1. Retain independent advisors such as bankers and lawyers; selecting and relying on independent advisors are common components of a reviewing court’s assessment of the committee’s conduct.
2. Disclose personal and business ties up front and address the independence issues head on and avoid situations where committee member conflicts do not surface until litigation is filed.
3. If the potential independent director is on the board when a demand is received, insulate that director from the litigation contesting the demand.

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128. MODEL BUS. CORP. ACT § 1.43.

129. *See id.*

130. *Id.*

4. Lastly, pass on a director who shares a jet with the controller or the target of the investigation.

#### CONCLUSION

It is worth emphasizing that:

it is a contingent risk we are dealing with, that an interest conflict is not in itself a crime or a tort or necessarily injurious to others. Contrary to much popular usage, having a “conflict of interest” is not something one is “guilty of”. It is simply a state of affairs. Indeed, in many situations, the corporation and the shareholders may secure major benefits from a transaction despite the presence of a director’s conflicting interest.<sup>131</sup>

There is nothing evil about being a director with ties to other directors. That is how many directors are recruited. But when it comes to replicating arm’s-length bargaining or reviewing a director’s conduct for possible or pending litigation, the less conflicts, the better. How close is too close? We will let you know. Thank you for inviting me to speak tonight.

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131. MODEL BUS. CORP. ACT ch. 8(F), intro. cmt. 1 (1984) (AM. BAR. ASS’N, amended 2016).



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THE RISE OF THE FINFLUENCER

SUE S. GUAN\*

*In today's meme-riddled stock market, how viable do traditional theories of information exchange and price discovery remain? The conventional understanding of stock market price discovery focuses on the exchange of "information," typically tied to the present value of an issuer's future cash flows, between traders. This paper explores the impact of "finfluencers"—those who wield outside influence on investing decisions through social media—on this understanding.*

*Finfluencers increasingly broker stock market information. Social media makes doing so easier than ever before. This paper explores two implications of the rise of finfluencers. First, finfluencers are not solely motivated to seek out fundamental value information and trade to profit off of it. Instead, they try to maximize popularity, be entertaining, and "grow their brand," among other motivations. Because they mediate the information that reaches retail investors and provide powerful coordination mechanisms across those investors, finfluencers' influence shapes the types of "information" and motivations that are reflected in stock price movements. Second, the more influence finfluencers wield, the more they can predict and even control trading patterns among their followers. From a finfluencer's perspective, stock price movements can become more predictable, which can weaken finfluencers' incentives to provide valuable information to their followers and make profiting at the expense of their followers more tempting.*

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*Finfluencers are shifting the stock market information ecosystem. By drawing on microstructure and financial economics, this paper offers a new understanding of how and explores implications for price discovery, trading strategies, corporate behavior, and policy.*

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## INTRODUCTION

In December 2022, the SEC charged eight social media influencers with fraud and stock market manipulation on Twitter and Discord.<sup>1</sup> According to the Chief of the SEC Enforcement Division’s Market Abuse Unit, “the defendants used social media to amass a large following of novice investors and then took advantage of their followers by repeatedly feeding them a steady diet of misinformation, which resulted in fraudulent profits of approximately \$100 million.”<sup>2</sup> The defendants gained hundreds of thousands of followers on social media, encouraged their followers to purchase stocks the defendants had already bought, and then sold the promoted stocks once their prices rose.<sup>3</sup>

For years, federal and state securities regulators have cautioned against investment fraud on social media. The SEC has warned investors against those who impersonate legitimate sources of market information on social media or engage in pump-and-dump and other manipulative schemes using social media.<sup>4</sup> In August 2022, the North American Securities Administrators Association (NASAA), which “represents state and provincial securities regulators in the United States, Canada

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1. *SEC Charges Eight Social Media Influencers in \$100 Million Stock Manipulation Scheme Promoted on Discord and Twitter*, U.S. SEC. & EXCH. COMM’N (Dec. 14, 2022), <https://www.sec.gov/news/press-release/2022-221>; Complaint, SEC v. Constantin (S.D. Tex. 2022) (No. 22-cv-04306).

2. U.S. SEC. & EXCH. COMM’N, *supra* note 1.

3. *Id.*

4. See *Social Media and Investment Fraud – Investor Alert*, SEC (Aug. 29, 2022), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/social-media-and-investment-fraud-investor-alert>, for the SEC’s warning against fraudsters on social media who disseminate false or misleading information and detailing of common scams; *Investor Bulletin: Social Sentiment Investing Tools —Think Twice Before Trading Based on Social Media*, SEC (Apr. 3, 2019), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-18> (informing investors about the risks of social sentiment investing tools, which analyze social media data).

and Mexico,” posted an “Informed Investor Advisory” on “finfluencers.”<sup>5</sup> An excerpt is below:

A finfluencer is a person who, by virtue of their popular or cultural status, has the ability to influence the financial decision-making process of others through promotions or recommendations on social media. They may influence potential buyers by publishing posts or videos to their social media accounts, often stylized to be entertaining so that the post or video will be shared with other potential buyers. The financial influencer may be compensated by the business offering the product or service, the platform on which the message appears, or an undisclosed financier. While there is nothing new about marketers paying celebrities to endorse their products, what IS different is that such breezy and hyper-emotional endorsements are being made in what is otherwise a very regulated industry with stringent rules about performance claims and disclosure of potential conflicts of interest. Remember, investment promoters generally must provide potential investors with all information relevant to making an informed investment decision. Finfluencers are testing the limits of what is considered regulated investment advice and protected free speech.<sup>6</sup>

The information ecosystem of today’s stock markets is changing. Retail trading increasingly affects stock price movements, social media shapes investing trends, and non-traditional entities mediate information. Understanding these

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5. NASAA, *Informed Investor Advisory: Finfluencers* (Aug. 2022), <https://www.nasaa.org/64940/informed-investor-advisory-finfluencers/>. These types of warnings are increasingly common. See, e.g., CA DEP’T OF FIN. PROTECTION AND INNOVATION, *Social Media Finfluencers – Who Should You Trust?* (Oct. 5, 2022), <https://dfpi.ca.gov/2022/10/05/social-media-finfluencers-who-should-you-trust/> (detailing risks of trusting finfluencers); VA STATE CORP. COMM’N, *SCC Cautions Virginians About Social Media “Finfluencers” Providing Financial Advice* (Sept. 8, 2022), <https://scc.virginia.gov/newsreleases/release/SCC-Cautions-Virginians-About-Online-Finfluencers> (offering tips to avoid risks as social media displaces traditional sources of investing information); D.C. DEP’T OF INS., SEC. AND BANKING, *Beware of Financial Influencers*, <https://disb.dc.gov/page/beware-financial-influencers> (warning against financial advice shared by finfluencers).

6. NASAA, *supra* note 5.

shifts requires answering the following question: who, or what, drives investing decisions today? This Article (a) argues that stock market influencers, or “finfluencers,” increasingly do, and (b) elucidates the impact of finfluencers on information and price discovery in stock markets.

The term “finfluencer” refers to a person or entity that has outsize impact on investor decisions through social media influence. Various types of finfluencers exist in today’s markets, ranging from celebrities such as Kim Kardashian to corporate personalities like Elon Musk or Ryan Cohen to ordinary investors who develop followings on YouTube, TikTok, and other social media platforms. These finfluencers are not traditional financial analysts. Instead, their audience is mostly composed of retail investors,<sup>7</sup> and their message, if they have one, typically focuses on “democratizing” finance or increasing access to information. A few examples of finfluencer-driven trading are described below.

In early 2021, retail investors on Reddit rallied around Keith Gill (username “Roaring Kitty”) to collectively drive GameStop’s stock price up from \$4 to around \$500 per share at one point. Gill had begun posting about his \$53,000 investment in GameStop in 2019, arguing that GameStop was undervalued. Users repeated Gill’s statement, “I like the stock,” as they posted about their purchases of GameStop stock on Reddit. Even when GameStop’s shares declined in value, many refused to sell so long as Gill did not sell, stating “if Roaring Kitty’s still in, I’m still in” while encouraging each other to hold the stock with “diamond hands.”

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7. This Article will use the term retail investors or retail traders to refer to those who directly trade in stock for individual accounts, as distinguished from institutional investors, who trade for institutional accounts. See Adam Hayes, *Retail Investor: Definition, What They Do, and Market Impact*, INVESTOPEDIA (updated Feb. 17, 2021), <https://www.investopedia.com/terms/r/retailinvestor.asp> (defining retail investors as “non-professional market participants who generally invest smaller amounts than larger, institutional investors”); Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1025 (2009) (distinguishing retail investors—individuals and households—from institutional investors).

Elon Musk tweeted “GameStonk!!” on January 26, 2021.<sup>8</sup> In response, GameStop’s stock price soared around 40%.<sup>9</sup>

On July 19, 2021, Ryan Cohen tweeted a picture of himself holding chopsticks up his nostrils.<sup>10</sup> Followers speculated that the chopsticks indicated an impending GameStop stock split (Cohen is the chair of GameStop’s board).<sup>11</sup>

In late 2021, Steven Gallagher was arrested and charged with securities fraud, wire fraud, and manipulation for using his Twitter account to engage in a pump-and-dump scheme.<sup>12</sup> After amassing a large following on Twitter under the handle @AlexDeLarge6553 (named for the character in *A Clockwork Orange*), Gallagher repeatedly purchased thinly-traded penny stocks and tweeted false and misleading information to encourage his followers to buy those stocks, enabling Gallagher to sell his shares at inflated prices.<sup>13</sup>

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8. Elon Musk (@elonmusk), TWITTER (Jan. 26, 2021, 4:08 PM), <https://twitter.com/elonmusk/status/1354174279894642703?lang=EN>.

9. GameStop Corp. (GME), YAHOO! FIN. (Jan. 27, 2021), <https://finance.yahoo.com/quote/GME?p=GME>.

10. Ryan Cohen (@ryancohen), TWITTER (Jul. 19, 2021, 7:48 PM), <https://twitter.com/ryancohen/status/1417315406272864258?lang=EN>.

11. See Miriam Gottfried and Caitlin McCabe, *GameStop’s Ryan Cohen Wants to Be More Than a Meme-Stock King*, WALL ST. J. (Nov. 19, 2022, 12:00 AM), <https://www.wsj.com/articles/gamestops-ryan-cohen-wants-to-be-more-than-a-meme-stock-king-11668834015>; Joe Fonicello, *Ryan Cohen Splits Chopsticks 2:1; PG-13*, GMEEDD (Jul. 20, 2021), <https://www.gmedd.com/tw/ryan-cohen-splits-chopsticks-21-pg-13/> (speculating about the meaning of Cohen’s chopsticks tweet); *Ryan Cohen on Twitter*, REDDIT, [https://www.reddit.com/r/Superstonk/comments/ontbnm/ryan\\_cohen\\_on\\_twitter/](https://www.reddit.com/r/Superstonk/comments/ontbnm/ryan_cohen_on_twitter/) (hypothesizing about the meaning of Cohen’s tweets).

12. See *U.S. v. Gallagher*, No. 21-mag-10220 (S.D.N.Y.); Complaint, SEC v. Gallagher, No. 1:21-civ-08739 (S.D.N.Y. filed October 26, 2021). YouTube and other “influencer” scams have occurred in other contexts as well. See Mara Leighton, *Thai Authorities Have Issued an Arrest Warrant Against a Popular YouTuber Accused of Scamming Followers out of \$55 Million, Reports Say*, INSIDER (Aug. 31, 2022, 11:14 PM), <https://www.insider.com/thai-influencer-youtuber-nutty-arrest-warrant-multimillion-dollar-forex-scam-2002-8> (“Victims say they were tricked into investing with Nutty in part because of the high-flying lifestyle she portrayed on her social media accounts, which included upscale vacations, luxury cars, and designer bags.”).

13. Complaint, SEC v. Gallagher, *supra* note 12.

Steven Gallagher's pump-and-dump scheme is clearly illegal; his false information led his Twitter followers to purchase stocks and drive up the price. The other examples do not involve any obvious illegality. No false information or even any new information was disseminated; nevertheless, stock prices reacted as though new information had been disseminated.

Finfluencers are sparking a conversation about what constitutes market-moving "information" as well as access to and control of that information. The above examples also raise the possibility that finfluencers encourage investor response to non-information or stale information. What impact do finfluencers have on investing preferences and price discovery, including the meaning of "information" for investors? Are finfluencers incentivized to encourage their followers to trade for reasons unrelated to informational changes about an underlying company?

Central tenets of market microstructure and financial economics drive the normative framework for price discovery and information on which this Article relies. Normatively, equities markets help promote the efficient allocation of capital and risk across the economy.<sup>14</sup> Stock prices provide signals that improve corporate governance and facilitate the allocation of resources across firms and households over time.<sup>15</sup> The normative framework typically assumes a narrow range of trading motivations that generates stock price movements: investors seek out fundamental value information about an issuer, typically by using valuation mechanisms such as discounted cash flow analysis, and trade that issuer's stock to profit off of that information.<sup>16</sup> In a previous paper, I explored how today's retail traders have complicated that picture through low-cost, social forms of coordination.<sup>17</sup> I argued that retail trades are in-

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14. See MERRITT B. FOX ET AL., *THE NEW STOCK MARKET* 33–47 (2019) (providing a normative framework whereby stock prices facilitate capital and risk allocation in the economy).

15. See *id.* (describing the utility of stock prices in directing managerial decisions and allocating resources and risk).

16. See *id.* at 33–58 (describing how stock prices move in response to informed trading).

17. See Sue S. Guan, *Meme Investors and Retail Risk*, 63 B.C. L. REV. 2053 (2022) (analyzing the impact of retail trading on prices and markets).

creasingly sticky and can substantially affect stock prices, corporate governance, and market functioning more broadly.<sup>18</sup>

This Article explores a related, evolving aspect of today's stock markets: the growing role of finfluencers as information brokers. Its contribution is twofold. First, it provides a descriptive account of the phenomenon of finfluencing. By detailing the impact of various kinds of finfluencers in the stock market, the Article develops a taxonomy of finfluencing that can be used to assess their impact.

Second, this Article provides a theoretical analysis of how finfluencers further complicate the traditional understanding of stock price movement in response to information. Finfluencers are motivated by a much broader set of incentives than simply seeking out fundamental value information. They seek to maximize popularity, be entertaining, and "grow their brand," among other motivations. Because they also increasingly mediate the information that reaches retail investors and provide powerful coordination mechanisms that allow their (and their followers') trading activity to affect stock price movements, they are shifting the types of "information" stock price movements reflect.

The Article then combines evidence and theory to illustrate how the broader stock market ecosystem is adjusting in response, with complex implications for capital flow. Finfluencers may make it increasingly rational for other market participants to treat finfluencer-driven activity as informative, even when that activity does not reference traditional forms of market information. As other market participants factor finfluencer-driven activity into trading decisions, these shifts are amplified and reinforced, creating a feedback loop. The boundaries of what constitutes market-moving information may expand. Finfluencer-driven activity may affect companies' cost of capital. Noise trading by creating or riding finfluencer-driven trading bubbles can become a rational trading strategy. Companies may increasingly recognize profit opportunities through finfluencer partnerships that can affect their own stock prices.

Positive and negative implications follow. On the one hand, finfluencers can improve financial literacy and broaden retail investor participation and market access. On the other

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18. *Id.*



hand, finfluencers can influence large numbers of followers' trades in predictable ways. As a result, their incentives to provide valuable information to those followers may diminish, and profiting at the expense of their followers becomes more tempting. Moreover, if finfluencers do not need to make false or misleading statements in order to generate price movements, fewer current legal remedies are available to protect those who are harmed.

The remainder of this Article proceeds as follows. Part I discusses the history of finfluencers and develops a taxonomy of finfluencers. While finfluencers are not new, social media has significantly expanded their reach. Part II examines the price impact of finfluencer-driven trading. Part III provides a theoretical analysis of how finfluencer-driven trading affects the information reflected in stock prices. Part IV assesses broader market responses. Part V considers benefits and harms of these shifts. Part VI discusses the way forward. A brief conclusion follows.

## I.

### A TAXONOMY OF FINFLUENCERS

Finfluencers have outside impact on investors' trading decisions through their social media influence. They mediate the information that reaches their followers, shape those followers' investing preferences and trading patterns, and provide powerful coordination mechanisms across large groups of traders, which allows their (and their followers') trading motivations to affect stock price movements.

While finfluencers are not new to the stock market, their greatly expanded reach, driven by social media, is a recent phenomenon. Social media has also provided a low cost, easy mechanism for ordinary retail investors to become powerful finfluencers. Section A provides a brief survey of historical finfluencers. Section B lays out various types of contemporary social media influencers: mega, macro, micro, and nano. Sections C, D, and E discuss three main kinds of finfluencers: celebrity, identity, and ordinary.

#### A. *A Brief Survey of Finfluencers*

The broad phenomenon of finfluencing is neither new nor surprising. Influential speakers have always had a broad,

sometimes market-wide impact.<sup>19</sup> Nearly a century ago, leading up to the stock market crash of 1929, an astrologer named Evangeline Adams amassed a sizeable influence among celebrity and amateur investors—including persons such as Charlie Chaplin and J.P. Morgan—based on stock tips she derived from star charts and astrology.<sup>20</sup> At one point, she disseminated a newsletter with 100,000 subscribers.<sup>21</sup>

Influence has long been a perfectly legal feature of stock markets. As one example, media personality Jim Cramer has had a stock market analysis platform on CNBC's *Mad Money* program for nearly two decades.<sup>22</sup> More broadly, financial analysts often have a documented influence over a company's stock price.<sup>23</sup> According to the SEC's website, "[t]he mere mention of a company by a popular analyst can temporarily cause its stock to rise or fall—even when nothing about the

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19. Nor is this impact limited to the securities market. In many ways, influencers are simply one type of a more traditional brand influencer. In 1986, the hip hop group, Run-D.M.C., came out with the hit "My Adidas." See Zak Maoui, *Run-DMC: "We were highly influenced by The Rolling Stones – we wanted to dress like Mick Jagger,"* GQ MAGAZINE (Nov. 2, 2019), <https://www.gq-magazine.co.uk/fashion/article/run-dmc-adidas-interview>; Alvin Blanco, *Run-DMC Recall 'My Adidas' Impact, 25 Years Later*, MTV (Nov. 11, 2011, 7:59 PM), <https://www.mtv.com/news/sn2aa5/run-dmc-my-adidas>. Run-D.M.C. had not been paid to promote Adidas. See Gary Warnett, *How Run-DMC Earned Their Adidas Stripes*, MR PORTER (May 27, 2016), <https://www.mrporter.com/en-us/journal/lifestyle/how-run-dmc-earned-their-adidas-stripes-826882>. The success of the hit led to a surge in popularity of Adidas sneakers, which led to a partnership with the brand Adidas. See *id.* Today, social media brand influencers are legion, using platforms such as TikTok, Instagram, and the like. See *infra* Part I.B.

20. See *The Crash of 1929: Program Transcript*, PBS 7, [https://www-tc.pbs.org/wgbh/americanexperience/media/pdf/transcript/Crash\\_of\\_1929\\_transcript.pdf](https://www-tc.pbs.org/wgbh/americanexperience/media/pdf/transcript/Crash_of_1929_transcript.pdf) (describing the following around Adams).

21. *Id.* at 15.

22. Jim Cramer, *About Mad Money*, CNBC, <https://www.cnbc.com/104189752/>; Tyler Clifford, *The Evolution of Jim Cramer's 'Mad Money': From Stock Picking to Stock Educating*, CNBC, <https://www.cnbc.com/2019/02/21/the-evolution-of-cramers-mad-money-from-stock-picking-to-educating.html>.

23. See *Analyzing Investor Recommendations*, U.S. SEC. & EXCH. COMM'N (Aug. 30, 2010), <https://www.sec.gov/tm/reportspubs/investor-publications/investorpubsanalystshtm.html> (explaining that "analysts' recommendations or reports can influence the price of a company's stock—especially when the recommendations are widely disseminated through television appearances or through other electronic and print media").

company's prospects or fundamentals has recently changed."<sup>24</sup> Indeed, a 1990 study demonstrated significant stock price responses to analyst recommendations published in the Wall Street Journal's Heard on the Street column between 1982 and 1985.<sup>25</sup> Similarly, short seller reports routinely lead to significant price drops in the companies covered.<sup>26</sup>

Using finfluence to perpetrate fraud or manipulation is also not new. In 2005, a telemarketing firm was charged by the SEC for leaving hundreds of thousands of fraudulent "wrong number" voicemails designed to promote certain stocks.<sup>27</sup> Those stocks' combined market capitalization soared by roughly \$179 million.<sup>28</sup> More recently, enforcement actions have been taken against manipulators on message boards.<sup>29</sup> The SEC previously found that authors on Seeking Alpha, a social media website, published fraudulent news in order to manipulate stock prices.<sup>30</sup> Similarly, a recent study revealed that manipulative short selling behavior on social media websites such as Seeking Alpha caused stock price distortions.<sup>31</sup>

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24. *See id.* Conflicts of interest may arise, and disclosure may be required. *Id.*

25. *See* Pu Liu et al., *Stock Price Reactions to The Wall Street Journal's Securities Recommendations*, 25 J. FIN. & QUANT. ANALYSIS 399, 400 (1990) (collecting studies demonstrating stock price responsiveness to information provided by investment advisory entities).

26. *See* Peter Molk & Frank Partnoy, *The Long-Term Effects of Short Selling and Negative Activism*, 2022 U. ILL. L. REV. 1, 53 (citing Peter Molk & Frank Partnoy, *Institutional Investors as Short Sellers?*, 99 B.U. L. REV. 837, 859–62 (2019)) (discussing price effect of short selling); Andrew Ross Sorkin et al., *A Short Seller Takes Aim at an Indian Corporate Giant*, N.Y. TIMES (Jan. 25, 2023), <https://www.nytimes.com/2023/01/25/business/dealbook/short-seller-hindenburg-adani.html> (after Hindenburg Research accused Adani Group of manipulation and fraud, shares in Adani fell precipitously).

27. *SEC Sues Telemarketers for Fraudulent "Wrong Number" Stock Tips*, U.S. SEC. & EXCH. COMM'N (May 3, 2005), <https://www.sec.gov/news/press/2005-70.htm>.

28. *Id.*

29. *See* Shimon Kogan, Tobias J. Moskowitz & Marina Niessner, *Social Media and Financial News Manipulation* 2, 35 (Sept. 15, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3237763](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237763) (showing that fraudulent articles on social media networks raised retail trading volume and on average led to an 8% rise in prices based on a dataset of 171 fraudulent articles).

30. *Id.* at 1, 2, 7–8.

31. Joshua Mitts, *Short and Distort*, 49 J. LEGAL STUD. 287, 330 (2020) (showing stock price manipulation through pseudonymous attacks and ma-

Finfluencing activity has raised thorny questions about the scope of the laws around fraud and manipulation. In 2000, the SEC settled a case with 15-year old Jonathan Lebed regarding a stock market manipulation scheme in which he promoted thinly-traded microcap stocks on Yahoo! Finance message boards and sold those stocks at a profit.<sup>32</sup> Lebed found that using exclamation marks and incorporating all capital letters made his messages seem more exciting, enabling him to generate more interest.<sup>33</sup> The case led to significant questions about the scope of the market manipulation prohibitions.<sup>34</sup> As one commentator noted, making stock price predictions without basis for those predictions “sounds a lot like what happens every day on Wall Street.”<sup>35</sup> At the time, Wall Street analysts evidently could and often did underestimate corporate earnings while promoting stocks of companies that they helped go public, often reaping substantial profits.<sup>36</sup> The commentator continued, “If Wall Street analysts and fund managers and corporate C.E.O.s who appear on CNBC and CNN to plug stocks are not guilty of seeking to manipulate the market, what on earth does it mean to manipulate the market?”<sup>37</sup> Similarly, “[W]hen a Wall Street analyst can send the price of a stock of a company that is losing billions of dollars up 50 points in a day, what does it mean to ‘artificially raise’ the price of a stock?”<sup>38</sup>

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nipulative options trading); *see also* Petition for Rulemaking on Short and Distort from John C. Coffee Jr., Joshua Mitts, James D. Cox, Peter Molk et al., to Vanessa Countryman, Sec’y, U.S. Sec. & Exch. Comm’n 3–7 (Feb. 12, 2020), <https://www.sec.gov/rules/petitions/2020/petn4-758.pdf> (asking the SEC to promulgate rules against manipulative short selling).

32. *SEC Brings Fraud Charges in Internet Manipulation Scheme*, U.S. SEC. & EXCH. COMM’N (Sept. 20, 2000), <https://www.sec.gov/news/press/2000-135.txt>.

33. Michael Lewis, *Jonathan Lebed’s Extracurricular Activities*, N.Y. TIMES (Feb. 25, 2001), <https://www.nytimes.com/2001/02/25/magazine/jonathan-lebed-s-extracurricular-activities.html>.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* As I and others have noted, interpreting the boundaries of the manipulation prohibitions has been notoriously difficult. *See, e.g.*, Merritt B. Fox et al., *Spoofing and Its Regulation*, 2021 COLUM. BUS. L. REV. 1244 (2022) (analyzing manipulation laws); Daniel R. Fischel & David J. Ross, *Should the Law Prohibit “Manipulation” in Financial Markets?*, 105 HARV. L. REV. 503, 506–07 (1991) (arguing that “the concept of manipulation should be aban-

As the Lebed example illustrates, social media allows ordinary persons who do not otherwise have an established media platform to wield significant influence over their followers. Social media has transformed the finfluencer landscape. The next sections discuss how.

### B. *Mega, Macro, Micro, Nano Influencers*

Social media has fostered a multi-billion dollar influencer marketing industry.<sup>39</sup> Traditional brand influencers today can fall into a number of categories: mega, macro, micro, and nano and vary in terms of followers, engagement, and perceived trustworthiness.

Mega influencers are usually celebrities who have more than one million followers and often charge millions of dollars for promotions through their social media.<sup>40</sup> However, their large numbers of followers do not always translate into greater engagement: their followers can be skeptical of the fact that mega influencers are paid to promote certain products.<sup>41</sup> Macro influencers usually have between 100,000 and one million followers.<sup>42</sup> They might be social media stars who produce more specialized content (focusing on fitness or stock market advice, for example) but reach a broad base of followers nonetheless.<sup>43</sup> Micro influencers tend to have between 10,000 and 100,000 followers.<sup>44</sup> Nano influencers usually have fewer than 10,000 followers.<sup>45</sup> Micro and nano influencers

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done” because “no satisfactory definition of [manipulation] exists”); Steve Thel, *Regulation of Manipulation Under Section 10(b): Security Prices and the Text of the Securities Exchange Act of 1934*, 1988 COLUM. BUS. L. REV. 359, 378–79 (1988) (noting how difficult it is to define manipulation under federal securities law).

39. See Werner Geysler, *The State of Influencer Marketing 2023: Benchmark Report*, INFLUENCER MARKETING HUB (Feb. 7, 2023), <https://influencermarketinghub.com/influencer-marketing-benchmark-report/> (noting that the influencer industry is expected to grow to roughly \$21.1 billion in 2023).

40. See *When to Work with Nano-, Micro- and Macro-Influencers*, IZEA (Feb. 25, 2022), <https://izea.com/resources/nano-micro-macro-influencers/> (describing different kinds of influencers).

41. *Id.*

42. *Id.*

43. *Id.*; Jacinda Santora, *12 Types of Influencers You Can Use to Improve Your Marketing*, INFLUENCER MKTG. HUB (July 15, 2022), <https://influencermarketinghub.com/types-of-influencers/> (detailing different kinds of influencers).

44. IZEA, *supra* note 40.

45. *Id.*

often have a much stronger “personal” connection to and level of engagement from their followers than mega influencers do.<sup>46</sup>

Authenticity and trust are central to the influencing business.<sup>47</sup> Consumers trust influencers as they would close friends and point to authenticity as a key driver for their engagement with influencers.<sup>48</sup> Moreover, influencing works.<sup>49</sup> Studies have shown that influencer advertising creates significantly greater “emotional intensity” and higher “memory encoding.”<sup>50</sup> Another found a 520% return for every dollar companies spent on influencer marketing.<sup>51</sup>

Finfluencers thrive on much of the same psychological phenomena. They earn the trust of their followers, substantially impacting investment decisions. The next sections explore types of finfluencers and their relationship to traditional social media brand influencers.

### C. Paid Celebrity Finfluencers

The most obvious category of finfluencer is a celebrity mega influencer such as Kim Kardashian. Indeed, Kardashian was recently fined \$1.26 million for touting a cryptoasset on

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46. *Id.* In other contexts, micro and nano influencers have been leveraged by political groups to influence political discourse and activity. See *Social Media Influencers and the 2020 U.S. Election: Paying ‘Regular People’ for Digital Campaign Communication*, U. TEX. AUSTIN CTR. FOR MEDIA ENGAGEMENT (Oct. 14, 2020), <https://mediaengagement.org/research/social-media-influencers-and-the-2020-election/> (explaining how coordinated networks of social media influencers are a “powerful asset for political campaigns”).

47. Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 83–84 (2019).

48. See Gavin O’Malley, *Many Followers Trust Influencers’ Opinions More Than Friends*, DIGIT. NEWS DAILY (Aug. 21, 2019), <https://www.mediapost.com/publications/article/339579/many-followers-trust-influencers-opinions-more-th.html>.

49. See Roberts, *supra* note 47, at 83–84 (collecting sources).

50. Blake Drosch, *What Does Your Brain on Influencer Marketing Look Like?*, INSIDER INTEL. (Aug. 26, 2019), <https://www.insiderintelligence.com/content/your-brain-on-influencers-neuroscience-study-explains-the-effects-of-influencer-marketing>.

51. Harrison Loew, *Influencer Marketing Benchmark Report 2019*, NEOREACH (Feb. 12, 2019), <https://neoreach.com/influencer-marketing-benchmark-report-2019/>.

her social media.<sup>52</sup> Like traditional mega influencers, celebrity mega finfluencers are typically paid to promote financial products by certain companies. They usually do not disseminate general investment advice. Celebrity mega finfluencers are not a new phenomenon and can be understood as a simple subset of traditional brand influencers.

#### D. Identity Celebrity Finfluencers

Other famous finfluencers—usually mega or macro—are not paid for any promotional content and may not disseminate financial advice or even promote any specific stock market positions. However, they wield enormous influence because of their identity or personality. Elon Musk and Ryan Cohen are illustrative examples. Elon Musk is known as “Daddy Elon” and Ryan Cohen as “Papa Cohen.”<sup>53</sup> Their social media activity generates price movements through the activity of their followers even when its content is unrelated to stock market or financial information. As Cohen, founder of Chewy.com and chair of GameStop’s board, stated: “I’m just being me; I’m just being myself,” and “I don’t want to speculate on how people interpret it.”<sup>54</sup>

For example, Cohen has been referred to as a “meme stock king,” and his tweets are routinely dissected by his nearly 400,000 followers as hints to future corporate decisions or stock price movements.<sup>55</sup> The term “meme stocks” refers to stocks of companies such as GameStop, AMC, or Bed Bath & Beyond that have been the subject of social media-driven trading rallies among “meme traders,” a subset of retail traders.<sup>56</sup>

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52. SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security, U.S. SEC. & EXCH. COMM’N, (Oct. 3, 2022), <https://www.sec.gov/news/press-release/2022-183>.

53. Caitlin McCabe, *The Meme Lords Who Are Taking over the C-Suite*, WALL ST. J. (Aug. 27, 2021), [https://www.wsj.com/articles/the-meme-lords-who-are-taking-over-the-c-suite-11630056603?mod=series\\_exchangeinternetpackage](https://www.wsj.com/articles/the-meme-lords-who-are-taking-over-the-c-suite-11630056603?mod=series_exchangeinternetpackage).

54. Gottfried & McCabe, *supra* note 11.

55. *Id.*; see also Fonicello, *supra* note 11 (speculating about the meaning of Cohen’s chopsticks tweet); Ryan Cohen on Twitter, *supra* note 11 (hypothesizing about the meaning of Cohen’s tweets).

56. See, e.g., Guan, *supra* note 17; Dhruv Aggarwal, Albert H. Choi, & Yoon-Ho Alex Lee, *Meme Corporate Governance* 7-8, EUROPEAN CORPORATE GOVERNANCE INSTITUTE (Feb. 14, 2023), <https://ssrn.com/abstract=4347885> (describing “meme traders” as those who are “executing transactions moti-

On July 19, 2021, Cohen tweeted a picture of himself holding chopsticks up his nostrils.<sup>57</sup> Followers speculated that the chopsticks indicated an impending GameStop stock split.<sup>58</sup> A picture with Carl Icahn posted on October 17, 2022 led Cohen's followers to speculate that said picture indicated Icahn's endorsement of GameStop.<sup>59</sup> And in August 2022, after Cohen abruptly sold his roughly 10% stake in Bed Bath and Beyond, its stock price plunged.<sup>60</sup> Cohen sold his shares at significant profits; the share price had previously jumped nearly 70% when retail investors purchased around \$73 million in Bed Bath and Beyond in response to Cohen's filing indicating that he had not sold certain significantly out-of-the-money call options in the stock.<sup>61</sup>

Many identity influencers disdain the traditional financial industry and self-style as trolls or "meme lords."<sup>62</sup> For example, on January 26, 2021, Musk tweeted "GameStonk!"<sup>63</sup> GameStop's stock price soared around 40% in response to the tweet.<sup>64</sup> Musk (who has over 1.25 million followers on Twitter) has also previously tweeted messages that "Tesla stock price is too high imo"<sup>65</sup> and "Am considering taking Tesla private at

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vated by Reddit discussion threads and triggering 'short squeeze' attacks," such as they are not "investing in any traditional sense. Although these traders only represent a subset of retail investors, they exist in sufficient numbers to affect price movements in the market for meme stocks.").

57. Ryan Cohen (@ryancohen), TWITTER (Jul. 19, 2021, 7:48 PM), <https://twitter.com/ryancohen/status/1417315406272864258?lang=EN>.

58. See Gottfried & McCabe, *supra* note 11; Fonicello, *supra* note 11.

59. Ryan Cohen (@ryancohen), TWITTER (Oct. 17, 2022, 8:30 PM), [https://twitter.com/ryancohen/status/1582212373985005569?ref\\_src=Twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1582212373985005569%7Ctwgr%5Ef5cf5fed2cf57294c9cebce739a14fb1aa3ab64e%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fwww.wsj.com%2Farticles%2Fgame-stops-ryan-cohen-wants-to-be-more-than-a-meme-stock-king-11668834015](https://twitter.com/ryancohen/status/1582212373985005569?ref_src=Twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1582212373985005569%7Ctwgr%5Ef5cf5fed2cf57294c9cebce739a14fb1aa3ab64e%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.wsj.com%2Farticles%2Fgame-stops-ryan-cohen-wants-to-be-more-than-a-meme-stock-king-11668834015).

60. Lauren Hirsch, *Bed Bath & Beyond Shares Plunge 40 Percent After Ryan Cohen's Exit*, N.Y. TIMES (Aug. 18, 2022), <https://www.nytimes.com/2022/08/18/business/bed-bath-beyond-shares.html>.

61. *Id.*

62. See McCabe, *supra* note 53.

63. Musk, *supra* note 8.

64. See GameStop Corp., *supra* note 9.

65. Elon Musk (@elonmusk), TWITTER (May 1, 2020, 8:11 AM), [https://twitter.com/elonmusk/status/1256239815256797184?ref\\_src=TWsrc%5Etfw](https://twitter.com/elonmusk/status/1256239815256797184?ref_src=TWsrc%5Etfw).



\$420,”<sup>66</sup> a number associated with marijuana consumption in popular culture. Such messages sent Tesla’s stock price on dramatic short-term swings. As another example, Barstool Sports founder David Portnoy hosted a livestream during which he bought stocks based on Scrabble letter tiles he blindly selected from a bag.<sup>67</sup>

### E. Ordinary Investor Finfluencers

Ordinary retail investors can also become finfluencers by developing followings on social media platforms such as Twitter, YouTube, TikTok, Instagram or Reddit that make it relatively easy to become this type of influencer.<sup>68</sup> These are usually nano, micro, or macro finfluencers. Because they are usually not famous for separate reasons, they often build their influence by demonstrating their expertise to their followers by, for example, providing general investment advice. They may also promote specific stocks or financial products. Most purport to disseminate information and are paid to partner with companies only after establishing a sizeable influence.

As one example, the rally around GameStop, arguably the first “meme” stock, was initiated by an ordinary investor finfluencer. In early 2021, Reddit users rallied around Keith Gill, known as “Roaring Kitty” on Reddit, who had invested \$53,000 in GameStop since 2009. He started posting about his investment in GameStop and touting the company’s potential, sparking heavy trading in which the stock price up from \$4 to

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66. Elon Musk (@elonmusk), TWITTER (Aug. 7, 2018, 9:48 AM), <https://twitter.com/elonmusk/status/1026872652290379776>.

67. Akane Otani, *The New Stock Influencers Have Huge—and Devoted—Followings*, WALL ST. J. (Mar. 21, 2021, 5:30 AM), <https://www.wsj.com/articles/the-new-stock-influencers-have-hugeand-devoted-followings-11616319001>; see also Matt Wirz, *Meme-Stock Traders Embrace Avaya Despite Wall Street Fears*, WALL ST. J. (Sept. 19, 2022, 8:00 AM), <https://www.wsj.com/articles/meme-stock-traders-embrace-avaya-despite-wall-street-fears-11663540636> (describing meme investor followers of activist investor Theo King).

68. While this Article focuses on influencers in the equities markets, influencers are extremely active in other asset classes, for example, cryptocurrency and NFTs. See Connor Goodwin, *How TikTok Cryptocurrency Influencers Are Teaching a New Generation of Investors*, WALL ST. J. (May 21, 2021, 8:29 AM), <https://www.wsj.com/articles/tiktok-cryptocurrency-influencers-investing-11621600121>.

around \$500 per share at one point.<sup>69</sup> Users repeated Gill's statement, "I like the stock," as they posted about their purchases of GameStop stock on Reddit.<sup>70</sup> Even when GameStop's shares fell, many refused to sell so long as Gill continued to hold his shares, stating "if Roaring Kitty's still in, I'm still in" and encouraging each other to have "diamond hands."<sup>71</sup>

Many other ordinary influencers exist and have been around for a number of years.<sup>72</sup> Kevin Paffrath, a YouTube influencer known as MeetKevin, has become so successful that he launched the Meet Kevin Pricing Power ETF in November 2022.<sup>73</sup> Haley Sacks, known as Mrs. Dow Jones, founded the company FINANCE IS COOL UNIVERSITY and has nearly half a million followers.<sup>74</sup> Dan Knight co-hosts a podcast called "P.G.I.R." which was recently ranked the top investing podcast in February 2021 and among the top fifty business podcasts in the United States.<sup>75</sup> Rose Han and Tori Dunlap seek to create

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69. See Nathaniel Popper & Kellen Browning, *The 'Roaring Kitty' Rally: How a Reddit User and His Friends Roiled the Markets*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/technology/roaring-kitty-reddit-gamestop-markets.html>; Nicolas Vega, *Here's How Much Money You'd Have if You Invested \$1,000 in GameStop During Last Year's Rally*, CNBC (Jan. 19, 2022), [https://www.cnbc.com/2022/01/19/how-much-money-you-d-have-if-you-invested-1000-dollars-in-gamestop-in-2021.html#:~:text=Jan.,-28%2C%202021%20\(Intraday&text=GameStop%20shares%20soared%20as%20high,of%20its%20value%20by%20Jan](https://www.cnbc.com/2022/01/19/how-much-money-you-d-have-if-you-invested-1000-dollars-in-gamestop-in-2021.html#:~:text=Jan.,-28%2C%202021%20(Intraday&text=GameStop%20shares%20soared%20as%20high,of%20its%20value%20by%20Jan).

70. See *The Journal, To the Moon, Part 4: Diamond Hands*, WALL ST. J. (June 13, 2021), <https://www.wsj.com/podcasts/the-journal/to-the-moon-part-4-diamond-hands/c5e48f39-6ed6-414f-a0d6-0dc9986640ba>; Noel Randewich, *GameStop Fan 'Roaring Kitty' to Tell Congress: 'I Like the Stock'*, REUTERS (Feb. 17, 2021, 6:23 PM), <https://www.reuters.com/article/us-retail-trading-testimony-reddit-idUSKBN2AH2Y2> (summing up Roaring Kitty's congressional testimony in the phrase "I like the stock").

71. See Popper & Browning, *supra* note 69.

72. See Dieter Holger, *The Financial Gurus Millennials Listen To*, WALL ST. J. (Mar. 13, 2020, 9:41 AM), <https://www.wsj.com/articles/the-financial-gurus-millennials-listen-to-11584104190>.

73. Spencer Jakub, *Meet Kevin, the ETF*, WALL ST. J. (Nov. 29, 2022), <https://www.wsj.com/articles/meet-kevin-the-etf-11669743728>; *The Meet Kevin Pricing Power ETF*, STOCKHACK, <https://www.mketf.com> (last visited June 13, 2023).

74. See Caleb Silver, *The Measure of Financial Influence with Mrs. Dow Jones*, INVESTOPEDIA (Aug. 22, 2022), <https://www.investopedia.com/the-express-podcast-episode-100-6501269>.

75. See Tara Siegel Bernard, *Trading Stock Tips on TikTok, Newbies Are Deeply Invested in Learning*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2021/04/28/your-money/stocks-investing-tiktok.html>.

investing communities for women.<sup>76</sup> Other examples of finfluencers on Instagram, TikTok, and YouTube abound.<sup>77</sup> The hashtag #stocktok on TikTok had over three billion views as of February 18, 2023.<sup>78</sup> The hashtag #fintok on TikTok also had over three billion views as of April 2, 2023.<sup>79</sup> Content tagged with #stocktok offered stock tips, investment advice, and lifestyle content of successful ordinary investors, among others.<sup>80</sup>

Trading platforms increasingly facilitate ordinary finfluencing and amplify finfluencers' reach. For example, Commonstock describes itself as “a social network that amplifies the knowledge of the best investors, verified by actual track records for signal over noise.”<sup>81</sup> Investing posts receive upvotes to help retail investors identify valuable information “through all the noise and the meme and troll accounts that are on other platforms.”<sup>82</sup> The Public Trading App encourages users to follow others in their social circles and mimic their investing portfolios.<sup>83</sup> Public advertises a “community of millions of investors, creators, and analysts.”<sup>84</sup> Other platforms such as Zulutrade and FX Junction also offer “copy” or “mirror” ser-

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76. Robbie Whelan, *The Social-Media Stars Who Move Markets*, WALL ST. J. (Aug. 27, 2021, 5:30 AM), <https://www.wsj.com/articles/the-social-media-stars-who-move-markets-11630056601>; See Tara Siegel Bernard, *From Her First \$100K to 3 Million Followers*, N.Y. TIMES (Apr. 18, 2022), <https://www.nytimes.com/2022/04/16/your-money/tori-dunlap-financial-influencers.html?searchResultPosition=1>.

77. See Whelan, *supra* note 76.

78. TIKTOK, <https://www.tiktok.com/tag/stocktok?lang=EN> (last visited Apr. 21, 2023).

79. TIKTOK, <https://www.tiktok.com/tag/fintok?lang=EN> (last visited Apr. 21, 2023).

80. *Id.*

81. COMMONSTOCK, <https://commonstock.com/security> (last visited Apr. 21, 2023).

82. Natasha Dailey, *Social-Investing App Commonstock Wants to Be the 'Bloomberg Terminal Of Main Street' and Weed Out the Meme-Stock Trolls*, BUS. INSIDER (Oct. 9, 2021, 9:05 AM), <https://markets.businessinsider.com/news/stocks/commonstock-app-weed-out-meme-stock-trolls-retail-investors-reddit-2021-10> (quoting David McDonough, CEO and Founder of Commonstock).

83. See, e.g., PUBLIC, <https://public.com/about-us> (last visited Apr. 21, 2023) (“Members control how they invest with a suite of powerful tools and get insights from a community of millions of investors, creators, and analysts.”).

84. *Id.*

vices.<sup>85</sup> For example, FX Junction encourages users to “[b]ecome a Signal Provider to earn extra money or AutoCopy signals of our best performing members.”<sup>86</sup>

## II.

### FINFLUENCER-DRIVEN PRICE IMPACT

The above taxonomy can be summed up in the following table:

<i>Finfluencer Type</i>	<b>Paid?</b>	<b>Source of influence</b>	<b>Purport to disseminate information?</b>	<b>Impact on stock prices</b>
<i>Celebrity</i>	Usually yes	Celebrity status	Often no	Yes
<i>Identity</i>	Usually no	Combination of celebrity status and potential stock market track record	Often no	Yes
<i>Ordinary</i>	Sometimes yes	Track record and perceived expertise	Usually yes	Yes

A number of observations can be made. First, social media has significantly expanded the reach of all types of finfluencers: celebrity, identity, and especially ordinary finfluencers. Ordinary finfluencers can easily and cheaply gain influence that might otherwise be reserved to celebrities and those with traditional forms of media or financial power.

Second, finfluencers can reach a wide audience and provide powerful coordination mechanisms across followers, am-

85. See ZULU**TRADE**, <https://www.zulutrade.com/> (last visited Apr. 21, 2023) (“Copy Top Performing Traders from different Brokers easily and reach your investment goals!”); FX **JUNCTION**, <https://www.fxjunction.com/> (last visited Apr. 21, 2023) (“Become a Signal Provider to earn extra money or AutoCopy signals of our best performing members.”); Cf. Christine Hall, *Public vs. Robinhood: Competitors Target Hottest Retail Trading App*, **CRUNCHBASE** (Feb. 18, 2021), <https://news.crunchbase.com/news/public-vs-robinhood-competitors-take-aim-at-biggest-retail-trading-app/> (discussing social and community-based competitors to Robinhood).

86. FX **JUNCTION**, *supra* note 85.

plifying the price impact of group-based or coordinated trading. Building trust with followers is central to finfluencer reach, which is amplified by the broad impact of retail traders, often the bulk of their following. This is especially true given that younger retail investors increasingly obtain information from social media sites. Studies have indicated, for example, that younger investors trust social media more than Google. Google's own studies have demonstrated that around forty percent of the younger demographic turn to TikTok or Instagram before Google.<sup>87</sup> In addition to expecting to see their personal values reflected by brands, retail traders also increasingly seek out "community, networking and self-education within financial services that make investing a fun, recreational activity."<sup>88</sup>

Third, as will be discussed further in Parts III-IV, finfluencer price impact does not necessarily reflect the informational content of finfluencers' social media matter. That is, regardless of the purported informativeness of their content, finfluencer-driven activity affects stock price movements.

This Part considers the price impact of social media and finfluencing in further detail. Part A surveys evidence of price impact of finfluencer-driven trading. Part B explores how recent trends in retail trading amplify finfluencer impact.

#### A. *Evidence of Finfluencer Price Impact*

There is little question that finfluencer activity can impact prices. Stock prices have long responded to Wall Street analyst recommendations (regardless of informativeness), influence from celebrities, and short seller reports.<sup>89</sup>

Contemporary evidence continues to support the link between finfluencing and price movements. Consider the price impact of the eight finfluencers charged with fraud and manipulation by the SEC in December 2022. The defendants purchased stocks, promoted those stocks to their followers on social media, and then sold those stocks at inflated prices caused

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87. Kalley Huang, *For Gen Z, TikTok Is the New Search Engine*, N.Y. TIMES (Sept. 17, 2022), <https://www.nytimes.com/2022/09/16/technology/gen-z-tiktok-search-engine.html>.

88. Svati Kirsten Narula, *What Generation Z Wants From Financial Technology*, WALL ST. J. (Jan. 25, 2022), [https://www.wsj.com/articles/generation-z-financial-technology-11642714326?mod=searchresults\\_pos2&page=1](https://www.wsj.com/articles/generation-z-financial-technology-11642714326?mod=searchresults_pos2&page=1).

89. *Supra* Part I.A.

by their followers' trading activity,<sup>90</sup> amassing approximately \$100 million in earnings in under three years.<sup>91</sup> The defendants' social media posts generated price increases as high as over 200% in some equities.<sup>92</sup> A similar price impact resulted from the social media and trading activity of Steven Gallagher, and Michael Beck, who was charged in February 2022 for penny stock fraud using his Twitter handle @BigMoneyMike6.<sup>93</sup>

The impact of influencing is certainly not limited to thinly-traded penny stocks. After Ryan Cohen sold his roughly 10% stake in Bed Bath & Beyond in August 2022 (at a significant profit), its share price plummeted.<sup>94</sup> The share price had previously jumped nearly 70% when retail investors purchased around \$73 million in the stock in response to a filing update from Cohen indicating that he held significantly out-of-the-money call options in the stock.<sup>95</sup> Similarly, after Elon Musk tweeted "GameStonk!!" on January 26, 2021,<sup>96</sup> GameStop's stock price soared around 40% in response.<sup>97</sup> Other studies have found that Musk's Twitter activity contributes to price movements, both in equities and in cryptocurrency.<sup>98</sup> Studies have also found that former President Trump's tweets significantly affect stock prices, even when no new information is disseminated.<sup>99</sup>

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90. Complaint, SEC v. Constantin et al., *supra* note 1 at ¶¶ 36–105.

91. *Id.* at 2.

92. *Id.* at 29.

93. Sealed Complaint, U.S. v. Gallagher, *supra* note 12 at 10; Complaint, SEC v. Gallagher, *supra* note 12; Complaint, SEC v. Michael M. Beck, a/k/a @BigMoneyMike6, and Relief Defendant Helen P. Robinson, No. 2:22-cv-00812 (C.D. Cal. filed Feb. 7, 2022).

94. Hirsch, *supra* note 60.

95. *Id.*

96. Elon Musk (@elonmusk), TWITTER (Jan. 26, 2021, 4:08 PM), <https://twitter.com/elonmusk/status/1354174279894642703?lang=EN>.

97. GameStop, *supra* note 9.

98. See, e.g., Sanjeev Metta et al., *Power of 280: Measuring the Impact of Elon Musk's Tweets on the Stock Market*, 21 U.S. BUS. MGMT 17 (2022) (assessing price impact of Musk's tweets); Lennart Ante, *How Elon Musk's Twitter Activity Moves Cryptocurrency Markets*, 186 TECH. FORECASTING & SOCIAL CHANGE (2023) (finding significant abnormal returns and trading volume in a sample of 47 cryptocurrency-related Elon Musk Twitter events).

99. Carl Ajjoub et al., *Social Media Posts and Stock Returns: The Trump Factor*, INT'L J. MANAGERIAL FIN. (2020) (analyzing Trump's Twitter messages

Recent studies have found that attention paid to social media and social news platforms predicts trading patterns, including returns and increased volume.<sup>100</sup> Twitter posts about stale stock news accelerate price pressure and reversal around the prices of those stocks, increasing liquidity and lowering bid-ask spreads.<sup>101</sup> Seeking Alpha content can “strongly predict” stock returns and earnings surprises.<sup>102</sup> In addition, earnings that go viral on social media can have negative price effects and social media virality generally can have effects on market quality.<sup>103</sup>

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between 2016 and 2018 that mention publicly traded companies and finding significant stock price impact).

100. See, e.g., Ekkehart Boehmer et al., *Tracking Retail Investor Activity*, 76 J. FIN. 2249, 2303 (2021) (showing that “marketable retail order flow can predict the cross-section of future stock returns”); Selin Duz Tan & Oktay Tas, *Social Media Sentiment in International Stock Returns and Trading Activity*, 22 J. BEHAV. FIN. 221, 221 (2021) (demonstrating that Twitter sentiment can predict stock returns); Robert Jarrow & Siguang Li, *Media Trading Groups and Short Selling Manipulation* 36 (Oct. 31, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3804130](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3804130) (demonstrating how traders in chatrooms can affect stock prices through impact trading); Michael S. Pagano et al., *How Did Retail Investors Respond to the COVID-19 Pandemic? The Effect of Robinhood Brokerage Customers on Market Quality*, FIN. RSCH. LETTERS, Nov. 2021, at 1, 2–6 (finding that collective Robinhood behavior can impact market quality); Jeremy Michels, *Retail Investor Trade and the Pricing of Earnings* 21–22 (Mar. 28, 2022) (unpublished manuscript), <https://ssrn.com/abstract=3833565> (showing that retail trade can substantially affect the price-earnings relation, irrespective of information content).

101. See Nitesh Chawla et al., *Information Diffusion on Social Media: Does It Affect Trading, Return, and Liquidity?* 4–7 (Dec. 1, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2935138](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935138) (finding that information diffusion is substantially correlated with intraday trading); Jim Kyung-Soo Liew & Tamás Budavári, *Do Tweet Sentiments Still Predict the Stock Market?* 12–13 (Aug. 8, 2016) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2820269](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820269) (finding evidence that Twitter sentiments predict market returns).

102. Hailiang Chen et al., *Wisdom of Crowds: The Value of Stock Opinions Transmitted Through Social Media*, 27 REV. FIN. STUD. 1367, 1370, 1374–77 (2014); see also Kogan et al., *supra* note 29, at 2, 35 (demonstrating that fraudulent articles on social media networks raised retail trading volume).

103. See Brett Campbell et al., *Earnings Virality*, 74 J. ACCT. & ECON. (forthcoming 2022) (manuscript at 6), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3800399](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3800399) (showing that viral earnings announcements negatively affect market quality and lead to excess retail trading, lower price efficiency, and exacerbate information asymmetry).

Additional evidence demonstrates that other market participants are paying attention to social media, influencers, and retail trading. One survey indicated that 85% of hedge funds and 42% of asset managers have been tracking retail-trading message boards as of early 2022.<sup>104</sup> JPMorgan has a product that tracks retail trading trends as well as sentiment on social media.<sup>105</sup> As JPMorgan's global co-head of cash equities trading stated, "The flow from retail is not something you can ignore if you are a professional investor . . . It's a whole new investor class that has emerged, and it's an investor class that's actually getting themes right."<sup>106</sup>

### B. *Finfluencers and Retail Trading*

As I have explored elsewhere, today's retail trading is increasingly sticky and likely to affect or predict future price movements—irrespective of retail trades' information content.<sup>107</sup> This is because today's retail traders are more numerous and coordinated than ever, have more direct market access, and use new, low-cost trading technology that promotes social aspects of trading.<sup>108</sup>

Because retail traders make up the bulk of influencer followers, influencers act as powerful coordination mechanisms for retail investors and create a feedback loop, further amplifying price impact. Influencers can leverage the same emotional engagement from retail traders as traditional brand influencers do with their followers. A number of recent trends are enhancing this effect.<sup>109</sup>

First, retail trading volume is significant, by some accounts reaching that of mutual funds and hedge funds combined, increasing from roughly fifteen to eighteen percent of

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104. See Caitlin McCabe, *Day Traders as 'Dumb Money'? The Pros Are Now Paying Attention*, WALL ST. J., (Jan. 16, 2022), <https://www.wsj.com/articles/fund-managers-pay-attention-to-retail-day-traders-11642132135>.

105. *Id.*

106. *Id.*

107. See Guan, *supra* note 17, at 2055 (discussing the impact of coordinated retail trading).

108. *Id.*

109. For a more in-depth treatment of recent retail investing trends, see *id.*



all trades in early 2020 to thirty percent by early 2021.<sup>110</sup> Retail investors now own substantial portions of various companies. Roughly thirty percent of Costco<sup>111</sup>, roughly forty percent of Apple,<sup>112</sup> more than thirty percent of Tesla, and more than eighty percent of AMC is owned by retail investors.<sup>113</sup> More broadly, studies have found that retail trading contributes to price movements around earnings surprises, as well as broader stock market selloffs and reversals.<sup>114</sup> Traders on Robinhood, the trading platform most popular with retail investors, accounted for “10% of the cross-sectional variation in stock returns during the second quarter of 2020” despite its tiny 0.2% market share.<sup>115</sup> Another study found that a trading strategy that involved purchasing stocks right after they debuted on the Robinhood Top 100 list and selling those stocks two days later achieved a return of 458%, in contrast to the twenty-four percent market return during the same period.<sup>116</sup>

Second, retail traders increasingly obtain investing information from peer-to-peer online social platforms, including social media, discussion fora, and other retail traders and fin-

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110. Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51, 73 (2021).

111. *Costco Wholesale Corp Stock Ownership—Who Owns Costco?*, WALLSTREETZEN, <https://www.wallstreetzen.com/stocks/us/nasdaq/cost/ownership> (last visited Apr. 17 2023).

112. *Apple Inc Stock Ownership—Who Owns Apple?*, WALLSTREETZEN, <https://www.wallstreetzen.com/stocks/us/nasdaq/aapl/ownership> (last visited Apr. 17, 2023).

113. Alex Morrell, *How AMC CEO Adam Aron Conquered Twitter, Embraced the ‘Apes’ of Reddit, and Won Over a New Generation of Investors*, BUS. INSIDER (Dec. 14, 2021), <https://www.businessinsider.com/amc-adam-aron-twitter-reddit-investors-meme-stock-2021-12>; *Tesla Inc Stock Ownership—Who Owns Tesla?*, WALLSTREETZEN, <https://www.wallstreetzen.com/stocks/us/nasdaq/tsla/ownership>.

114. See Michels, *supra* note 100, at 22 (showing how retail trading affects the price-earnings relation); Ethan Wolff-Mann, *Retail Investors Played a Big Role in Both Wild Market Rout and the Reversal, Data Suggests*, YAHOO! FIN. (Jan. 25, 2022), <https://finance.yahoo.com/news/retail-investors-market-rout-and-reversal-160655523.html>.

115. Philippe van der Beck & Coralie Jaunin, *The Equity Market Implications of the Retail Investment Boom I* (Swiss Fin. Inst., Rsch. Paper Series, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3776421](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3776421).

116. See Roberto Stein, *The Top 5 Predictable Effects of New Entries in Robinhood’s ‘100 Most Popular’ List I* (Sept. 17, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3694588](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694588).

fluencers. Social media platforms and investing news websites such as Seeking Alpha disseminate information to retail investors<sup>117</sup> and increasingly displace traditional financial information sources such as sell-side equity analyst research.<sup>118</sup> Another study found that more than fifty percent of millennials and Gen Z report obtaining financial advice on social media sites such as TikTok and Instagram, and a majority of those look to influencers for financial advice.<sup>119</sup> Indeed, the hashtags #stocktok and #fintok on TikTok had over three billion views as of April 2, 2023.<sup>120</sup>

Third, retail trading is increasingly coordinated. Social media is driving much of this transformation. Through social media and social investing platforms, retail investors have much greater direct access to information and can communicate with each other and coordinate their investing power in simple, low-cost ways. For example, retail investors came together to support heavy trading in GameStop and cultural movements in January 2021 and to “save” AMC from bankruptcy in 2020.<sup>121</sup>

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117. See Chen et al., *supra* note 102, at 1386 (discussing social media investing sources).

118. See Michael S. Drake et al., *Social Media Analysts and Sell-Side Analyst Research*, 27 REV. ACCT. STUD. (forthcoming 2022) (manuscript at 1, 7, 30–31) [http://www.utah-wac.org/2020/Papers/moon\\_UWAC.pdf](http://www.utah-wac.org/2020/Papers/moon_UWAC.pdf) (discussing social media’s “evolving role” in markets and the impact of social media equity research on sell-side equity research); see also Theresa Kuchler & Johannes Stroebel, *Social Finance*, 13 ANN. REV. FIN. ECON. 37, 45 (2021) (considering the role played by social interactions in financial decisions); Eric Chartier et al., *Behavioral Finance: The Impact of Artificial Intelligence and Social Media Analytics* 2–3 (Feb. 27, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3794039](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794039) (discussing social media influencers in the stock market).

119. *Gen Z Turns to TikTok and Instagram for Financial Advice and Actually Takes It, Study Finds*, CREDIT KARMA (July 13, 2021), <https://www.creditkarma.com/about/commentary/gen-z-turns-to-tiktok-and-instagram-for-financial-advice-and-actually-takes-it-study-finds>.

120. #stocktok, TIKTOK, <https://www.tiktok.com/tag/stocktok?lang=EN>; %20 (last visited Apr. 2, 2023); #fintock, TIKTOK, <https://www.tiktok.com/tag/fintock?lang=EN> (last visited Apr. 2, 2023).

121. See, e.g., Matt Turner, *A Meme Stock Is Born: How to Spot the Next Reddit Favorite*, BLOOMBERG (June 13, 2021), <https://www.bloomberg.com/news/articles/2021-06-13/a-meme-stock-is-born-how-to-spot-the-next-reddit-favorite>; Erin Griffith, *No End to Whiplash in Meme Stocks, Crypto and More*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/06/23/technology/no-end-to-whiplash-in-meme-stocks-crypto-and-more.html>. See generally MEME

Social trading technology has made it increasingly simple for retail traders to trade in a coordinated manner and impact prices as a group. Finfluencers only make this easier.<sup>122</sup> As discussed above, trading platforms like Public, Commonstock, and Zulutrade have emerged that promote social trading by encouraging retail investors to form communities and mimic others' trades.<sup>123</sup> These platforms encourage seamless "copy trading" or "mirror trading," allowing direct information access, feedback, and communication.<sup>124</sup> Unlike traditional investment platforms, these trading platforms enable millions of retail investors to directly connect with each other and with influencers.<sup>125</sup> Trading platforms encourage social trading in less obvious ways as well. For example, retail investors trade based on Robinhood's list of its one hundred most popular stocks, effectively copying other Robinhood users' trades. These users are five to seven times more likely to purchase stocks just added to Robinhood's "Top 100" list.<sup>126</sup> Anecdotal evidence also shows that Robinhood users trade based on the "slope" of a stock's price on the Robinhood app—the graphic that charts a stock's price movements—often buying stocks with the steepest slopes or the most dramatic increases in price.<sup>127</sup>

Trading platforms also offer free, zero-commission trading, which makes retail and influencer coordination even easier. One study by Aggarwal, Choi and Lee found that certain meme stocks saw abnormal returns when zero-commission

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STOCK TRACKER, <https://memestocks.org/> (last visited Apr. 22, 2023) (listing stocks discussed on r/wallstreetbets).

122. See Dirk A. Zetsche et al., *From FinTech to TechFin: The Regulatory Challenges of Data-Driven Finance*, 14 N.Y.U. J.L. & BUS. 393, 417 (2018) (discussing customer engagement opportunities on newer financial platforms).

123. See Jiaying Deng et al., *Social Trading, Communication, and Networks* 1–2 (Paderborn Univ. Ctr. for Tax & Acct. Rsch., Taxation, Acct. & Fin. Working Paper, Paper No. 74, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3802038](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802038) (discussing "copy trading" and "mirror trading," where investors to link their accounts to other investors).

124. Deng et al., *supra* note 123, at 1–2.

125. *Id.* at 2.

126. Stein, *supra* note 116, at 1.

127. UNSTRUCTURED INTERVIEW WITH ROBINHOOD USER IN SAN FRANCISCO, CALIFORNIA (Jan. 28, 2021) (discussing interviewee's use of Robinhood and whether the user would switch platforms due to Robinhood's GameStop trading halts).

trading became the norm in October 2019, more than a year prior to the Reddit-fueled rallies experienced by GameStop and others.<sup>128</sup> They also found that trading volume increased in both meme and non-meme stocks after the introduction of zero-commission trading.<sup>129</sup> This implies that zero-commission trading can further facilitate retail impact on other, non-meme public companies.<sup>130</sup>

Retail coordination is not always intentional, but retail trades that are unintentionally coordinated with each other can also be powerful enough to affect prices. Unintentional coordination can occur because the same sources funnel information to retail traders or because the social aspects of retail trading amplify cognitive biases and phenomena, such as herding, which have long been known to affect decision-making in various contexts.<sup>131</sup> Research shows that when investors learn through a social network, “fanatic and rational views dominate over time, and their relative importance depends on their following by influencers.”<sup>132</sup> This can generate “social network

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128. Aggarwal et al., *supra* note 56, at 3–4, 16–17.

129. *Id.* at 19.

130. *See id.* at 4 (“Furthermore, the emergence and the significance of zero-commission trading on the meme stock phenomenon implies more fundamental changes that can happen at other public companies.”).

131. *See generally* Sushil Bikhchandani & Sunil Sharma, *Herd Behavior in Financial Markets*, 47 IMF STAFF PAPERS 279 (2001) (discussing herd behavior’s effect on the market); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); 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, 620–23 (2014) (exploring underinvestment, “naïve diversification,” and investing in excessive fee funds as reasons for common mistakes in retail investing); Donald C. Langevoort, *Behavioral Approaches to Corporate Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 442 (Claire A. Hill & Brett H. McDonnell eds., 2012) (discussing behavioral biases in corporate law); Claire A. Hill, *Why Financial Appearances Might Matter: An Explanation for “Dirty Pooling” and Some Other Types of Financial Cosmetics*, 22 DEL. J. CORP. L. 141 (1997) (describing accounting methods used by companies to improve their financial appearance). Relatedly, substantial literature has explored the extent to which online marketing and communication leverages big data, predictive technologies, and targeted analytics to reach consumers and shape their preferences. *See, e.g.*, Helen Norton, *Manipulation and the First Amendment*, 30 WM. & MARY BILL RTS. J. 221, 228–29 (2021).

132. Lasse Heje Pedersen, *Game On: Social Networks and Markets 1* (May 24, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3794616](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794616).

spillovers, large effects of influencers and thought leaders, bubbles, bursts of high volume, price momentum, fundamental momentum, and reversal.”<sup>133</sup> Retail investors also tend to form “echo chambers” on discussion forums.<sup>134</sup> This further skews and limits the information they receive, amplifying their trading reactions in either direction. In this way, fintech can exacerbate the effects of feedback trading.<sup>135</sup> Similarly, some may interpret information repeated through a social network as new information.<sup>136</sup> This highlights the role of narrative in driving economic or trading behavior, creating feedback effects and amplifying price pressure.<sup>137</sup>

Finfluencers can leverage some of the same behavioral biases to maximize follower engagement, for example, by using colorful graphics and attention-grabbing content. Over twenty years ago, Jonathan Lebed found that using exclamation marks and incorporating all capital letters made his messages seem more exciting and enabled him to generate more interest.<sup>138</sup> Robinhood has become dominant among retail traders because of its fun user interface, with features ranging from

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133. *Id.*

134. *See id.* at 4; J. Anthony Cookson et al., *Echo Chambers*, 36 REV. FIN. STUD. 450, 450–56 (2023) (discussing investors’ exposure to confirmatory information on StockTwits).

135. *See analogously* Taha Havakhor et al., Tech-Enabled Financial Data Access, Retail Investors, and Gambling-like Behavior in the Stock Market 20–21 (Aug. 5, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3434812](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3434812) (showing how feedback trading enabled by the Yahoo! Finance Application Programming Interface affects retail trading).

136. *See* Peiran Jiao et al., *Social Media, News Media and the Stock Market*, 176 J. ECON. BEHAV. & ORG. 63, 64 (2020).

137. *See generally, e.g.*, Robert J. Shiller, *Narrative Economics: How Stories Go Viral and Drive Major Economic Events* (2019) (considering the impact of stories on markets and the economy); George A. Akerlof & Robert J. Shiller, *Animal Spirits: How Human Psychology Drives the Economy, and Why It Matters for Global Capitalism* (2009) (exploring the effects of psychology on the economy); George A. Akerlof & Robert J. Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (2015) (discussing markets’ susceptibility to deception and manipulation); Bradford Cornell, *Making Sense of Tesla’s Run-up*, ADVISOR PERSPS. (July 19, 2021), <https://www.advisorperspectives.com/articles/2021/07/19/making-sense-of-teslas-run-up> (explaining how narratives and feedback effects can move stock prices, where investors interpret a stock price increase to indicate the truth of the narrative).

138. Lewis, *supra* note 33.

colorful graphics to confetti that bursts onto the screen to celebrate a trade.<sup>139</sup> Robinhood also leverages stock lotteries and other gamification methods to maximize user engagement.<sup>140</sup> As one Robinhood user put it, he would stay with Robinhood despite its functional limitations simply because “Robinhood has the prettiest UI [user interface].”<sup>141</sup> By contrast, platforms such as Fidelity or Chase, although functionally robust, can feel dull and clunky.<sup>142</sup>

This evidence undercuts major models of price discovery that deem retail investors largely unable to affect price.<sup>143</sup> The conventional understanding, drawn from microstructure theory, is that most retail investors are uninformed traders who make trading decisions in idiosyncratic, individual ways.<sup>144</sup> On the whole, retail investors are just as likely to be buying or selling in any given moment, which means that their trades tend to cancel each other out in the aggregate.<sup>145</sup> However, retail investors today are not necessarily just as likely to buy as they are to sell, such that their trades cancel each other out in aggregate.<sup>146</sup> Instead, retail investors increasingly engage in co-

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139. See Michael Wursthorn & Euirim Choi, *Does Robinhood Make It Too Easy to Trade? From Free Stocks to Confetti*, WALL ST. J., <https://www.wsj.com/articles/confetti-free-stocks-does-robinhoods-design-make-trading-too-easy-11597915801>.

140. See, e.g., Tory Hobson, *Gamification in the Most Delightful Way*, MEDIUM: PINCH PULL PRESS (Jan. 25, 2018), <https://medium.com/pinch-pull-press/gamification-in-the-most-delightful-way-504caf72c1bc>.

141. Unstructured Interview with Robinhood User, *supra* note 127.

142. See, e.g., Logan Robison, *Robinhood vs Fidelity 2021: Best Stock Brokerage?*, INVESTING SIMPLE (Oct. 6, 2021), <https://www.investingsimple.com/robinhood-vs-fidelity/>; Nicole Casperson, *Robinhood Drops the Confetti, but Advisers Aren't Convinced*, INVESTMENTNEWS (Apr. 6, 2021), <https://www.investmentnews.com/robinhood-drops-the-confetti-but-advisers-arent-convinced-204828> (“If anything, it’s the duller-than-dishwater experience of most financial platforms that has opened the door for dynamic and engaging platforms like Robinhood and Stash Invest to thrive.” (quoting William Trout, Director, Javelin Wealth Management)).

143. FOX ET AL., *supra* note 14, at 62 (describing the difference between informed and uninformed investors and explaining that retail investors are generally deemed to be uninformed).

144. *Id.* An individual investor’s need to pay an upcoming bill is an example of an idiosyncratic reason to buy or sell stock that is not based on information. *Id.*

145. *Id.* at 67.

146. See Guan, *supra* note 17.

ordinated behavior through trading and social media.<sup>147</sup> Their trading is thus stickier and has a greater impact on prices.<sup>148</sup>

Finfluencers only stand to amplify these effects. Social media thus effectively does two things. It allows all types of finfluencers to expand their reach and their price impact, and it enables finfluencers to capitalize on growing retail investor price impact that is itself being supercharged by social media. This feedback loop is shifting the kinds of information that can move stock prices, as is discussed next.

### III.

#### FINFLUENCER-DRIVEN INFORMATION

Financial economics provides a theoretical framework of price discovery that assumes a narrow range of incentives that motivate trading decisions. Investors seek out fundamental value information about an issuer, usually by using valuation mechanisms such as discounted cash flow analysis, and trade that issuer's stock to profit off of that information.<sup>149</sup> As they trade, stock prices move to reflect the information.<sup>150</sup>

Finfluencers, however, are motivated by a much broader set of incentives than simply seeking out fundamental value information. For example, they seek to maximize popularity, be entertaining, and "grow their brand." They also mediate the information that reaches their followers and provide powerful coordination mechanisms that allow their (and their fol-

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147. See Iris ten Teije, *The Rise and Evolution of Social Investing*, FORBES (Feb. 17, 2022), <https://www.forbes.com/sites/forbesfinancecouncil/2022/02/17/the-rise-and-evolution-of-social-investing/?sh=29c9b8f462cc>.

148. Indeed, as early as the 1990s, data indicated that retail trades could be systematic and coordinated. See Brad M. Barber et al., *Systematic Noise*, 12 J. FIN. MKTS. 547, 549–50 (2009). If retail traders introduce systematic noise, informed traders' ability to correct that noise might be limited, meaning that such noise will be reflected in prices. See J. Bradford De Long et al., *Noise Trader Risk in Financial Markets*, 98 J. POL. ECON. 703, 705 (1990) (showing that noise traders can limit the effectiveness of arbitrage strategies).

149. See FOX ET AL., *supra* note 14, at 33–58 (describing the mechanisms by which equities trading can promote price accuracy and liquidity, which can in turn facilitate economic and social goals around efficient allocation of capital, resources, and risk).

150. See *id.* at 60–70 (describing how price discovery, or the means through which stock prices reach more accurate levels, is largely driven by the information asymmetries between informed traders and the liquidity suppliers with whom they interact).

lowers') trading motivations to affect stock price movements. If most finfluencer followers are retail investors, finfluencers amplify the effects of retail trading on stock markets, and in so doing, amplify the impact of retail motivations for trading as well. Further, if finfluencers and retail traders are not conducting discounted cash flow analysis in the narrow, traditional sense of information discovery, then their activity can shift the types of "information" stock price movements reflect. These shifts are amplified as other market participants factor finfluencer-driven motivations into trading decisions.

This Part provides a theoretical account of how finfluencer-driven trading shapes the types of information reflected in stock price movements, and how finfluencer-driven trading interacts with the traditional economic theory of price discovery. Section A lays out the normative framework drawn from microstructure and financial economics. Section B illustrates how stock prices might move in response to various kinds of finfluencer-driven information and motivations. Section C assesses the permanence of finfluencer-driven trading. Sections D and E consider the long term informativeness of finfluencer-driven trading while also examining the fine distinction between noise and signal in today's stock markets.

#### A. *The Traditional Normative Framework*

The stock market and its regulation perform central roles in furthering several critical economic and social goals. These goals are:

- (1) promoting the efficient allocation of capital to the best new investment projects in the economy;
- (2) promoting the efficient operation of the economy's existing productive capacity;
- (3) promoting the efficient allocation of resources between current and future periods so as to best satisfy the needs of firms seeking financing for real investments [trading the promise of future dollars to obtain current dollars], and the needs of savers seeking to forgo current consumption in order to enjoy future consumption [trading current dollars to obtain the promise of future dollars];
- (4) promoting the efficient allocation among investors of the risks associated with holding securities so that risk-averse investors bear their vola-



tility with minimal disutility; and (5) operating fairly and fostering an overall sense of fairness.<sup>151</sup>

Two characteristics of the stock market—share price accuracy and market liquidity—interact with these goals in important ways.<sup>152</sup> The more accurate prices are and the more liquid the market is, the more easily these goals can be advanced. Price accuracy refers to whether share price accurately estimates the future cash flows of the issuer.<sup>153</sup> In general, greater price accuracy will facilitate more socially beneficial investment projects, help identify good and bad managers, and advance the other goals mentioned above.<sup>154</sup> Liquidity generally refers to transaction costs and how easily a trade can be completed.<sup>155</sup> The more liquid the market is, the easier it is to trade without incurring trade-offs; for example, a larger trade often worsens the execution price.<sup>156</sup>

Information asymmetries between informed traders and the liquidity suppliers with whom they trade largely drives price discovery, the mechanism by which stock prices become more accurate.<sup>157</sup> Vis-à-vis the rest of the market, informed traders trade based on superior information about the underlying company.<sup>158</sup> These traders identify mispriced stocks and trade to make profits based on their views.<sup>159</sup> Their trading thus moves prices toward a more accurate value.<sup>160</sup> Moreover, by seeking out and generating new information, usually from bits of publicly available information about an issuer that are

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151. Merritt B. Fox et al., *Informed Trading and Its Regulation*, 43 J. CORP. L. 817, 833 (2018).

152. *See id.* (citing Thierry Foucault et al., *Market Liquidity: Theory, Evidence, and Policy* 31 (2013)).

153. *Id.*

154. *See* Merritt B. Fox et al., *Stock Market Manipulation and Its Regulation*, 35 YALE J. ON REGUL. 67, 83 (2018) (explaining that greater stock price accuracy helps funnel capital toward more socially beneficial real investment projects). Greater stock price accuracy also drives better management decisions and improves investors' sense of fairness. *Id.*

155. FOX ET AL., *supra* note 14, at 34.

156. *Id.*

157. *Id.* at 65–66.

158. *Id.* at 60.

159. *Id.*

160. *See id.* at 70 (showing how more accurate stock prices result from informed trading, as liquidity suppliers adjust their quotes in response to information).

not yet reflected in price, informed traders substantially contribute to long term price accuracy.<sup>161</sup> By contrast, uninformed traders trade for reasons such as managing savings or rebalancing portfolios and do not trade based on information about an issuer.<sup>162</sup>

Most discussions of stock markets and their participants characterize retail investors as uninformed traders.<sup>163</sup> Because their reasons for trading, such as deferred consumption or rebalancing portfolios, are idiosyncratic and unrelated to information, uninformed traders are assumed to buy and sell roughly in the same quantities in aggregate.<sup>164</sup> They may also be categorized as “mistake” traders who trade based on incorrect information.<sup>165</sup> Although mistake traders may in the aggregate move stock prices, “anti-mistake” traders correct these movements by trading when they do not believe there is new information about the issuer.<sup>166</sup>

This framework largely dismisses the possibility that retail trading has any significant impact on price, but as discussed above, recent evidence has eroded the strength of these assumptions. Moreover, finfluencers provide powerful coordination mechanisms across retail followers that significantly amplify retail price effect, in turn expanding finfluencer and retail influence on price discovery. The next sections detail how.

### B. *Finfluencer-Driven Stock Price Movements*

As finfluencers mediate and shape the market’s understanding of information, the price movements they generate reflect the motivations behind their trades. This means that such price movements do not necessarily solely reflect discounted cash flow analysis; instead, they can reflect investor whims and preferences untethered to information as traditional theory understands it. In particular, finfluencers can accelerate and amplify stock prices’ incorporation of retail moti-

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161. *See id.* at 140 (“The distinguishing feature of fundamental value informed trading is that, unlike the other . . . kinds of informed trading, the information on which it is based did not exist before it was generated as the result of the trader’s own actions.”).

162. *Id.* at 80.

163. *See id.* at 62–63.

164. *Id.* at 62, 67.

165. *Id.* at 63.

166. *Id.*

vations as “information.” They also help overcome classic coordination problems among individual investors and heavily shape those investors’ preferences.

### 1. *Cultural Preferences and Personal Values*

As an example, consider a self-driving car company’s stock priced at ten dollars per share. Influencers and retail investors like the company’s mission, which is to produce self-driving cars for underprivileged communities. As such, they buy as a group, driving the share price up to fifteen dollars. That fifteen dollar share price now reflects the cultural preferences or personal values of influencers and their followers.

Assume that the most accurate price based on a traditional discounted cash flow analysis would be thirteen dollars per share. Informed investors know that the stock should be priced at thirteen dollars per share and would otherwise place purchase orders that drive the stock price up from ten dollars to thirteen dollars. However, that profit would be completely taken through influencer-driven trading. So, *ex ante*, informed investors would be less incentivized to seek out the information indicating that the stock was undervalued in the first place.

Further, absent the permanence of influencer-driven price changes, informed anti-mistake traders might sell the stock until its price went down to thirteen dollars per share. But informed traders know that influencer-driven price effects can be sticky, such that informed sales may not impact the price, and that the price might continue to rise further, despite the informed traders’ sell orders. A rational informed trader would accordingly choose *not* to sell. This might cause the self-driving car stock to remain at an inflated price for a longer period of time.<sup>167</sup>

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167. See Nicolae B. Gârleanu et al., *A Long and a Short Leg Make for a Wobbly Equilibrium* 1, 32 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28824, 2021), <https://www.nber.org/papers/w28824> (discussing how short sellers might abandon short positions if prices increase). Others have set forth a model demonstrating how a coalition of traders on social media can affect stock price in a dynamic game with large short sellers. In this game, social media traders can discipline large short sellers and can decrease allocational efficiency if the stock is overpriced prior to the short selling, but can increase allocational efficiency if the stock is underpriced prior to the short selling. Jarrow & Li, *supra* note 100.

The influencer-driven price increase to fifteen dollars a share has now caused a substantial and sticky deviation from the stock's fundamental value. Critically, this deviation reflects cultural preferences and personal values rather than any valuation based on traditional cash flow analysis.

## 2. *Paid Promotions*

If corporations pay influencers to promote stocks, the influencer-driven information signal provided by price movements can reflect ad-based bias in addition to traditional information and non-traditional information.

As an example, consider the self-driving car company stock priced at ten dollars per share. The company knows that influencers can generate significant interest in the company and shape investment decisions among retail as well as institutional investors. The company pays certain influencers to promote its stock. With the promotion, the share price rises to thirteen dollars. Even if the most accurate price based on a traditional discounted cash flow analysis would be thirteen dollars, the share price increase reflects not only traditional "information," but also simple ad-based promotion.

Another version of the story could unfold as follows. The self-driving car company pays influencers to promote its stock. With the influencer's promotion, the share price rises from ten dollars to thirteen dollars. This time, let us assume that the most accurate price based on traditional metrics is eight dollars per share. The ad-driven price increase has caused a significant deviation from the stock's fundamental value.

Just as in the previous example, absent the permanence of influencer-driven trades, informed anti-mistake traders in this case would sell the stock until its price decreased to eight dollars. Again, informed traders understand that influencer-driven price effects can be sticky. And again, a rational informed trader would choose *not* to sell in this situation, resulting in the self-driving car stock remaining at an inflated price for longer.<sup>168</sup>

If this pattern of influencer-led trading and stock price movement occurs frequently enough, stock prices will increas-

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168. See Gârleanu et al., *supra* note 167, at 30-31; Jarrow & Li, *supra* note 100, at 3.

ingly reflect these other types of values or characteristics—cultural values, social preferences, and ad-based motivations.

### 3. *Maximizing Popularity*

Today's finfluencers, especially ordinary influencers, are also incentivized to maximize popularity. Maximizing popularity increases finfluencers' impact on stock price movements, as well as revenue from ads and subscribers.

For example, the social trading network FX Junction encourages those who become approved as "Signal Providers" to "Get yourself noticed" by filling out a profile ("Your Profile page is the first thing potential copy traders can visit to see more information about yourself"); "rank high" on the Find Traders page; "get your profile more attention" by posting ideas and commentary on the Dashboard; and "attract more investors on FX Junction by sharing your performance and other information on other social networks and forums."<sup>169</sup> As another example, the trading platform Commonstock has a Leaderboard highlighting top investors and top followers,<sup>170</sup> as well as "% of mentions," which refers to how frequently an asset is mentioned on the platform.<sup>171</sup>

Because finfluencers are not necessarily compensated based on their investing track records but rather on their content and numbers of viewers and subscribers, their popularity might not be tied to giving objectively valuable investing advice.<sup>172</sup> Their social media content, catered to their followers, often focuses on selling an expensive lifestyle replete with designer possessions.<sup>173</sup> Their content might also reflect social trends: for instance, "loss porn," posting evidence of large losses from stock bets, is popular on fora such as Reddit.<sup>174</sup> At the very least, these finfluencers are usually not solely motivated by maximizing investment returns or the quality of the information they disseminate.

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169. *Become a Signal Provider*, FX JUNCTION, [https://www.fxjunction.com/help/become\\_signal\\_provider](https://www.fxjunction.com/help/become_signal_provider).

170. COMMONSTOCK, <https://commonstock.com/leaderboard>.

171. COMMONSTOCK, <https://commonstock.com/trending>.

172. See Whelan, *supra* note 76.

173. See *id.*

174. See, e.g., *Part 1: Largest WSB LOSS Porn Ever Posted!!!*, REDDIT, [https://www.reddit.com/r/wallstreetbets/comments/pfirph/part\\_1\\_largest\\_wsb\\_loss\\_porn\\_ever\\_posted/](https://www.reddit.com/r/wallstreetbets/comments/pfirph/part_1_largest_wsb_loss_porn_ever_posted/) (1.2k comments).

The information a finfluencer disseminates can also be shaped by their followers' demands. Follower demand can drive the finfluencer information economy, rather than finfluencer supply. If followers do not like a finfluencer's message, their collective response can silence that message. This can happen, for example, when a finfluencer disseminates negative information about a company. As one commentator put it, "[t]here is a surrender-to-the-narrative-or-else attitude online, and it's really frightening, because if you say bitcoin is overvalued, or Tesla is overvalued or whatever popular SPAC is overvalued, these trolls in anonymous accounts come out of the woodwork and start attacking you."<sup>175</sup> However, if finfluencers with sizeable followings only disseminate positive advice, their followers tend to buy, which tends to inflate the share price. Ecosystems that depend on upvotes, such as Commonstock, can skew finfluencer incentives even more. Reasons for stock recommendations, and potentially stock price movements that occur in response, may drift further away from traditional conceptions of information and price accuracy and cater more closely to followers' interests.

Finally, finfluencers could be motivated to obtain fake followers, in order to "rank high" on certain social media platforms and otherwise inflate their engagement.<sup>176</sup> To the extent that more followers increase a finfluencer's impact on stock prices, this further decouples the link between "good" investment advice and price movement. That is, a large following may not signal valuable advice or information; it might simply reflect a fake number.

### C. *The Limits of Arbitrage*

Finfluencers can make it harder for other traders to eliminate price differentials caused by nonfinancial trading reasons, which they could otherwise do through arbitrage. As it becomes more difficult for other traders to arbitrage prices because finfluencing makes those prices more resistant to informed trading, prices reflect even more nonfinancial, finfluencer-driven value.

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<sup>175</sup> Whelan, *supra* note 76.

<sup>176</sup> See Marit Hinnosaar & Toomas Hinnosaar, *Influencer Cartels* (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3786617](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786617) (studying groups of influencers who collude to inflate engagement).

As an example, consider a company planning to produce rocket ships for space tourism with stock priced at thirteen dollars per share. Retail traders and finfluencers like the company's self-proclaimed mission, which is to "send apes to the moon." The technology is still in the early stage of development, and the company will not be able to produce rocket ships for at least another decade. Yet finfluencer-driven trading drives the price up to sixteen dollars per share.

Assume that the most accurate share price based on discounted cash flow analysis would be twelve dollars. Absent the permanence of finfluencer-driven trades, informed anti-mistake traders in this case would sell the stock until its price decreased to thirteen dollars. However, informed traders understand that finfluencer-driven effects can be sticky, such that informed sales may not impact the price, and that the price might continue to increase irrationally, despite the informed traders' sell orders. That is, they understand that arbitrage is not profitable or may be impossible. A rational informed trader would therefore choose *not* to sell in this situation, resulting in the space tourism stock remaining at an inflated price for longer<sup>177</sup> and allowing the finfluencer and their followers to exert more power over markets. Thus, pressure from finfluencers (exerted through price movements) can influence firm choices with effects that are even more long-lasting the harder it is for other investors to eliminate the pressure through arbitrage.

#### D. *Is Finfluencer-Driven Trading Informed?*

The next question becomes: do finfluencers tend to expand the market's conception of information in a socially beneficial way or harm it by introducing noise that is socially wasteful? While this an open empirical question, the answer is complex from a theoretical standpoint: finfluencers likely add *both* information and noise. Indeed, the line between informative finfluencer activity and noisy finfluencer activity is thin.

On the one hand, existing normative frameworks state that fundamental value information traders seek to maximize investment returns. Doing so usually depends on seeking out information, because trading on good information leads to

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177. See Gârleanu et al., *supra* note 167, at 30-31 (discussing how short sellers might abandon short positions if prices increase).

greater profits.<sup>178</sup> Through the trading of fundamental value traders, stock prices therefore become more accurate.<sup>179</sup> Finfluencer-driven trading as described here can loosen the link between profit and information, narrowly defined. Profit can be linked to a number of other characteristics: sentiment, influence, and advertising promotions. In other words, to the extent that the market's definition of information remains narrowly circumscribed to discounted cash flow analysis, finfluencers can make stock prices less accurate.<sup>180</sup> Moreover, finfluencer impact might dilute the impact of all information, good or bad.<sup>181</sup>

On the other hand, an argument can be made that “information” and profit can or should encompass nonfinancial characteristics like investor sentiment. For example, if retail investors trade for nonpecuniary reasons or select stocks based on factors not directly related to future cash flows, such as an issuer's sustainability or cultural values, a stock's price may grow to reflect those characteristics. Even though traditional theory might not deem this to be “information,” it could be understood as information about the value of a company in a broader sense.<sup>182</sup>

Finfluencers could help expand “informativeness” in socially beneficial ways, precisely because they are not motivated

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178. See FOX ET AL., *supra* note 14, at 70.

179. See *id.* at 36.

180. As such, one study found causal effects from social media sentiment without fundamental information on same day stock returns. See Xinjie Wang et al., *The Causal Relationship Between Social Media Sentiment and Stock Return: Experimental Evidence from an Online Message Forum*, 216 ECONOMICS LETTERS (2022). Others have studied the potential impact of Twitter sentiment on stock prices of sports companies during class actions. See Karim Derouiche & Marius Cristian Frunza, *Study of Tweets' Sentiment Impact on Stock Prices During Class Actions: An Application to Sports Companies* (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3653125](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3653125).

181. See Shimon Kogan et al., *supra* note 29, at 35 (finding that all news on social media platforms, including legitimate news, was discounted following fraud revelations).

182. In related contexts, there is a debate as to the relationship between ESG ratings and stock returns. See, e.g., George Serafeim & Aaron Yoon, *Stock Price Reactions to ESG News: The Role of ESG Ratings and Disagreement* (Jan. 13, 2021), <https://ssrn.com/abstract=3765217> (examining whether ESG ratings affect stock prices); Florian Berg et al., *The Economic Impact of ESG Ratings* (Sept. 4, 2022), <https://ssrn.com/abstract=4088545> (examining ESG ratings' impact on stock returns, fund holdings, and firm behavior).



by the narrow range of traditional valuation methods. For example, consider a jet fuel company stock priced at ten dollars per share. Finfluencers and retail investors like the company's dedication to creating zero-emission jet fuel. The most accurate price based on discounted cash flows is eight dollars per share, because the company is operating at a loss and conventional jet fuel is much less expensive, creating significant competition. Yet finfluencers and their followers are dedicated to promoting and owning companies that combat climate change. As such, they buy as a pack, driving the share price up to fifteen dollars. That fifteen dollar share price now reflects the environmental preferences of finfluencers and their followers.

Even though discounted cash flow analysis might deem the fifteen dollar per share price less "accurate," the "inflated" price reflects the social or cultural reality that a significant portion of investors prefer companies with climate-focused missions. The increase in price might allow the company to raise capital more cheaply and fund more projects that eventually become profitable, bringing its "underlying" value closer to its higher stock price. As a result, the fifteen dollar a share stock price no longer looks inflated; it looks informative of the company's future cash flows—and is therefore more accurate.

In this way, finfluencers can shape not only price movements, but social and market conceptions of information. In doing so, finfluencers and their followers stand to have significant impact on markets.

#### E. *Noise and Signal*

Of course, the thin line between noise and signal is a longstanding feature of stock markets. Noise is inevitable, and sophisticated and unsophisticated investors alike contribute to irrationality and inefficiency.<sup>183</sup> A substantial literature has ex-

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183. See, e.g., Bikhchandani & Sharma, *supra* note 131, at 282, 289–90 (discussing how herd behavior impacts the market); Ryan Bubba & Prasad Krishnamurthy, *Regulating Against Bubbles: How Mortgage Regulation Can Keep Main Street and Wall Street Safe—From Themselves*, 163 U. PA. L. REV. 1539, 1545–48 (2015) (considering the limits of rational behavior during bubbles). This implicates debates around the efficient market hypothesis. Some might argue that prices do not reflect fundamental value; rather, they simply reflect the intersection of supply and demand. See, e.g., Ronald J. Gilson & Reinier H. Kraakman, *Market Efficiency after the Financial Crisis: It's Still a Mat-*

plored the limited ability of arbitrageurs to bet against noise traders when faced with longer-horizon noise risk or fundamental risk.<sup>184</sup> That is, it has long been understood that noise can be sticky. At what point does noise, conventionally understood, become information? In some ways, finfluencer activity represents another outpost of trading that reflects this complexity.

The Lebed example in Part I is illustrative. As one commentator pointed out, Lebed's stock promotions did not materially differ from Wall Street analyst stock promotions.<sup>185</sup> That is, "when a Wall Street analyst can send the price of a stock of a company that is losing billions of dollars up 50 points in a day, what does it mean to 'artificially raise' the price of a stock?"<sup>186</sup> This raises further questions regarding the activity of other more established finfluencers. Those such as media personality Jim Cramer or the short selling firm Hindenburg Research purport to disseminate information. Finfluencers such as Elon Musk and Ryan Cohen often do not. Ordinary finfluencers often do. But these finfluencers all have price impact, blurring the line between noise and signal. Given the range of possibilities, how might the rest of the market react? The next Part explores this question.

#### IV.

##### THE FINFLUENCER INFORMATION ECOSYSTEM

According to economist Robert Shiller, one strategy in a speculative market is to adopt a Keynesian beauty contest approach: select the stocks that others will select, the stocks that those others think still others will select, and so on.<sup>187</sup> Basi-

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*ter of Information Costs* (Feb. 11, 2014), <https://ssrn.com/abstract=2396608> (discussing informational efficiency and the efficient market hypothesis in the wake of the 2008 financial crisis); Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 *AM. ECON. REV.* 393, 404-05 (1980) (proposing a model where there is "an equilibrium degree of disequilibrium").

184. See De Long et al., *supra* note 148, at 705 (demonstrating how noise traders can limit the effectiveness of arbitrage strategies).

185. Lewis, *supra* note 33.

186. *Id.*

187. See, e.g., Robert J. Shiller, *The Beauty Contest That's Shaking Wall St.*, *N.Y. TIMES* (Sept. 3, 2011), <https://www.nytimes.com/2011/09/04/business/economy/on-wall-st-a-keynesian-beauty-contest.html> (explaining that, according to Keynes, the optimal strategy in a speculative market is to choose

cally, an investor should aim to anticipate other investors' preferences, rather than necessarily trade on their own preferences. Finfluencers can short-circuit this process. Not only can finfluencers anticipate investors' preferences, but they can also control those investors' preferences to some degree and shape the types of information that affect stock price movements.

This Part explores further implications for the stock market ecosystem by considering the effects of finfluencer activity on other market participants' incentives and capital flow. It attempts to answer a number of questions by considering evidence and theory. First, will other market participants treat finfluencer-driven trading as information or as noise? Second, if they treat it as noise, will they be able to identify and avoid it? Sections A and B consider these queries. The following sections then assess broader market effects, beginning with a discussion of finfluencer incentives in Sections C and D. Section C lays out a core insight: the predictability and controllability of finfluencers' follower activity. Section D discusses the incentive of finfluencers and other market participants to create bubbles. Sections E and F explore corporate responses, including corporate finfluencers and managerial decisions shaped by finfluencer preferences. Section G considers the impact on capital raising. Finally, Section H discusses newly created financial products, such as certain ETFs, in response to finfluencer activity, and Section I considers wider market impact.

#### A. *Treating Finfluencer Activity as Informative*

On the one hand, other market participants may treat finfluencer-driven trading as informative. That is, if finfluencer-driven trading can predict or drive stock price movements, others will treat that as informative regardless of its relationship to a company's cash flows. This is because it would become more rational for other market participants to adjust their behavior in anticipation of finfluencer activity. Other informed investors might be motivated to take a company's meme stock status, its cultural mission, or its popularity with finfluencers into account as they seek to evaluate the "value" of a company. As those informed investors trade with liquidity suppliers, and as liquidity suppliers adjust their quotes to ac-

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the stocks that others will choose, the stocks that those others believe still others will choose, and so on).

count for perceived information from counterparties, stock prices will move to reflect the information that those investors have. That information might increasingly reflect values, including finfluencer-driven values, that are not necessarily tied to discounted cash flows.

For example, consider the hypothetical space tourism company discussed above. A traditional valuation of the company puts its stock at twelve dollars a share. Assume that the company is currently trading at thirteen dollars a share. Past experience with the stickiness of the company's inflated stock price may lead traders who would typically undertake discounted cash flow analysis in evaluating the accuracy of a company's share price to factor into their analysis the potential for "finfluencer hype." In doing so, they conclude that finfluencer hype increases their valuation, or at least sets their prediction for the stock price at fourteen dollars a share. Instead of selling the stock (which they otherwise might have done based on a traditional analysis demonstrating the stock is overvalued), they buy the stock, believing the price will rise to reflect finfluencer-driven trading. The price does indeed rise to fourteen dollars a share. In this way, if such traders systematically assign some value to this type of finfluencer factor, stock price movements will increasingly reflect those factors. And, if the higher stock price enables the company to raise capital to fund better projects, its value may rise to meet its stock price, making that initial price bump seem more informed.

Similarly, to the extent stock prices increasingly reflect decisions spurred by ads or sponsorships, other market participants adjust their behavior in anticipation. As investors trade with liquidity suppliers, and as liquidity suppliers adjust their quotes to account for perceived information from counterparties, stock prices move to reflect the information that those investors have. That information might increasingly reflect values not necessarily tied to discounted cash flows.

#### B. *Discounting Finfluencer Activity as Noise*

On the other hand, markets may discount finfluencer-driven trading as noise. They may seek to profit off a finfluencer-driven trading episode but will not seriously consider factors such as finfluencer popularity, hype, or cultural value as indicative of information. However, even if markets dismiss

finfluencer-driven trading as noise, the question remains whether other participants can reliably avoid the noise.

The ability of other participants to avoid finfluencer-driven noise might be limited because of the potential profitability of participating in finfluencer-driven trading or even trying to become a finfluencer. Existing literature explores the trading strategy of rationally riding a bubble.<sup>188</sup> Predictable investor sentiment and limited ability to arbitrage are factors that contribute to an assessment whether to ride a bubble.<sup>189</sup> As discussed above, both of these factors apply to finfluencer-driven trading. Thus, it may be come rational and even optimal for sophisticated as well as unsophisticated investors to participate in finfluencer-created noise or bubbles.

For example, if the psychedelic drug industry is being hyped up by finfluencers, it may be a rational trading strategy for sophisticated and unsophisticated investors to buy psychedelic drug stocks, at least in the short term. Indeed, evidence increasingly demonstrates that other traders are paying attention to social media. Hedge funds and large financial institutions increasingly scrutinize social media and retail investor activity,<sup>190</sup> cementing retail and finfluencer impact on markets even further. In early October 2022, traders on Reddit jumped on concerns over the financial health of Credit Suisse, fueling speculation that the bank might collapse as Lehman Brothers did.<sup>191</sup> Credit Suisse's stock price fell 12% on October 3, 2022.<sup>192</sup>

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188. See, e.g., Stefan Nagel & Markus Konrad Brunnermeier, *Hedge Funds and the Technology Bubble* (June 2003), <https://ssrn.com/abstract=423940> (demonstrating that it may be optimal for rational investors to ride bubbles because of limits to arbitrage and predictable investor sentiment); Nadja Guenster et al., *Riding Bubbles* (Dec. 9, 2009), <https://ssrn.com/abstract=1071670>.

189. Nagel & Brunnermeier, *supra* note 188.

190. See Caitlin Ostroff & Paul Vigna, *Wall Street Is Looking to Reddit for Investment Advice*, WALL ST. J. (Aug. 27, 2021), [https://www.wsj.com/articles/wall-street-is-looking-to-reddit-for-investment-advice-11630056648?mod=Series\\_exchangeinternetpackage](https://www.wsj.com/articles/wall-street-is-looking-to-reddit-for-investment-advice-11630056648?mod=Series_exchangeinternetpackage).

191. Caitlin McCabe, *How a Social-Media Frenzy Around Credit Suisse Rattled Its Stock*, WALL ST. J. (Oct. 5, 2022), <https://www.wsj.com/articles/how-a-social-media-frenzy-around-credit-suisse-rattled-its-stock-11664978035>.

192. *Id.*

### C. *Predictable Price Movements*

The foregoing discussion highlights a central observation: if finfluencers can control, influence, or simply predict price movements due to trading by their followers, they can profit off of that trading. Finfluencers need not engage in fraud or manipulation to predictably profit off of their followers' trades, nor do they necessarily need to disseminate valuable information. Finfluencers simply tweet, post or trade, their followers pile in, and stock prices can move.

Recall the examples of Elon Musk's "Gamestonk!!" tweet and Ryan Cohen's sale of Bed Bath and Beyond's shares.<sup>193</sup> Neither example involved investing advice or any representations about GameStop or Bed Bath and Beyond. Neither example involved obvious intent to defraud or to manipulate. Nevertheless, both examples involved significant price movements in response: GameStop in soaring 40%, Bed Bath and Beyond in skyrocketing 70% then plummeting after Cohen's sale.<sup>194</sup>

Thus, finfluencers may not need to disseminate any investment advice or valuable information in order to set off a predictable set of trades by their followers. No wrongdoing has occurred, but it can be tempting to profit off of the predictable pattern. Because of this, finfluencer incentives might be skewed, limiting or worsening the information reaching investors.

### D. *Creating Bubbles*

The ability to control preferences and profit off of predictable price movements may motivate finfluencers to create price bubbles by pushing the price of an asset away from its underlying value. While there may be some reputational risk, if finfluencer followers are directed to buy low and sell high at opportune times, this could become an extremely profitable strategy for the finfluencer, enabling the finfluencer to amass additional followers and become even more successful. Riding those bubbles may also be rational for other traders, as discussed previously.

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193. Elon Musk (@elonmusk), TWITTER (Jan. 26, 2021, 4:08 PM), <https://twitter.com/elonmusk/status/1354174279894642703?lang=EN>; Hirsch, *supra* note 60.

194. GameStop, *supra* note 9; Hirsch, *supra* note 60.

For example, consider the stocks of a number of psychedelic drug companies, all of which are penny stocks. Volume traded is low, meaning that causing price movements through trading is relatively easy. A finfluencer with a sizeable social media following gins up significant hype around the psychedelics industry, perhaps speculating that psychedelic drugs will be increasingly used in mainstream medicine. The finfluencer has already bought a significant number of shares of these psychedelic drug companies and tells their followers that previous investments in these companies has been very lucrative. As a result of the hype, the finfluencer's followers pile in as well, causing significant price gains. At this point, the finfluencer sells their shares, making significant profits. Of course, some of the finfluencer's followers would also make significant profits.

Again, this simple example illustrates that profits are possible—and even simple—to make because follower activity is predictable. It also illustrates that finfluencers do not need to make false or misleading statements in order to generate price movements. Simple hype will do—and will be reflected in stock price movements. Some commentators have termed this “hype and dump” manipulation, noting that “it can be optimal for an informed trader to create false hype among uninformed traders provided that there is at least one naive trader in the market and the cost of dishonest rumor-mongering is not too low.”<sup>195</sup>

Another situation is possible: hedge funds or other sophisticated entities could post anonymously on social media platforms and become pseudonymous or anonymous finfluencers. In so doing, they could contribute to and even create a bubble from which they can profit. Consider a hedge fund that invests significantly in social media strategy. The hedge fund is aware that finfluencers can create hype and drive bubbles. The hedge fund's employees aggressively post on social media under pseudonyms, amassing followings and becoming pseudonymous influencers. The hedge fund has been closely following retail interest in self-driving cars. It also has a large stake in a nascent self-driving car company, whose stock is trad-

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195. Nevzat Eren & Han N. Ozsoylev, *Hype and Dump Manipulation* (Nov. 2006), <https://ssrn.com/abstract=948814> (introducing an economic model where hype and dump manipulation can be sustained).

ing for three dollars per share with relatively low volume. In this situation, the hedge fund, acting as pseudonymous influencer, can easily generate excitement around the self-driving car company among its followers (without necessarily disseminating any false or misleading information). Buying pressure for the self-driving car company's stock might increase and lead to price gains, and the hedge fund could profit significantly as a result.

Again, the predictability and reach of finfluencing can make this an attractive profit strategy. Moreover, creating a bubble could inject additional noise into markets while masking that noise as information behind price impact.

#### E. *Corporate Finfluencers*

Corporations and their management might similarly be incentivized to develop followings themselves, allowing them to influence their own stock price. Elon Musk has wielded significant influence for years now. In this way, a company can gain more control over the types of information that are incorporated into their stock price.

Consider the history of Tesla. As of March 2022, around thirty-eight percent of Tesla was owned by retail investors.<sup>196</sup> Tesla's stock price history can be interpreted to reflect the growing power of retail trading driving out short sellers, partially driven by Musk's influence. As I have explored elsewhere, increased coordinated retail buying lowers the expected profitability of short selling.<sup>197</sup> And recent reports indicate that short sellers of Tesla are "giving up."<sup>198</sup> Short positions in Tesla were at 1.1%–3.2% by recent accounts, the lowest since Tesla went public in 2010.<sup>199</sup> Yet traditional metrics suggest that Tesla's stock is substantially overpriced.<sup>200</sup>

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196. *Tesla Inc Stock Ownership—Who Owns Tesla?*, *supra* note 113.

197. *See* Guan, *supra* note 17, at 2057.

198. *See* Thyagaraju Adinarayan & Esha Dey, *Many Tesla Short Sellers Are Giving Up*, BLOOMBERG (Oct. 4, 2021), <https://www.bloomberg.com/news/articles/2021-10-04/tesla-short-sellers-flee-as-musk-s-carmaker-sets-delivery-record>.

199. *Id.*

200. Ian Bezek, *Tesla Vanquished the Short Sellers, but Risks Remain*, NASDAQ (Oct. 1, 2021), <https://www.nasdaq.com/articles/tesla-vanquished-the-short-sellers-but-risks-remain-2021-10-01> (discussing Tesla's \$690 million net income, or \$0.64 per share with a \$750 billion market capitalization, in com-



Corporations already actively use social media to disseminate information.<sup>201</sup> For example, several companies hired a ghostwriter on Twitter.<sup>202</sup> Betterment, an investing roboadvisor platform, saw a surge in signups after a TikTok influencer posted videos describing how to become a millionaire from Betterment.<sup>203</sup> One study used social media content analysis to confirm that in the “buy now, pay later” credit context, lenders engage with potential consumers on TikTok.<sup>204</sup> And companies are partnering with influencers to reach younger investors. This, of course, carries risks: companies can be promoted on social media fora, but they can also be panned by trolls.<sup>205</sup>

#### F. *Corporate Decisionmaking*

The ecosystem extends further. According to traditional theory, stock prices provide signals to managers and help direct limited real resources to the projects that generate the

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parison with Toyota’s \$21 billion net income, or \$15 per share with a \$250 billion market capitalization).

201. *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm’n, SEC Says Social Media OK for Company Announcements if Investors Are Alerted (Apr. 2, 2013), <https://www.sec.gov/news/press-release/2013-2013-51htm> (explaining that “companies can use social media outlets like Facebook and Twitter to announce key information in compliance with Regulation Fair Disclosure (Regulation FD) so long as investors have been alerted about which social media will be used to disseminate such information”).

202. *See* Mattathias Schwartz, *I Made \$200,000 Last Year Ghostwriting Tweets for Superstar VCs. It Takes Me 5 Hours a Week. Here’s How I Found My Clients and Built a Booming Side Hustle from Scratch*, BUS. INSIDER (Oct. 12, 2022), <https://www.businessinsider.com/twitter-ghostwriter-silicon-valley-vc-venture-founder-san-francisco-2022-10>.

203. Misyrlena Egkolfopoulou, *Wall Street Influencers Are Making \$500,000, Topping Even Bankers*, BLOOMBERG (Sept. 17, 2021), <https://www.bloomberg.com/news/articles/2021-09-17/social-media-influencers-income-advertising-wall-street-products#xj4y7vzkg?leadSource=Uverify%20wall?leadSource=uverify%20wall>.

204. Nikita Aggarwal et al., *#Fintok and Financial Regulation*, 54 ARIZ. ST. L.J. 333, 341 (2023).

205. *See, e.g.*, TAUTACHROME, INC., *Tautachrome (OTC: TTCM) Targets Criminal Stock Trolls and Forums that Protect Them* (Feb. 25, 2022), <https://www.globenewswire.com/en/news-release/2022/02/26/2392603/0/en/Tautachrome-OTC-TTCM-Targets-Criminal-Stock-Trolls-and-Forums-that-Protect-Them.html>.

most value in the economy.<sup>206</sup> A vast literature has evaluated this dynamic.<sup>207</sup> If prices contain information about finfluencer-driven preferences along nonfinancial values, those managers' decisions will also reflect those preferences, in responding to price movements that reflect these values. Managerial decisions may thus grow to reflect further retail or finfluencer-driven preferences.<sup>208</sup>

Consider an example where a firm is considering two projects. Project A has a net present value (NPV) of \$80, and Project B has an NPV of \$100. Project A involves partnering with Elon Musk, and Project B does not involve partnering with anyone. Once the two potential projects are announced, a particularly influential finfluencer aggressively promotes Project A despite its lower NPV, because the finfluencer knows their followers prefer content related to Elon Musk and Tesla. Choosing Project A might lead to a larger increase in the firm's stock price due to the finfluencer's impact, even though Project A has a lower NPV than Project B. Reasons for promoting Project A might vary, including that Project A might have sustainability or ecological implications, for example. In general, these reasons are not problematic and may be socially beneficial, if we take the view that prices naturally can or should reflect nonfinancial values. Corporations might simply pivot to considering nonfinancial values *ex ante* in choosing projects. In other words, those nonfinancial values may take on financial value, if corporations place a premium on projects such as Project A, which might be more sustainable or otherwise socially beneficial.

Companies may also deliberately attempt to attract the attention of finfluencers and retail investors by choosing

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206. See Fox et al., *Informed Trading*, *supra* note 151, at 833–34 (discussing the signaling effects of stock prices).

207. See, e.g., FOX ET AL., *supra* note 154, at 83 (citations omitted) (aggregating sources).

208. This can be analogized to trends in corporate decision making that prefer projects that promote ESG goals. See, e.g., Sharon Hannes et al., *The ESG Gap*, HEBREW UNIV. OF JERUSALEM LEGAL STUD. RSCH. PAPER SERIES NO. 23–4, 8–11 (Dec. 5, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4293914](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4293914) (describing the rise of ESG focus in the corporate world and considering proponents' justifications—long-term value maximization, stakeholderism and social preferences of investors—for the view that corporations should pursue ESG goals in addition to simple profit maximization).

projects that are likelier to appeal to them.<sup>209</sup> Doing so might become increasingly sensible given that younger consumers tend to want their brands to reflect their values.<sup>210</sup>

### G. *Capital Raises*

Stock prices also affect companies' ability to raise capital. Finfluencer-driven activity can shift a company's cost of capital, with both positive and negative implications.

On the one hand, if an issuer's share price is distorted, its cost of capital will not reflect its underlying viability. Weak underlying fundamentals may not prevent a company experiencing a finfluencer-driven rally from raising capital easily and cheaply.<sup>211</sup> Conversely, it may be harder for companies that

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209. See, e.g., Matt Levine, Opinion, *Meme Activists Come for Macy's*, BLOOMBERG (Nov. 4, 2021), <https://www.bloomberg.com/opinion/articles/2021-11-04/macy-s-targeted-by-meme-activists> (citing Letter from Guy Phillips, Managing Member, NuOrion Advisors, LLC, to Jeffrey Gennette, Chairman & Chief Exec. Officer, Macy's, Inc. (Nov. 4, 2021), <https://nuorionadvisorsbusiness.files.wordpress.com/2021/11/letter-to-m-chairman-3.pdf>) (considering how companies can appeal to meme investors through strategies such as partnering with electric vehicle companies and cryptocurrencies).

210. See Narula, *supra* note 88. As one example, an activist investor sent a letter to Macy's in November 2021 with the following: "Macy's share price is materially undervalued and requires urgent action to unlock value. We believe that by adopting the strategies discussed below, Macy's would be worth more than \$75 per share. . . . Macy's should form partnerships with EV car companies (e.g., Tesla, Lucid or Rivian) to showcase their products on the ground floor of Macy's 100 top landmark stores (e.g., Herald Square, Marshall Field, Union Square) and to use their massive parking footprint to build an EV charging network. . . . We believe that direct association with EV companies will drive enormous traffic to Macy's stores. In addition, Macy's should announce immediately that they are partnering with various Crypto platforms to allow digital payments." Letter from Guy Phillips to Jeffrey Gennette, *supra* note 209, at 1.

211. For example, AMC raised \$1 billion, while GameStop raised \$1.7 billion. Press Release, AMC Theatres Investor Relations, AMC Raises \$917 Million of Fresh Investment Capital Since Mid-December of 2020 (Jan. 25, 2021), <https://investor.amctheatres.com/newsroom/news-details/2021/AMC-Raises-917-Million-of-Fresh-Investment-Capital-Since-Mid-December-of-2020/default.aspx>; See Myles Udland, *GameStop Gives Investors 1.6 Billion Reasons to Care About the Meme Trade: Morning Brief*, YAHOO! NEWS (June 23, 2021), <https://news.yahoo.com/game-stop-gives-investors-16-billion-reasons-to-care-about-the-meme-trade-morning-brief-091020855.html>.

have stronger fundamentals but that lack finfluencer-driven support to raise capital.<sup>212</sup>

On the other hand, finfluencer-driven trading could help companies committed to projects that might create social benefits in the future achieve financing more easily today. For example, a company that is committed to combating climate change but is currently operating at a loss might benefit from finfluencer activity. Raising capital might become less expensive during a finfluencer-driven rally, which would allow that company to fund additional projects. If those projects become profitable, the company's "underlying value" would move closer to its higher stock price. As a result, the higher stock price becomes informative of the company's future cash flows rather than inflated.

#### H. *Finfluencer Financial Products*

Finfluencers not only drive investor preferences among existing financial products but can also spur an expanded supply of financial instruments in response to changing investor demand. These innovations, or additional or new instruments, can also reflect an expanded understanding of "information."

Kate Judge has written on the phenomenon of investor-driven innovation, which describes the emergence of innovations in response to investors who value aspects of financial instruments other than their risk-adjusted returns.<sup>213</sup> These innovations can include repackaged cash flows or reliance on derivatives in creative ways.<sup>214</sup> As Judge notes, ETFs, as a historical matter, were created principally in response to investor demand for low-cost, diversified investment options.<sup>215</sup> In addition, the "rapid rise of funds catering to investors' interests in integrating [environmental or social] values into their invest-

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212. See Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. (forthcoming Oct. 2022) (manuscript at 16-17), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4049896](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049896) (pointing out effects on cost of capital).

213. See Kathryn Judge, *Investor-Driven Innovation*, 8 HARV. BUS. L. REV. 291, 293 (2018) (providing an analysis of how financial innovation responds to investor demand).

214. *Id.*

215. *Id.* at 326-27.

ment strategies is a prime example of an investor-driven innovation.”<sup>216</sup>

Finfluencers are already creating financial products that cater to retail preferences. Kevin Paffrath, a YouTube finfluencer, has applied to launch three ETFs called Meet Kevin All In ETF, Meet Kevin Select ETF and Meet Kevin Moderate ETF.<sup>217</sup> Certain ETFs actively chase meme returns, betting that momentum and sentiment indicate future returns.<sup>218</sup> Four of these funds—SFYF, FOMO, BUZZ, and MEME—look at online social media chatter and high short interest, among other indicators, to select stocks.<sup>219</sup>

Finfluencer-driven prices can also impact stock indices that contain certain stocks, as well as funds that incorporate those stocks or indices. For example, the Russell 2000 experienced significant volatility as a result of trading in AMC and other meme stocks that are in the index.<sup>220</sup> GameStop and AMC are in the twenty-five billion dollar Vanguard Small Cap Value ETF and the SPDR S&P 1500 Momentum Tilt ETF.<sup>221</sup> Tesla was added to the S&P 500 in late 2020, which means that

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216. *Id.* at 319–20; *see also* Hannes et al., *supra* note 208, at 2, 8–11 (noting that ESG investment is expected to reach \$50 trillion by 2025, with more than half of investors invested in ESG products in 2022, and describing the rise of ESG focus in the corporate world and considering proponents’ justifications—long-term value maximization, stakeholderism and social preferences of investors—for the view that corporations should pursue ESG goals in addition to simple profit maximization).

217. Jakub, *supra* note 73.

218. *See* Michael Wursthorn, *Meet the ETF Portfolio Managers Trying Their Luck with Meme Stocks AMC and GameStop*, WALL ST. J. (June 19, 2021), <https://www.wsj.com/articles/meet-the-etf-portfolio-managers-trying-their-luck-with-meme-stocks-amc-and-gamestop-11624110383>; *see also* Lan Anh Tran, *What’s in a Meme ETF?*, MORNINGSTAR (Oct. 8, 2021), <https://www.morningstar.com/articles/1060452/whats-in-a-meme-etf>.

219. *See* Tran, *supra* note 218 (noting that SFYF contains the 50 most-popular stocks that its self-directed brokerage customers hold; BUZZ and MEME look to social media presence to select stocks, and MEME factors in high short interest).

220. *See* Kristine O’wram, *Russell 2000 Swells; Investors Await Update on AMC, GameStop*, BLOOMBERG NEWS (June 5, 2021), <https://www.bloomberg.com/news/articles/2021-06-05/russell-2000-swells-investors-await-update-on-amc-and-gamestop>; *see also* Gunjan Banerji & Michael Wursthorn, *You May Own AMC Stock After Its 2,850% Gain and Not Even Know It*, WALL ST. J. (June 2, 2021), <https://www.wsj.com/articles/amc-rally-accelerates-as-stock-price-more-than-doubles-11622656821>.

221. *See* Banerji & Wursthorn, *supra* note 220.

billions of dollars in index-held assets now also hold Tesla.<sup>222</sup> Because passive investing in many ways still dominates the U.S. investing landscape, enormous values of these funds are traded,<sup>223</sup> and changes to such indices have substantial downstream implications for funds with holdings tied to such indices.<sup>224</sup>

### I. *Market Impact and Capital Flow*

Finfluencer-driven trading is positioned to have long-lasting effects on information and the stock market. This is because influencers magnify the social media-fueled impact of retail trades. It is also because other market participants may increasingly rationally participate in influencer-driven trading or shift financial decisions in response to or in anticipation of influencer-driven activity. The more pronounced these phenomena, the greater the shift in the types of information that drive stock price movements—especially as it becomes more difficult to differentiate information from noise.

The stock market's basic function is a simple one: to facilitate capital raising. While noise is an inevitable component of markets, accurate prices have been understood to facilitate smoother capital raising so that companies generating the greatest social value receive more capital at lower cost. On the one hand, influencers can distort prices, negatively affecting corporate governance, capital raises, securities litigation, and market confidence.<sup>225</sup> On the other hand, more positively, influencers may cause capital to flow more to projects that sim-

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222. See Peter Santilli, *Tesla Stock Joins the S&P 500: A Game Changer*, WALL ST. J. (Dec. 21, 2020), <https://www.wsj.com/graphics/tesla-stock-joins-the-sp500/>.

223. See, e.g., *SPDR S&P 1500 Momentum Tilt ETF*, WALL ST. J., <https://www.wsj.com/market-data/quotes/etf/MMTM> (showing the valuation of assets traded in the SPDR S&P 1500 Momentum Tilt ETF); see Dawn Lim, *Index Funds Are the New Kings of Wall Street*, WALL ST. J. (Sept. 18, 2019), <https://www.wsj.com/articles/index-funds-are-the-new-kings-of-wall-street-11568799004> (highlighting the enormous value now traded in index funds).

224. See Sam Potter & Claire Ballentine, *AMC Drama Is Exposing Risks in \$11 Trillion World of Indexing*, BLOOMBERG NEWS (June 5, 2021), <https://www.bloomberg.com/news/articles/2021-06-05/amc-drama-is-exposing-risks-in-11-trillion-world-of-indexing>; see also Banerji & Wursthorn, *supra* note 220.

225. See Guan, *supra* note 17 (detailing how retail trading can affect prices with downstream implications for pricing and corporate governance).

ply reflect nontraditional types of information or values, as investors more broadly have done with respect to corporate ESG commitments.<sup>226</sup> This may be through selection of corporate projects, investment flow to finfluencer ETFs, or rational participation in finfluencer-driven trading.

## V.

### LONGER-TERM BENEFITS AND DANGERS OF FINFLUENCERS

Finfluencer-driven activity interacts with the stock market information ecosystem in complex ways. This Part considers the longer-term implications of finfluencer impact. Sections A and B discuss benefits of finfluencers, which include improving financial literacy and increasing retail participation in markets. Section C explores deviating motives that may diminish benefits and distort prices. Section D discusses difficulties in disciplining finfluencers, and Section E considers the potential for fraud and manipulation.

#### A. *Improving Financial Literacy*

Finfluencers can improve financial literacy, which is critically important as retail investors increasingly participate in stock markets and must wade through huge amounts of information. Leveraging the same trust and engagement traditional brand influencers rely on, finfluencers can act as educators and reach investors otherwise resistant to traditional financial advice.<sup>227</sup>

This is already occurring. Investment platforms such as Betterment, Wealthfront, and even Fidelity, are already part-

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226. See Judge, *supra* note 213; Hannes et al., *supra* note 208, at 2 (noting that ESG investment is expected to reach \$50 trillion by 2025, with more than half of investors invested in ESG products in 2022). The increasing relevance of non-financial, social concerns to disclosure in the context of securities fraud-on-the-market suits has also been noted. See Kevin S. Haerberle, *Fraud-on-the-Market Liability in the ESG Era*, L. & ECON. CTR. AT GEO. MASON 22-041 (Feb. 28, 2023), <https://ssrn.com/abstract=4198386> (arguing that ESG disclosure merits reconsidering the scope of current fraud on the market doctrine).

227. See Taylan Yalcin et al., *Sustainability Influencers: Between Marketers and Educators*, 28 Bus. F. (Mar. 28, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3800316](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3800316); Egkolfopoulou, *supra* note 203.

nering with influencers.<sup>228</sup> Educational finfluencers exist across different social media platforms, ranging from those who promote specific stocks as a result of analysis to those who disseminate general investing tips.<sup>229</sup> Many retail investors turn to platforms such as TikTok or Instagram to learn about the stock market.<sup>230</sup> The finfluencer Mrs. Dow Jones has founded FINANCE IS COOL UNIVERSITY, a platform to disseminate market tips and information.<sup>231</sup> The website for FINANCE IS COOL UNIVERSITY states:

What's up, rich person? It's me Haley aka Mrs. Dow Jones and you've been CATFISHED! Yep, all this time you thought managing your money was impossible but it turns out you just didn't have the right teacher. Enter: Me! I'm about to reveal all the money secrets I personally use to get (and stay) rich. Starting from square one. Let me pop your financial cherry & open your eyes to just how fulfilling & exciting life can be when you are financially literate.<sup>232</sup>

In so doing, finfluencers can significantly improve retail financial literacy, a critical goal that has proven notoriously difficult to achieve.<sup>233</sup> Indeed, while some studies have noted that recent new retail investors tend to be younger, lower-income, and more diverse, it is also important to note that for many Americans, stock market participation is still out of reach (and highly correlated with income, education, age and race).<sup>234</sup>

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228. See Egkolfopoulou, *supra* note 203; Tara Siegel Bernard, *Trading Stock Tips on TikTok, Newbies Are Deeply Invested in Learning*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2021/04/28/your-money/stocks-investing-tiktok.html?searchResultPosition=2>.

229. See Bernard, *supra* note 228.

230. See *id.*

231. See Caleb Silver, *The Measure of Financial Influence with Mrs. Dow Jones*, INVESTOPEDIA (Aug. 22, 2022), <https://www.investopedia.com/the-express-podcast-episode-100-6501269>.

232. FINANCE IS COOL, <https://university.financeiscool.com/p/start-here> (last visited Apr. 17, 2023).

233. See, e.g., Fisch & Wilkinson-Ryan, *supra* note 131, at 605, 609 (exploring underinvestment, “naïve diversification,” and investing in excessive fee funds as reasons for common mistakes in retail investing).

234. See Mark Lush et al., *Investing 2020: New Accounts and the People Who Opened Them*, NORC UNIV. CHI. (Feb. 2021); Lydia Saad & Jeffrey M. Jones, *What Percentage of Americans Owns Stock?*, GALLUP (May 12, 2022). See also Fox et al., *supra* note 38, at 1290–91 (noting that negative market perceptions



Many influencers thus aim to appeal directly to communities with historically low stock market involvement. For example, 32-year old Rose Han, a YouTube and Instagram influencer, stated that “[i]f you turn on CNBC, it’s all these older white guys, and it’s hard to relate to them because I don’t look like them; a lot of my followers don’t look like them . . . Being a woman, women trust me more, because they’d rather learn from someone like me than from a finance bro.”<sup>235</sup> Tori Dunlap, along with a number of other female influencers, aims to help women reach each other in the investing community while being educational.<sup>236</sup> Dunlap has partnered with an app called Treasury, “an investing education platform for the Her First \$100K [Dunlap’s financial literacy company] community that combines non-judgmental discussion, jargon-free educational videos & articles and tools to easily understand and manage your investments.”<sup>237</sup>

This is especially true as younger retail investors increasingly look to social media sites when seeking out information. As stated previously, studies have shown that around forty percent of the younger demographic turn to TikTok or Instagram prior to Google.<sup>238</sup>

### B. *Increased Retail Participation*

Influencers can also promote more direct investor participation with companies by impacting shareholder governance—especially as influencer-driven trading increasingly affects corporate decisions. That is, retail traders might increas-

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can reduce retail participation in markets); *see also* Lydia Saad, *U.S. Stock Ownership Stays at Record Low*, GALLUP (May 8, 2013), <http://news.gallup.com/poll/162353/stock-ownership-stays-record-low.aspx> (describing stock ownership lows due to “fear the market is still too risky as long as joblessness remains a national problem,” at least partially); MICHAEL LEWIS, *FLASH BOYS: A WALL STREET REVOLT 200–01* (2014) (tying low stock ownership to perceptions of market unfairness); *see also* Editorial, *The Hidden Cost of Trading Stocks*, N.Y. TIMES (June 22, 2014), <http://www.nytimes.com/2014/06/23/opinion/best-execution-and-rebates-for-brokers.html> (explaining that sophisticated and everyday investors are not treated equally by the stock market).

235. Whelan, *supra* note 76.

236. *See* Bernard, *supra* note 75.

237. TREASURY, <https://treasury.app/herfirst100k/investing-101-workshop?source=Homepage> (last visited Apr. 24, 2023).

238. *See* Huang, *supra* note 87.

ingly be motivated to participate in stock markets and governance because their activity tangibly affects prices and corporate outcomes. This can create a feedback loop: as retail traders participate more, companies might more directly communicate with retail investors, spurring additional retail participation in governance.

As I and others have discussed elsewhere, retail investors have significantly increased their capacity to become actively involved in corporate and stakeholder governance.<sup>239</sup> Their social media and trading platforms have lowered the cost of acquiring information and facilitated retail governance participation.<sup>240</sup> Some commentators have thus argued that retail investors may generate substantial shifts in shareholder and corporate governance.<sup>241</sup> Another commentator pointed out that increased retail participation can benefit economic development, improving managerial accountability through direct investment and engagement with companies.<sup>242</sup> Finfluencer-driven trading could contribute to socially-oriented divestment

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239. See Guan, *supra* note 17. Retail investors have historically been thought to be disinclined to vote. See Ricci & Sautter, *supra* note 110, at 80–81. More recently, scholars have begun interrogating that belief. See Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 601 (2022); Jacob H. Russell, *Which Investors to Protect? Evolving Conceptions of the American Shareholder, 1900–Present*, in CAMBRIDGE HANDBOOK OF INVESTOR PROTECTION (Arthur B. Laby ed., forthcoming 2022) (manuscript at 43–44). Social media is also shifting that belief. See Seth C. Oranburg, *A Little Birdie Said: How Twitter Is Disrupting Shareholder Activism*, 20 FORDHAM J. CORP. & FIN. L. 695, 696 (2015); Ricci & Sautter, *supra* note 110, at 85; Fisch, *supra* note 212 (manuscript at 32) (discussing retail shareholders' role in stakeholder governance, given that “[r]etail shareholders do not simply represent, they embody the interests of employees, customers, the community and society at large”); See Alon Brav et al., *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. FIN. ECON. 492 (2022).

240. See Ricci & Sautter, *supra* note 110, at 83–88 (considering retail shareholder governance); Katja Langenbucher & Fizza Hasan, *GameStop—A Case for Empowering Retail Investors?: A Comparative Glance at the U.S. and the EU*, in SELBSTBESTIMMUNG: FREIHEIT UND GRENZEN 400–01 (Antje G.I. Tölle et al. eds., 2021) (discussing how retail investors might coordinate to monitor management and participate in shareholder governance).

241. See Ricci & Sautter, *supra* note 110, at 83–88; Langenbucher & Hasan, *supra* note 240. *But see* Aggarwal et al., *supra* note 56 (based on voting, shareholder proposal, and ESG metrics, finding little evidence that retail shareholders at meme stock companies led to more “democratic” governance regimes).

242. Fisch, *supra* note 212 (manuscript at 4).

and investment movements,<sup>243</sup> and some note that retail investors can even bring value through activist investing.<sup>244</sup>

This is already occurring in some ways. Executives, sometimes finfluencers, are actively seeking out retail investors to involve them in shareholder governance.<sup>245</sup> Companies—and corporate finfluencers—can communicate directly with retail investors on platforms such as Clubhouse, “a new type of social network based on voice—where people around the world come together to talk, listen and learn from each other in real-time.”<sup>246</sup> Robinhood recently provided its users with a platform to communicate with other investors as well as with corporations.<sup>247</sup> During Tesla’s second quarter 2021 earnings call, more than two thousand users upvoted one question (representing 367,000 shares of Tesla) on that platform.<sup>248</sup> Elon

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243. See Catharina Janz et al., *Does ESG Information Impact Individual Investors’ Portfolio Choices? – Evidence from an Experiment* (Jan. 21, 2023), <https://ssrn.com/abstract=4332893> (finding that ESG information impacts retail investors’ portfolio choices); Qianqian Li et al., *Retail Investors and ESG News*, Jacobs Levy Equity Mgmt. Ctr. for Quantitative Fin. Rsch. Paper Series (Mar. 10, 2023), <https://ssrn.com/abstract=4384675> (finding that retail investors care about ESG news to the extent they find it financially material to firm performance). This would be in line with broader ESG movements. See Hanes et al, *supra* note 208, at 3, 8–10 (noting that ESG investment is expected to reach \$50 trillion by 2025, with more than half of investors invested in ESG products in 2022 and describing the rise of ESG focus in the corporate world and considering proponents’ justifications—long-term value maximization, stakeholderism and social preferences of investors—for the view that corporations should pursue ESG goals in addition to simple profit maximization).

244. Ricci & Sautter, *supra* note 110, at 91–92.

245. See Nina Trentmann, *Connecting with Small Shareholders Remains a Challenge for Companies*, WALL ST. J. (Feb. 7, 2022), <https://www.wsj.com/articles/connecting-with-small-shareholders-remains-a-challenge-for-companies-11644229801>.

246. CLUBHOUSE, <https://www.clubhouse.com/> (last visited May 18, 2023); Matt Phillips, *Hungry for Investors, Some Companies Woo the Little Guy*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/13/business/stock-market-investors.html>; *AMC Entertainment Holdings, Inc.’s (AMC) CEO Adam Aron on Q1 2021 Results – Earnings Call Transcript*, SEEKING ALPHA (May 6, 2021), <https://seekingalpha.com/article/4425374-amc-entertainment-holdings-inc-s-amc-ceoadam-aron-on-q1-2021-results-earnings-call>.

247. See Lauren Solberg, *Robinhood Enters the Realm of Proxy Voting*, MORNINGSTAR (Oct. 6, 2021), <https://www.morningstar.com/articles/1060879/robinhood-enters-the-realm-of-proxy-voting>.

248. *Id.* The question was: “Elon has said that Tesla will be opening up the Supercharger network to other EVs later this year. Can you share more de-

Musk answered the question, and Tesla posted the question later on the platform.<sup>249</sup> Prior to AMC's 2021 annual shareholders' meeting, thousands of AMC's investors discussed voting strategies on Reddit.<sup>250</sup> Retail investors owned over eighty percent of AMC's shares, meaning that they could significantly impact the company.<sup>251</sup> Nikola Corporation and Lucid Group both recently used social media channels such as Reddit and YouTube to engage with retail investors in advance of shareholder votes, even directly engaging with a finfluencer in one instance.<sup>252</sup>

Just as they have driven the creation of certain ETFs and educational platforms, finfluencers might also drive the creation of voting platforms directed at retail shareholders. As one commentator has argued, direct retail investment in companies can make retail investors more likely to be informed about those companies,<sup>253</sup> and voting platforms for otherwise excluded retail investors would improve the shareholder voting process.<sup>254</sup> Voting platforms would enable retail traders to vote more easily, incentivizing companies and proxy solicitation firms to reach out directly to share information with traders.<sup>255</sup> This increased information-sharing by companies makes retail participants more informed and more likely to

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tails on how this will be structured? Will this be select brands? Will they contribute to the growth of the network?" (quoting Robert M., Retail Investor, Tesla).

249. *Id.*

250. *See id.* at 83 n.276.

251. *Aron, supra* note 246. Because of their nicknames, "apes," those investors also began adopting gorillas in 2021. *See* Jason Murdock, *WallStreetBets Users Adopt 3,500 Gorillas, Raise \$377,000 for Charity*, NEWSWEEK (Mar. 18, 2021), <https://www.newsweek.com/reddit-wallstreetbets-members-adopt-gorillas-charity-raisemoney-update-1577148>.

252. *See* Steve Lipin & Keilley Banks, *Getting Out the Retail Vote: Targeting Reddit and New Social Tools in Proxy Solicitations* (Sept. 3, 2022), <https://corp.gov.law.harvard.edu/2022/09/03/getting-out-the-retail-vote-targeting-reddit-and-new-social-tools-in-proxy-solicitations/> ("The use of new channels and tools reflects the changing nature of the investor community, many of whom are investing through Robinhood and other new platforms and swapping commentary on Reddit, StockTwits, YouTube, Twitter and others.").

253. Fisch & Wilkinson-Ryan, *supra* note 131 (manuscript at 31).

254. Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 12–19 (2017).

255. *Id.* at 46.

participate, creating a feedback loop.<sup>256</sup> Similarly, the rise of pass-through voting has led to significant investments in infrastructure to reach retail investors and may indicate a growing willingness to consider social or cultural values important to investors. Vanguard is starting a program to give individual investors more options regarding their shares,<sup>257</sup> and Blackrock is implementing a similar program.<sup>258</sup>

Facilitating retail voting and encouraging more informed investor participation could have further benefits, including improving financial literacy and enhancing perceptions of market fairness and access. As noted elsewhere, retail investors could also increase trader heterogeneity, which could help counteract socially harmful behavior by other trading groups, such as active manager herding or speculative trading by hedge funds or day traders.<sup>259</sup> Retail traders could thus potentially diminish market volatility, as retail traders' buying activity during market dips throughout the past few years exemplifies.<sup>260</sup>

### C. *Deviating Motives*

As discussed above, as finfluencers gain greater influence and a larger following, they can predict or control trading patterns more easily. This predictive ability can introduce incentives that deviate from providing valuable stock market information.

A central tension emerges. The more finfluencers mediate information, the more they cultivate their followers' trust and can add value for their followers. However, finfluencers

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256. *Id.*

257. See Silla Brush, *Vanguard to Test Giving Retail Investors More Voting Power*, BLOOMBERG (Nov. 2, 2022), <https://www.bloomberg.com/news/articles/2022-11-02/vanguard-to-test-giving-retail-investors-more-voting-power>.

258. Blackrock, *Empowering Investors through Voting Choice* (Nov. 2022), <https://www.blackrock.com/corporate/literature/publication/voting-choice-factsheet.pdf>.

259. See, e.g., Bikhchandani & Sharma, *supra* note 131, at 279–80, 303 (discussing how and why investment managers herd); Nerissa C. Brown et al., *Analyst Recommendations, Mutual Fund Herding, and Overreaction in Stock Prices*, 60 MGMT. SCI. 1, 3 (2014) (finding price-destabilizing effects resulting from fund managers who herd); Bubb & Krishnamurthy, *supra* note 183, at 1540, 1545 (considering the limits of rational behavior during bubbles); Fisch, *supra* note 212 (manuscript at 4) (discussing benefits of retail participation).

260. Wolff-Mann, *supra* note 114.

become better positioned to gain from wrongdoing, manipulation, and the mere ability to predict and influence their followers' behavior. Profiting at the expense of their followers becomes more tempting. Finfluencers can also be thought of as possessing specific types of private information, such as hype-related characteristics or what they choose to promote next, that the finfluencer can trade on in advance of their followers or the rest of the market. Such information and activity are difficult to observe and predict, making finfluencers' private knowledge particularly valuable.

As finfluencers act as informational bottlenecks and shape the types of "information" reflected in stock prices, their incentives can become skewed and the information reaching investors can be limited or worsened. Finfluencers might lie, create bubbles, keep information private for longer, or release information only once it becomes stale (and after the finfluencer has traded on it).

#### D. *Finfluencer Discipline*

Traditional brand influencers that market products directly to followers often receive compensation from firms. To a certain degree, these influencers are motivated to write honest reviews because their reputation directly affects their ability to obtain future paid promotions and to reach additional consumers.<sup>261</sup> But even then, consumers struggle to adequately discipline traditional brand influencers for misrepresentations and bad behavior.<sup>262</sup>

To the extent they are sharing investment advice or market information, finfluencers may experience even less of a direct link between reputation and honest performance. When a traditional brand influencer promotes a product, their followers can test it out and assess the influencer's honesty and trustworthiness. But assessing investment advice is notoriously noisy. The behavior and performance of traditional broker-dealers and financial advisors is already difficult to monitor.

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261. Zijun Tian, *How Should Firms Cooperate with Honest Influencers?* (July 26, 2022), <https://ssrn.com/abstract=4173460> (explaining that influencers value their authenticity); Amy Pei & Dina Mayzlin, *Influencing the Influencers* (Sept. 10, 2021), <https://ssrn.com/abstract=3376904> (examining various degrees of affiliation between companies and influencers).

262. See Roberts, *supra* note 47, at 100–01 (documenting difficulties faced by unhappy consumers).

The assessment is even more difficult if a finfluencer is selling not just investment information, but also more intangible products, such as meme-based entertainment or contrarian content.<sup>263</sup>

Consequently, followers may be even less able to effectively discipline finfluencer behavior. Thus, from the finfluencer's perspective, the perceived cost of manipulation, fraud, or creating a bubble *ex ante* may be lower because the value of a finfluencer's content is less measurable and observable, at least in terms of reputational risk among followers. Moreover, unlike a firm such as Hindenburg Research or a person such as Jim Cramer, the consequences of providing bad information may be lower. The relative anonymity of social media may also provide a shield. A large literature has explored the negative impact of online anonymity on behavior.<sup>264</sup> Similarly, having standalone fame may cushion reputational harms. For example, Elon Musk may not suffer reputational repercussions when his non-informative tweets lead to stock price changes.

#### E. *Fraud and Manipulation*

At their worst, finfluencers may engage in fraud or manipulation. Successful frauds require disseminating falsehoods that induce others to trade in predictable ways that allow perpetrators to profit off the resulting price moves. Successful manipulations require predicting price movements or influencing price movements in predictable ways, likewise enabling the manipulator to trade in a way that profits off the resulting price moves. Finfluencers are particularly well-positioned to induce price-moving trades among their followers. If a group of traders that follows a finfluencer's advice can move stock prices, and if the finfluencer can control those movements, the finfluencer can buy low and sell high and make significant amounts of money at the expense of their followers.

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263. See Daniel Bradley et al., *Bucking the Trend: The Informativeness of Analyst Contrarian Recommendations*, 43 FIN. MGMT. 391 (2014) (finding larger market reactions in response to contrarian analyst recommendations).

264. See, e.g., Maria Konnikova, *The Psychology of Online Comments*, NEW YORKER (Oct. 23, 2013), <https://www.newyorker.com/tech/annals-of-technology/the-psychology-of-online-comments>.

Several notable pump and dump schemes by finfluencers have made the news in recent years. In late 2021, Steven Gallagher was arrested and charged with securities fraud, wire fraud, and manipulation for using his Twitter account to engage in a pump and dump scheme.<sup>265</sup> After amassing a large following on Twitter under the handle @AlexDelarge6553 (named for the character in *A Clockwork Orange*), Gallagher repeatedly purchased thinly-traded penny stocks and tweeted false and misleading information to encourage his followers to buy those stocks, enabling Gallagher to sell his shares at inflated prices.<sup>266</sup> Similarly, in February 2022, the SEC charged Michael M. Beck for penny stock fraud using his Twitter handle @BigMoneyMike6.<sup>267</sup> And in December 2022, the SEC charged eight social media influencers with fraud and stock market manipulation on Twitter and Discord.<sup>268</sup> According to the Chief of the SEC Enforcement Division's Market Abuse Unit, ". . . [T]he defendants used social media to amass a large following of novice investors and then took advantage of their followers by repeatedly feeding them a steady diet of misinformation, which resulted in fraudulent profits of approximately \$100 million."<sup>269</sup> The defendants gained hundreds of thousands of followers on social media, encouraged their followers to purchase stocks the defendants had already bought, and then sold the promoted stocks once their prices rose.<sup>270</sup>

Of course, pump and dump schemes are not new;<sup>271</sup> social media just makes fraud and manipulation easier to accom-

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265. Sealed Complaint, U.S. v. Gallagher, *supra* note 12, at 1–3; Complaint, SEC v. Gallagher, *supra* note 12, at 3–4.

266. Sealed Complaint, U.S. v. Gallagher, at 2; Complaint, SEC v. Gallagher, *supra* note 12, at 6.

267. Complaint, SEC v. Beck, at 6.

268. U.S. SEC. & EXCH. COMM'N, *supra* note 1; Complaint, SEC v. Constantin et al., *supra* note 1, at 2.

269. U.S. Sec. & Exch. Comm'n, *supra* note 1.

270. *Id.*

271. *See, e.g.*, Fox et al., *supra* note 151, at 111–12 (discussing various types of stock market manipulation); Tom C.W. Lin, *The New Market Manipulation*, 66 EMORY L.J. 1253, 1292 (2017) ("Unscrupulous parties can now leverage the mechanisms of new media technology and new financial technology to disrupt and distort financial markets on an unprecedented scale by disseminating bad data, fake news, and faulty information into a marketplace that thrives on accurate information." (first citing Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 714 (2006); and then citing Sabrina Tavernise, *As Fake News Spreads Lies, More*



plish.<sup>272</sup> Josh Mitts has identified another recent outgrowth of social media-based manipulation: pseudonymous short attacks on public companies followed by price declines and subsequent reversals.<sup>273</sup> In these situations, followers traded on the perceived information disseminated by finfluencers or by pseudonymous writers on the investing site SeekingAlpha.com.<sup>274</sup> Finfluencers were able to generate price movements through follow-on retail trading due to their social media reputation and influence.

To further illustrate the ease of committing fraud or manipulation through finfluencing, consider a pharmaceutical company stock priced at two dollars per share. Volume traded is low, meaning that causing price movements through trading is relatively easy. A finfluencer with a sizeable social media following tells their followers that the company has a drug about to receive FDA approval, a falsehood. The finfluencer has already bought a significant number of shares of the stock at two dollars per share. Upon hearing the lie, the finfluencer's followers pile into the stock, buying until the price reaches five dollars per share. At this point, the finfluencer sells all their shares, making a profit of three dollars per share. The false-

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*Readers Shrug at the Truth*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/us/fake-news-partisan-republican-democrat.html>).

272. See Thomas Renault, *Market Manipulation and Suspicious Stock Recommendations on Social Media* (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3010850](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010850) (analyzing Twitter messages regarding small capitalization firms and finding evidence consistent with pump and dump schemes); David Skillicorn & David Nam, *Detecting Stock Market Manipulation from Online Forums* (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4041038](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4041038) (building predictive models for pump and dump schemes using social media posts' language); Christian Leuz et al., *Who Falls Prey to the Wolf of Wall Street? Investor Participation in Market Manipulation* (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3082266](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082266) (analyzing characteristics of the varying types of individuals who invest in pump and dump schemes); Jean-Yves Delort et al., *The Impact of Manipulation in Internet Stock Message Boards* (Oct. 30, 2009), <https://ssrn.com/abstract=1497883>; Sanjiv Sabherwal et al., *Do Internet Stock Message Boards Influence Trading? Evidence from Heavily Discussed Stocks with No Fundamental News*, 38 J. BUS. FIN. & ACCT. 1209 (2011) (finding that online message boards can predict trading in some situations).

273. Mitts, *supra* note 31.

274. See, e.g., *id.* at 310 (noting that the market is likely to believe a pseudonym in two scenarios: cases in which an author's prior predictions have historically yielded nonreversals, on average, and cases in which the author has no history).

hood is exposed, and the share price reverses back to two dollars. Many followers who bought at high prices have now suffered substantial losses.

This example illustrates that profitable manipulation or fraud is possible—and even simple—because follower activity is predictable. So one major concern posed by the rise of finfluencers is their ability to amass followers and incentive to profit off of them. Those harmed might include retail investors who exit from the market after losing substantial amounts of money.<sup>275</sup> People who otherwise would invest in the stock market might suffer diminished savings, which might lead to broader negative macroeconomic repercussions.<sup>276</sup> Companies might also suffer reputational injury because of finfluencer activity.<sup>277</sup>

## VI.

### THE WAY FORWARD

This Part considers the way forward. How do we increase the benefits and decrease the dangers of finfluencing? Although a full explication of reforms is beyond the scope of this Article, this Part provides a preliminary treatment.

At one end, it is critical to incentivize valuable information generation by finfluencers. At the other end, existing prohibitions in the securities markets may offer sufficient protection against clear fraud and manipulation. In the middle, protections against information that is legal but poor quality are not currently robust and should be carefully considered. Section A discusses existing prohibitions against fraud and manipulation. Section B considers requiring more robust disclo-

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275. See Fox et al., *supra* note 38, at 1290–91 (discussing how retail market participation might decrease due to negative perceptions of the market); see also Saad, *supra* note 234 (describing stock ownership lows resulting at least partially from “fear the market is still too risky as long as joblessness remains a national problem.”); LEWIS, *supra* note 234, at 200–01 (tying low stock ownership to perceptions of market unfairness); see also N.Y. TIMES, *supra* note 234 (explaining differences in how the stock market treats sophisticated and everyday investors).

276. Fox et al., *supra* note 38, at 1290–91 (pointing out that public perception may warrant a policy response if it is difficult to eradicate and is damaging market functioning).

277. See Roberts, *supra* note 47, at 99.

sure from finfluencers. Section C evaluates ways to incentivize better information.

#### A. *Regulating Fraud and Manipulation*

The antifraud and antimanipulation provisions of the securities laws prohibit clearly illegal misconduct in securities markets.<sup>278</sup> Regulators and courts primarily rely on two provisions of the Securities Exchange Act of 1934 to protect investors from fraud and manipulation: Section 10(b) and its accompanying Rule 10b-5, and Section 9(a).<sup>279</sup>

Section 9(a)(2) prohibits effecting “a series of transactions” in a security (1) that “creat[e] actual or apparent active trading” or affect its price, (2) “for the purpose of inducing the purchase or sale of such security by others.”<sup>280</sup> Section 10(b) prohibits the use of “any manipulative or deceptive device” in connection with trading a security in violation of a Securities and Exchange Commission (SEC) rule.<sup>281</sup> Rule 10b-5 makes it unlawful, in connection with the purchase or sale of any security,

(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person[.]<sup>282</sup>

At its core, Section 9(a) depends on the manipulator’s purpose, as purchasing or selling a security will necessarily create an actual trade and often affects the price of the security. Rule 10b-5 has largely been used to police deceit and misrepresentation.<sup>283</sup>

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278. By contrast, others have written on the difficulties of holding traditional brand influencers accountable, suggesting creative ways to discipline bad actors. *See generally id.*

279. Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(a)(2), 78j(b).

280. *Id.* § 78i(a)(2).

281. *Id.* § 78j(b).

282. Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2021).

283. *Chiarella v. United States*, 445 U.S. 222, 234–35 (1980) (“Section 10(b) is aptly described as a catchall provision, but what it catches must be

Pump and dump schemes on social media fall easily within these proscriptions. However, one can imagine the difficulties in applying the regulations to a situation in which a finfluencer simply discloses a financial position in a company's stock or blindly pulls Scrabble tiles from a bag to dictate their trades. Limited remedies exist for investors who might claim they suffered losses as a result of Ryan Cohen's Bed Bath and Beyond stock sales, or because they bought risky stocks after Portnoy randomly selected them. In such situations, no falsehood has been told and intent to manipulate, if it exists, would be difficult to prove. In other words, finfluencers today can easily profit off of their followers' predictable trading behavior without running afoul of antifraud or antimanipulation laws. Merely profiting off other traders' behavior, without more, is not illegal; doing so is the basis of all trading behavior in the stock market.

In other words, the antifraud and antimanipulation laws can be used effectively to prohibit and punish clearly illegal deceptive and manipulative activity.<sup>284</sup> This will protect investors against the worst forms of finfluencer misconduct. On the other hand, legal but potentially harmful behavior requires more creative responses, as discussed next.

#### B. *Finfluencer Disclosure*

Disclosure can help deter bad behavior or at least mitigate harm. In the traditional brand influencing context, studies have demonstrated that consumers view influencer content more critically and find it less persuasive if they know it is sponsored.<sup>285</sup> In the securities context more broadly, disclo-

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fraud.”). Fox et al., *supra* note 154, at 118 n.122 (“See, e.g., Schreiber v. Burlington N., Inc., 472 U.S. 1. 8 n.6 (1985) (“Congress used the phrase “manipulative or deceptive” in § 10(b) and we have interpreted “manipulative” in that context to require misrepresentation.” (citations omitted)); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 476 (1977) (manipulation “refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity” (citations omitted)); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976) (“[T]he word “manipulative” . . . is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.” (citations omitted))).

284. This is especially true if materiality is broadly defined.

285. See Roberts, *supra* note 47, at 99–100 (collecting sources).

sure plays a central role in market functioning.<sup>286</sup> At the same time, the limits to disclosures have also been widely discussed.<sup>287</sup>

Most disclosures in securities markets are company-specific, not finfluencer-specific. The distinction is potentially important. Whereas investors might find company-level disclosures confusing and challenging to process, investors may respond more effectively to finfluencer-specific disclosures. Knowing that a finfluencer's post is sponsored may cause viewers to engage with the content more critically and skeptically.<sup>288</sup> Finfluencer disclosures of paid promotions can make

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286. See, e.g., Goshen & Parchomovsky, *supra* note 271, at 756–57 (discussing the relationship between disclosure and governance).

287. See, e.g., Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059, 1061–68 (2011) (considering the failures of stockbroker disclosure); James Fallows Tierney, *Investment Games*, 72 DUKE L.J. (forthcoming 2022–2023) (manuscript at 1, 6), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3916407](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916407) (arguing that “sophisticated financial intermediaries” largely control investor protection under modern securities law).

288. Disclosures should be utilized carefully. A substantial literature exists on the efficacy of trade-level disclosures, a large portion of which indicates that such warnings are often ineffective and potentially counterproductive. See, e.g., Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 599–604 (2013) (discussing the limits of disclosure, including for sophisticated investors); Prentice, *supra* note 287, at 1061–68. For example, companies like AMC and Hertz expressly warned investors that their stock might be worthless. See Joe Wallace, *AMC Shares Sink on Stock Sale Plan and Warning to Buyers*, WALL ST. J., (June 3, 2021) <https://www.wsj.com/articles/meme-stocks-gyrate-after-amc-files-to-sell-more-shares-11622721750>; Hertz Glob. Holdings, Inc., Prospectus Supplement to Prospectus Dated June 12, 2019 (Registration Statement No. 333-231878) (June 15, 2020) (“We are in the process of a reorganization under chapter 11 of title 11, or Chapter 11, of the United States Code, or Bankruptcy Code, which has caused and may continue to cause our common stock to decrease in value, or may render our common stock worthless. Investing in our common stock involves a high degree of risk.”). These warnings did not prevent retail investors from purchasing the stock. See Virginie Montet, *AMC Completes Large Stock Offering Despite Blunt Investor Warning*, YAHOO! NEWS (June 3, 2021), <https://news.yahoo.com/amc-completes-large-stock-offering-183303685.html> (noting that AMC raised nearly \$600 million despite warning that “[u]nder the circumstances, we caution you against investing in our Class A common stock, unless you are prepared to incur the risk of losing all or a substantial portion of your investment” (quoting AMC, Prospectus Supplement to Prospectus Dated December 30, 2020 (File No. 333-251805) (January 25, 2021))).

their followers feel more informed and encourage them to critically evaluate information, further contributing to financial literacy and retail participation.

Other types of disclosures can be considered.<sup>289</sup> For example, social media platforms could publish lists of influencers who have had been fined or had legal action taken against them, much as FINRA's BrokerCheck database provides information on credentials and violations for brokers.<sup>290</sup> Doing so could be voluntary, if social media companies believe that users prefer platforms with trustworthy influencers. Corporations or hedge funds could be encouraged to disclose social media activity as well, in the same way that commitment to social or environmental goals has gained significant traction in the corporate world.<sup>291</sup> In non-financial contexts, others have

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289. While beyond the scope of this Article, it bears noting that regulating influencer content may implicate certain First Amendment concerns. Under the Investment Advisers Act of 1940, which governs investment advice and advisers, individuals can disseminate financial advice without registering under the Act so long as it is through a "publication of regular and general circulation." In October 2021, Robinhood's submission to the SEC argued that "Whether through words or other modes of communication such as animation and graphics, [digital engagement] practices convey ideas and information and thus constitute speech entitled to First Amendment protection," and that "[a]n effort to regulate digital engagement practices based on their communicative content would therefore face strict First Amendment scrutiny — which regulations rarely survive." *See also, e.g.*, Norton, *supra* note 131 (exploring the intersection between First Amendment protections and manipulation). Norton explores the degree to which manipulative speech is prohibited and points out that the Supreme Court's commercial speech doctrine does not address commercial speech that is manipulative but not deceptive. *Id.* at 233. Norton proposes that the Court should extend its doctrine to include "manipulative" commercial speech. *Id.* False or misleading speech is not protected by the First Amendment. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64 (1980).

290. BrokerCheck, FINRA, <https://brokercheck.finra.org/>.

291. *See, e.g.*, Hannes et al., *supra* note 208, at 8–10 (describing the rise of ESG focus in the corporate world and considering proponents' justifications—long-term value maximization, stakeholderism and social preferences of investors—for the view that corporations should pursue ESG goals in addition to simple profit maximization). A wide-ranging debate exists as to the effectiveness of ESG commitments. *See id.* at 3 (observing a "wide gap between the rhetoric that calls for the promotion of ESG goals and the advancement of ESG goals in practice"); Dorothy Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563; Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs*, (N.Y.U. L. & Econ Rsch, Working Paper No. 22-01, 2022), <https://ssrn.com/abstract=3974697>.

proposed various tools to address harmful and manipulative activity online: limitations on autoplay and infinite scrolling, strict default privacy settings, and other content-neutral restrictions.<sup>292</sup> Others have argued that financial regulators such as the Consumer Financial Protection Bureau should engage in social media content analysis to monitor consumers, influencers, and market activity, treating platforms such as TikTok as “modern complaint boxes.”<sup>293</sup> This could also chill predatory behavior, the authors argue.<sup>294</sup>

With respect to sponsored finfluencer activity, Section 17(b) of the Securities Act of 1933 contains anti-touting provisions that prohibit promoting a security without disclosing compensation or the amount of such compensation.<sup>295</sup> The SEC has recently settled with a number of celebrities over illegal touting of cryptocurrency on social media without disclosing that they received payments.<sup>296</sup> Courts have also held that news writers have a duty to disclose certain stock market financial interests.<sup>297</sup> Of course, broker-dealers and investment advisors are subject to a detailed regime of regulations governing many aspects of their practices, including disclosure, reporting, marketing, and so forth.<sup>298</sup> These regulations apply to their social media activity as well. However, most finfluencers

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292. See, e.g., Norton, *supra* note 131, at 241–42 (collecting sources).

293. Nikita Aggarwal et al., #Fintok and Financial Regulation, 54 ARIZ. ST. L. J. 333, 337 (2023).

294. *Id.*

295. 15 U.S.C. § 77q(b).

296. U.S. SEC. & EXCH. COMM’N, *supra* note 52; U.S. SEC. & EXCH. COMM’N, *NBA Hall of Famer Paul Pierce for Unlawfully Touting and Making Misleading Statements about Crypto Security* (Feb. 17, 2023), <https://www.sec.gov/news/press-release/2023-34>; U.S. SEC. & EXCH. COMM’N, *SEC Charges Crypto Entrepreneur Justin Sun and his Companies for Fraud and Other Securities Law Violations* (Mar. 22, 2023), <https://www.sec.gov/news/press-release/2023-59> (charging Lindsay Lohan, Jake Paul, DeAndre Cortez Way (Soulja Boy), Austin Mahone, Michele Mason (Kendra Lust), Miles Parks McCollum (Lil Yachty), Shaffer Smith (Ne-Yo), and Aliaune Thiam (Akon)).

297. See Mitts et al., *supra* note 31, at 5 (collecting cases).

298. See U.S. Sec. & Exch. Comm’n, Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice (Aug. 27, 2021), <https://www.sec.gov/rules/other/2021/34-92766.pdf>, pp. 33–35 (asking for comments regarding digital engagement investment practices).

are not registered financial advisors and may not be subject to many of these regulations, especially if they are not receiving payment for their content.

Some jurisdictions have begun to issue advice regarding social media financial content. So far, the SEC has largely limited inquiries into the social media use of registered investment advisers or broker-dealers.<sup>299</sup> Financial regulators elsewhere have begun to issue guidance related to financial advice on social media, typically clarifying how financial content might breach relevant regulations.<sup>300</sup> For example, a statement issued in October 2021 by the European Securities and Markets Authority clarified the consequences of EU Market Abuse Regulation violations for investment recommendations on social media.<sup>301</sup> Similarly, an information sheet issued in March 2022 by the Australian Securities and Investments Commission warned against potential violations of the 2001 Corporations Act for social media influencers with financial content.<sup>302</sup>

### C. *Better Finfluencer Information*

More broadly, it is important to incentivize better information generation by finfluencers. Of course, understanding what comprises “good” information remains a challenge. Information continues to evolve beyond financial statement analysis, even for traditional investors.<sup>303</sup> And as discussed pre-

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299. *See id.* at 1.

300. *See* DELOITTE, *Regulatory Posture on Social Media Advertising and Finfluencers* (June 28, 2022), <https://www2.deloitte.com/gu/en/pages/financial-services/articles/regulatory-posture-social-media-advertising-finfluencers.html> (summarizing guidance provided by the Financial Market Authority of New Zealand, the European Securities and Markets Authority, the Australian Securities and Investments Commission, and the Monetary Authority of Singapore, among other regulatory bodies).

301. EUR. SEC. & MKTS. AUTH., *ESMA’s Statement on Investment Recommendations on Social Media* (Oct. 28, 2021), [https://www.esma.europa.eu/sites/default/files/library/esma70-154-2780\\_esmas\\_statement\\_on\\_investment\\_recommendations\\_on\\_social\\_media.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-154-2780_esmas_statement_on_investment_recommendations_on_social_media.pdf).

302. AUSTL. SECS. & INVS. COMM’N, *Discussing Financial Products and Services Online* (Mar. 2022), <https://asic.gov.au/regulatory-resources/financial-services/giving-financial-product-advice/discussing-financial-products-and-services-online/>.

303. *See, e.g.*, U.S. SEC. & EXCH. COMM’N, *SEC Says Social Media OK for Company Announcements if Investors Are Alerted* (Apr. 2, 2013), <https://www.sec.gov/news/press-release/2013-2013-51.htm> (clarifying that compa-



viously, the borders of the market's understanding of "information" may merit expansion.

If deployed productively, finfluencers and social media can play a substantial role in disseminating good information to retail investors, which would expand the retail investor base and help address broader financial literacy and fairness concerns.<sup>304</sup> Finfluencers' incentives to strengthen their reputations, develop trust, and amass additional followers should be leveraged. Research in analogous contexts has found that social monitoring may generate better informational content in financial reports.<sup>305</sup> If finfluencers who have historically provided valuable information generate more trust and engagement among followers, those finfluencers might be incentivized to continue to provide valuable information and discouraged from providing poor quality information.

Incentivizing finfluencers to generate good information that contributes to price accuracy would benefit retail investors as well as the market's price discovery mechanisms. Additional incentives could be given to finfluencers who make edu-

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nies can use social media to disseminate information in compliance with Regulation Fair Disclosure).

304. Fairness concerns and other structural disadvantages experienced by retail investors could also be alleviated by an improvement in the quality of information disseminated by social media. Theoretical conceptions of "fairness" in stock prices do not evaluate whether each investor nets a positive return. Instead, the evaluation of fairness generally depends on how it affects market participants' wealth positions *ex ante*. See Fox et al., *supra* note 38, at 1263. Fair prices, moreover, are commonly defined simply as prices that reflect all publicly available information. Of course, *perceived* fairness can significantly affect retail investing behavior. See FOX ET AL., *supra* note 14, at 49–54.

305. Fox et al., *supra* note 38, at 1368 (discussing how Seeking Alpha authors might be incentivized to contribute good information); see also Jonathan Clarke et al., *Fake News, Investor Attention, and Market Reaction*, 32 INFO. SYS. RSCH. 35, 49–51 (2021) (demonstrating that fake news attracts more attention than legitimate news on Seeking Alpha); Paulo B. Goes et al., "Popularity Effect" in *User-Generated Content: Evidence from Online Product Reviews*, 25 INFO. SYS. RSCH. 222, 236 (2014) (noting that more objective reviews result from more viewership). Of course, rational decision making can also be impeded by social monitoring, as others discussed in the context of disclosure. Peer activity may lead to more self-monitoring and better outcomes, but it can also worsen irrational behavior. See Davidoff & Hill, *supra* note 288, at 603, 632 (discussing the limits of disclosure) (citing Judith Chevalier & Glenn Ellison, *Career Concerns of Mutual Fund Managers*, 114 Q. J. ECON. 389, 389 (1999)).

cation a significant part of their platform. For example, regulators could consider partnering with platforms such as FINANCE IS COOL UNIVERSITY to warn against misinformation.

As discussed above, companies and institutional investors might consider communicating directly with influencers and retail investors. One way to do this is through voting platforms. Vanguard and Blackrock have launched programs to give individual investors more options regarding their shares.<sup>306</sup> Increased participation and communication could facilitate better information sharing while contributing to financial literacy.<sup>307</sup> Companies and institutional investors can also reach influencers and retail investors through direct retail communication. Companies are increasingly shifting their communication strategies to include direct conversations with retail investors, content on social media, and monitoring retail trading platforms.<sup>308</sup> Expanding access and communication could also increase companies' or institutions' willingness to consider social or cultural values that are important to influencers and retail investors in making financial decisions.

Finally, it may be worth considering developing some kind of a repository for "qualified" influencers. As one example, the Financial Planning Standards Board has recently provided recommendations to the International Organisation of Securities Commissions Retail Market Conduct Task Force, suggesting the establishment of a regulatory "sandbox" for influencers and publication of a list of participating influencers.<sup>309</sup>

#### CONCLUSION

This Article has documented the rise of influencers in today's stock markets, analyzed how influencer-driven trading interacts with the conventional normative framework for price

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306. See Brush, *supra* note 257; Blackrock, *supra* note 258; Martha Carter et al., *Be Careful What You Wish For*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 28, 2022), <https://corpgov.law.harvard.edu/2022/12/28/be-careful-what-you-wish-for/>.

307. Fisch, *supra* note 212 (manuscript at 31).

308. See Trentmann, *supra* note 245.

309. Sonia Rach, *Finfluencers' Are the Supply Filling a Demand*, FIN. TIMES (Aug. 25, 2022), <https://www.ftadviser.com/your-industry/2022/08/25/finfluencers-are-the-supply-filling-a-demand/>.

discovery, and assessed the benefits and dangers of finfluencers.

Finfluencers are disrupting the information-based ecosystem of today's stock markets by amplifying retail trading impact and expanding the types of "information" reflected in stock prices. Markets must reconsider what information is contained in stock prices and who controls or shapes that information. Capital flow in the real economy is being affected in complex ways and might increasingly reach projects that reflect nontraditional types of information or values. While finfluencers can benefit the market by improving financial literacy and increasing retail participation, they may also have skewed incentives to create bubbles or engage in fraud and manipulation. While the securities laws are equipped to punish clearly illegal behavior, other reforms should focus on improving communication and information.



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DISCLOSING WITH CARE: EXPLORING A  
CORPORATE DISCLOSURE REGIME FOR  
STATELESSNESS

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*Approximately 10 million people around the world do not hold any recognized nationality. Significantly more are unable to access any formal documentation to prove their nationality and are thus unable to access fundamental rights and services, such as education, employment, and travel. Public international law initiatives, though critical, have not been able to resolve the most intractable statelessness crises despite decades of treaty-making and other efforts. As a result, more innovative responses are needed to address the severe and ongoing violations of stateless people's rights. This Note explores the potential role for corporate disclosure requirements in addressing the statelessness crisis. Modeling a potential disclosure regime based on the Dodd-Frank Act, California Transparency in Supply Chains Act, and the French Corporate Duty of Vigilance Law and applying it to the statelessness situation in Dominican Republic, this Note assesses the potential for corporate involvement in issues impacting vulnerable populations such as stateless individuals. Ultimately, this Note concludes that the risks of a disclosure regime for stateless individuals may outweigh the benefits unless serious care is taken to ensure that reporting is accompanied by the necessary protections. In doing so, the Note sheds light on possible protections that must be included in a regime and highlights the possible risks of due diligence regimes for human rights concerns impacting vulnerable populations more generally.*

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#### INTRODUCTION

Statelessness, defined as the lack of a recognized nationality, was characterized by the late Chief Justice Earl Warren as “a form of punishment more primitive than torture.”<sup>1</sup> Famously described by philosopher Hannah Arendt as the “right to have rights,” the fundamental right to nationality and identity documentation is a prerequisite for access to state protection and a wide range of other basic rights, including education, healthcare, and freedom of movement.<sup>2</sup> Individuals with-

1. U.N. High Comm’r for Refugees, *A Special Report: Ending Statelessness Within 10 years*, UNHCR, <https://www.unhcr.org/protection/statelessness/546217229/special-report-ending-statelessness-10-years.html> (last visited May 9, 2022).

2. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (2nd enlarged ed. 1958); U.N. High Comm’r for Hum. Rts., *OHCHR and the Right to a Nationality*, <https://www.ohchr.org/en/nationality-and-statelessness> (last visited July 28, 2023); David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 Hum. Rts. Q. 245 (2006), [https://scholarship.law.umn.edu.faculty\\_articles/412](https://scholarship.law.umn.edu.faculty_articles/412).

out a nationality are significantly more vulnerable to violence, trafficking, forced displacement, and other forms of abuse.<sup>3</sup>

Although having a nationality is imperative for the realization of a host of basic rights, statelessness remains an ongoing issue. The United Nations High Commissioner for Refugees (UNHCR) estimates that there are approximately 10 million stateless individuals around the world.<sup>4</sup> The urgency and complexity of statelessness issues requires innovative solutions from the global community and may call for participation from actors typically outside of the discussion around solutions to statelessness. Transnational corporations (hereinafter “TNCs”) are one such actor. In regions with significant stateless populations, TNCs may employ or exploit stateless individuals in their supply chains.<sup>5</sup> TNCs also possess the power and resources necessary to move the dial on statelessness by putting pressure on governments, raising awareness, and supporting local initiatives to alleviate statelessness.<sup>6</sup>

This Note analyzes the possibility of addressing the problem of statelessness through the corporate reporting requirements. Over the past two decades, a number of initiatives have been introduced both in the United States and in other countries, mandating corporate disclosures on human rights issues ranging from the use of conflict minerals to the use of forced labor in supply chains.<sup>7</sup> These initiatives require corporations to conduct investigations into their operations, assess human rights-related risks, and report both their findings and response measures to regulatory bodies. Some authors have proposed establishing a similar reporting requirement for state-

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3. U.S. Dep’t. of State, *Statelessness*, <https://www.state.gov/other-policy-issues/statelessness> (last visited Apr. 3, 2022).

4. Refugees, *supra* note 1.

5. Mark Brewer & Sue Turner, *Solving Child Statelessness: Disclosure, Reporting, and Corporate Responsibility*, 8 BRITISH JOURNAL OF AMERICAN LEGAL STUDIES 83, 86 (2019).

6. *Id.*

7. See, e.g., Bus. & Human Rts. Res. Ctr., *France’s Duty of Vigilance Law*, <https://www.business-humanrights.org/en/latest-news/frances-duty-of-vigilance-law> (last visited May 9, 2022); State of Cal. Dep’t. of Just., *The California Transparency in Supply Chains Act*, <https://oag.ca.gov/SB657> (last visited May 9, 2022); SEC, *Fact Sheet: Disclosing the Use of Conflict Minerals*, <https://www.sec.gov/opa/Article/2012-2012-163htm-related-materials.html> (last visited May 9, 2022); Modern Slavery Act 2015 (Eng.), <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> (last visited May 9, 2022).

lessness, which would require companies to report the risk of statelessness in their supply chains and discuss the programs and policies in place to mitigate those risks.<sup>8</sup> At first glance, such a scheme offers a powerful opportunity to bring corporations into the efforts to alleviate statelessness. However, because of the unique vulnerability of stateless persons and their inability to access many state recourse mechanisms when abuse occurs, it is critical to consider potential unintended consequences before introducing or changing a regulatory scheme.

With this in mind, this Note analyzes the feasibility, advantages, and risks of a disclosure regime that targets statelessness. The discussion incorporates examples from the Dominican Republic (DR) to help illustrate the practical implications of a disclosure strategy. While no active proposal currently exists that would require corporations to disclose the risk of statelessness in their supply chains, the conversation is ongoing, and understanding the practical implications of a such a regime can shed light on a corporation's relationship with individuals without a nationality or documents. By exploring an under-researched application of reporting requirements, this Note contributes to a larger debate regarding the efficacy of due diligence requirements in providing solutions to human rights violations.

This Note proceeds as follows: Part I provides a background on statelessness generally, highlighting the challenges in relying solely on public international law to address ongoing statelessness issues. Part II turns to the growing debate on business and human rights, providing a background on disclosure regimes targeted at human rights that have been introduced in the United States, as well as the conversation in the literature around statelessness and corporate disclosure. Part III provides a brief background on corporations and undocumented persons in the DR. Finally, Part IV discusses what a corporate disclosure regime for statelessness might look like, weaving in examples from the DR, and concludes by weighing the benefits and risks of the regime.

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8. Brewer & Turner, *supra* note 5.



## I.

## BACKGROUND

A. *Statelessness Generally*

When discussing statelessness and relevant solutions, this Note considers both stateless individuals and individuals who lack any form of identity documentation, despite theoretically having access to a recognized nationality.

Under international law, a stateless person is defined as a “person who is not considered as a national by any State under the operation of its law.”<sup>9</sup> Common causes of statelessness include gaps in nationality laws, lack of birth registration, emergence of new states, or the intentional deprivation of nationality.<sup>10</sup> Obtaining exact global estimates of the number of stateless individuals is challenging given that, by nature of being stateless and not recognized by state governments, individuals are often not registered in government registries or other population censuses.<sup>11</sup> As of 2019, the UNHCR counted 4.2 million stateless individuals worldwide, although the actual number is estimated to exceed 10 million due to severe underreporting.<sup>12</sup>

In addition to the *de jure* stateless individuals discussed above, individuals may also be *de facto* stateless, or effectively stateless, meaning that despite having a claim to citizenship, they lack identity documentation or recognition of their nationality.<sup>13</sup> Administrative issues, costs associated with birth registration, or targeted discrimination may lead individuals to lack proof of their nationality. Without any documentation to prove their nationality, *de facto* stateless individuals encounter many of the same barriers and human rights violations as those who are *de jure* stateless. Individuals lacking identity documentation are also often unable to register their own chil-

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9. U.N. High Comm’r. for Refugees, *Convention Relating to the Status of Stateless Persons*, <https://www.unhcr.org/protection/statelessness/3bbb25729/convention-relating-status-stateless-persons.html> (last visited Apr. 3, 2022).

10. U.N. High Comm’r. for Refugees, *Ending Statelessness*, <https://www.unhcr.org/ending-statelessness.html> (last visited Apr. 3, 2022).

11. INSTITUTE ON STATELESSNESS AND INCLUSION, *STATELESSNESS IN NUMBERS: 2020* (Aug. 2020), [https://files.institutesi.org/ISI\\_statistics\\_analysis\\_2020.pdf](https://files.institutesi.org/ISI_statistics_analysis_2020.pdf).

12. U.S. Dep’t. of State, *supra* note 3.

13. *Id.*

dren, resulting in statelessness issues that compound over generations. Lack of identity documentation or a recognized nationality impacts the wide range of rights that individuals enjoy vis-à-vis the state, such as the right to education, to marry, to travel freely, and to due process, among many others.<sup>14</sup>

A number of international conventions have laid out protections for the right to nationality. The Universal Declaration on Human Rights, adopted in 1948, recognizes nationality as a fundamental human right. The inherent value of nationality and the risks of statelessness was affirmed by the international community in the 1954 Convention on the Status of Stateless Persons (hereinafter “1954 Convention”) and the 1961 Convention on the Reduction of Statelessness (hereinafter “1961 Convention”).<sup>15</sup> The 1954 Convention requires that stateless persons be treated no less favorably than aliens with respect to employment, housing, and public education, among other basic rights. The 1961 Convention sets out safeguards against statelessness in several contexts and requires states to commit to reducing statelessness over time. Other U.N. treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the U.N. Convention on the Rights of the Child also guarantee the right to a nationality for children in particular.

Despite international acknowledgement of this issue, the problem of statelessness persists. Given the significant number of individuals impacted by statelessness and the wide range of other basic human rights that are subsequently impacted, it is imperative that the global community continue to find innovative and effective solutions to statelessness and documentation issues.

Recognizing that public international law, while important, has not been sufficient to address statelessness, this paper explores a potential private international law initiative that re-

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14. Brewer & Turner, *supra* note 5, at 87.

15. U.N. Convention Relating to the Status of Stateless Persons (Sept. 28, 1954), <https://www.unhcr.org/en-us/protection/statelessness/3bbb25729/convention-relating-status-stateless-persons.html>; U.N. Convention on the Reduction of Statelessness (Aug. 30, 1961), <https://www.unhcr.org/en-us/protection/statelessness/3bbb286d8/convention-reduction-statelessness.html>; U.N. High Comm’r. for Refugees, *U.N. Conventions on Statelessness*, <https://www.unhcr.org/un-conventions-on-statelessness.html> (last visited May 6, 2022).

lies on transnational corporations (TNCs) to play a role in alleviating statelessness and access to documentation issues.

### B. *Business and Human Rights Generally*

This Section begins by exploring the growing debate around business and human rights, a critical background to contextualize a possible corporate role in addressing statelessness. Historically, the most widely accepted view of a corporation's responsibilities regarding human rights was to say that such responsibilities did not exist—corporations owed a duty to their shareholders to generate profits, and to no one else.<sup>16</sup> However, over the past couple of decades, corporations have become increasingly political actors, and the view that corporations cannot remain on the margins of social and economic issues has become more prevalent. International and private organizations such as the United Nations and the Business Roundtable have recognized the importance of corporate respect for human rights, releasing guidelines and statements on the need for corporations to respect human rights and to provide remedies where corporate abuse has occurred.<sup>17</sup>

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16. Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84 (2015); Milton Friedman, *A Friedman doctrine— The Social Responsibility Of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 30, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>; see also *From There to Here: 50 Years of Thinking on the Social Responsibility of Business*, McKinsey & Company (Sept. 11, 2020), <https://www.mckinsey.com/featured-insights/corporate-purpose/from-there-to-here-50-years-of-thinking-on-the-social-responsibility-of-business>.

17. Int'l Lab. Org. [ILO], TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY, (2017), [https://www.ilo.org/wcmsp5/groups/public/-ed\\_emp/-emp\\_ent/-multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/-multi/documents/publication/wcms_094386.pdf); U.N. High Comm'r. on Hum.Rts., GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), [https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf); Int'l Labor Organization [ILO], TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (1977), [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.volkswagenag.com/presence/nachhaltigkeit/documents/policy-extern/1977%20ILO%20Tripartite%20Declaration%20EN.pdf](https://www.volkswagenag.com/presence/nachhaltigkeit/documents/policy-extern/1977%20ILO%20Tripartite%20Declaration%20EN.pdf); *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans*, <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> (Aug. 19, 2019).

The argument that corporations have an obligation to engage with human rights issues stems from their duties to shareholders as well as from their obligations to *stakeholders*—the individuals that will be impacted by their operations.<sup>18</sup> Corporations' obligation to refrain from engaging in human rights abuses to and provide a remedy where those abuses do occur is abundantly clear when considered from a stakeholder perspective. Duties to stakeholders are often framed under the umbrella of corporate social responsibility, which includes companies' efforts to "meet or exceed stakeholder expectations" through efforts to address social, ethical, and environmental concerns, not just profitability concerns.<sup>19</sup> Under this conception, businesses must integrate human rights compliance and remedy systems into their business strategies in order to ensure that they are not negatively impacting the communities in which they operate.

Although the stakeholder arguments are significant, the duty to prevent and remedy human rights abuses extends beyond a duty to the communities in which corporations operate. From the shareholder perspective, there is a growing argument that boards must consider human rights concerns in order to adequately fulfill their fiduciary duties to shareholders.<sup>20</sup> More and more, consumers and investors are turning away from companies with poor human rights records, suggesting that from a sheer profitability standpoint, firms cannot afford to engage in human rights abuses.<sup>21</sup> Companies have also faced increased legal risks for violating human rights. For instance, plaintiffs in the U.S. have brought claims against corporate defendants for human rights abuses committed abroad under statutes such as the Alien Tort Claims Act (ATCA) and Trafficking Victims Protection Act (TVPA).<sup>22</sup> Ensuring the

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18. Narine, *supra* note 16.

19. Kathleen Wilburn & Ralph Wilburn, *Achieving a Social License to Operate Using Stakeholder Theory*, 4 J. OF INT'L. BUS. ETHICS 3 (2011).

20. Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights Eighteenth Annual Corporate Law Symposium: Corporate Social Responsibility in the International Context*, 74 U. CIN. L. REV. 75 (2005).

21. *Id.* at 79.

22. *Id.* at 81. Lindsey Robertson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring TVPA as a Promising Tool for Corporate Accountability*, COLUM. HUM. RTS. L. REV. The U.S. Supreme Court has severely limited the ability for plaintiffs to bring claims against corporate defendants under the ATCA

protection of basic human rights also promotes predictability and stability in business operations, preventing social and political disruption that could adversely impact a firm's long-term stability.<sup>23</sup>

In light of these financial, legal, and reputational risks, shareholders have increasingly leveraged the power of shareholder proposals in asking corporate boards to consider corporate human rights performance in their decisions.<sup>24</sup> In the United States, for example, under Securities and Exchange Commission (SEC) regulations, shareholders holding at least \$2,000 of stock for at least one year may file a shareholder proposal to be included in a company's proxy statement and votes by all shareholders. These proposals, whether binding or not, are being used more and more frequently by shareholders to hold companies accountable for human rights abuses.<sup>25</sup> In 2021, at least 435 shareholder resolutions were filed at the federal level on economic, social, and governance issues.<sup>26</sup>

These shareholder initiatives have been supported by organizations such as the Investor Alliance for Human Rights, an organization whose mandate is to help investors, particularly large institutional investors, understand *their* fiduciary duties to maintain a portfolio of companies that respects human rights. Large investors such as State Street have also released statements articulating their commitment to human rights and noting that, where investee companies are not adequately managing human rights risks, they will consider taking action by voting down directors and voting for or against relevant

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in recent years, and claims have largely only succeeded on the most egregious human rights violations, such as genocide or slavery. However, jurisprudence under alternative avenues, such as the TVPA, and other legal regimes outside of the U.S. offer increasingly promising avenues to hold corporate defendants accountable for abuse.

23. U.N. High Comm'r. for Hum. Rts., *Business and Human Rights: A Progress Report* (Jan. 1, 2000), <https://www.ohchr.org/sites/default/files/Documents/Publications/BusinessHRen.pdf>.

24. Adam Kanzer, *Putting Human Rights on the Agenda: The Use of Shareholder Proposals to Address Corporate Human Rights Performance* (2009), [https://www.domini.com/uploads/legacy/Finance\\_for\\_a\\_Better\\_World\\_Kanzer.pdf](https://www.domini.com/uploads/legacy/Finance_for_a_Better_World_Kanzer.pdf).

25. *U.S. Shareholder Proposals Jump to a New Record in 2023*, ISS CORPORATE SOLUTIONS (May 24, 2023), <https://www.isscorporatesolutions.com/>.

26. Report, PROXY PREVIEW, <https://www.proxypreview.org/2021/report> (last visited May 9, 2022).

shareholder proposals.<sup>27</sup> These movements and others suggest that it is becoming increasingly infeasible for boards to avoid engaging with human rights issues.

Corporate reporting on human rights and social issues has emerged as one critical way that stakeholders and shareholders are pushing companies to fulfill their human rights-related obligations. Transparency reports and other disclosures on human rights offer investors, consumers, regulators, and human rights advocates a means to monitor corporate behavior and hold companies accountable when they engage in human rights violations.<sup>28</sup> The power of information and the business risks of ignoring this information motivates interest in a disclosure and reporting regime for statelessness. With this in mind, the following Section explores corporate disclosure generally and examples of human rights focused regimes, with the goal of outlining the way that possible disclosure strategies might be applied to statelessness.

### C. *Corporate Disclosure and Human Rights*

Approaches to corporate disclosure around the world have varied. Within the United States, corporate disclosure is primarily regulated by the SEC, the principal regulatory agency for publicly traded companies. Established through the Securities Act of 1933 and the Securities Exchange Act of 1934, the SEC's modern disclosure regime requires regular disclosure of material information, defined by the Supreme Court as any information that would be viewed by the "reasonable investor as having significantly altered the 'total mix' of information made available."<sup>29</sup> There is no bright-line rule for materiality, but it essentially refers to "what is important to investors, nothing more, nothing less."<sup>30</sup>

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27. Benjamin Colton et al, *Human Rights: Disclosures, Practices & Insights*, Harv. L. School F. on Corp. Gov., <https://corpgov.law.harvard.edu/2022/02/17/human-rights-disclosures-practices-insights> (last visited May 9, 2022).

28. Kishnathi Parella, *Investors as International Law Intermediaries: Using Shareholder Proposals to Enforce Human Rights*, 45 Seattle U. L. Rev. 41 (2021), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2769&context=sulr>.

29. *TSC Indus. v. Northway, Inc.*, 42 U.S. 438, 449 (1976).

30. Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 152 (2009).

Although it was initially used almost entirely for regulating the disclosure of financial information, the materiality requirement has expanded in scope over the past decades to include nonfinancial information, including information about subjects ranging from business relationships to human rights. The Global Reporting Initiative, which focuses on best practices for sustainability reporting, has suggested that material information should cover aspects that “reflect the significant economic, environmental, and social impacts; or substantially influence the assessments and decisions of stakeholders.”<sup>31</sup>

Outside of the United States, the extent and form of disclosure regimes varies.<sup>32</sup> The European Union and its member states have proposed various legislative schemes that impose varying levels of accountability for failure to report and for engaging in abuse. The growing trend towards disclosure regimes demonstrates the myriad of ways that disclosure is being looked to as a strategy to incentivize corporate accountability and positive action on human rights.

Throughout the remainder of this Section, I provide an overview of three recent disclosure schemes that provide relevant examples for a potential scheme for addressing statelessness. The first two are drawn from Mark Brewer and Sue Turner’s piece, *Solving Child Statelessness: Disclosure, Reporting, and Corporate Responsibility* (hereinafter “Solving Child Statelessness”), which outlines the United States’ Dodd Frank Act and California Transparency in Supply Chains Act as possible examples of disclosure regimes to draw from in formulating a similar regime for child statelessness. I outline a brief analysis of the advantages and drawbacks of these two examples and then analyze the French Corporate Duty of Vigilance Law, which offers a powerful third example of the ways in which private and public factors can be leveraged to incentivize corporate action on human rights.

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31. Mert Demir, Maung K. Min & Louis D. Coppola, *Discrepancies in Reporting on Human Rights: A Materiality Perspective*, 64 THUNDERBIRD INT’L BUS. REV. 169, 171 (2022); GRI 101: Foundation 2016, GLOBAL REPORTING INITIATIVE (2016), <https://www.globalreporting.org/standards/media/1036/gri-101-foundation-2016.pdf>.

32. Kerstin Lopatta et al., *The Current State of Corporate Human Rights Disclosure of the Global Top 500 Business Enterprises: Measurement and Determinants*, CRITICAL PERSP. ON ACCT. (Sep. 4, 2022), <https://doi.org/10.1016/j.cpa.2022.102512>.

### 1. *Section 1502 of the Dodd Frank Act*

Section 1502 of the Dodd-Frank Act aims to mitigate the use of minerals that are known to be used to finance conflict and human rights abuses in the Democratic Republic of the Congo (DRC). The provision requires companies to disclose whether the minerals used in the production of a company's manufactured goods originated in the DRC or another country covered by the provision. If the minerals did originate in the DRC or another covered country, companies are required to submit a report to the SEC detailing 1) the due diligence process implemented with respect to the mineral supply chain and 2) a description of the products that are found to be connected to financing of conflict or human rights abuses. For a product to be "DRC Conflict Free," it must not contain any minerals that finance, either directly or indirectly, any armed groups in the DRC or neighboring countries.<sup>33</sup> Issuers are subject to liability primarily based on Rule 10b-5, which affords a private right of action to shareholders injured due to a false or misleading statements made by corporate insiders.<sup>34</sup>

Proponents of the conflict minerals provisions argue that the successful reduction in revenues from mining and consequent reduction in financing for armed groups demonstrates the success of the legislation and that short-term negative impacts are necessary to address the long-term impacts of violence in the region.<sup>35</sup> According to advocates of the initiative, the provisions necessarily introduce a paradigm shift within companies' supply chains. The reporting requirements force them to scrutinize their supply chains more thoroughly, bear the full cost of the negative impacts of their business, and consider alternative means of doing business where their business activities fuel conflict.<sup>36</sup> The potential name-and-shame effects of the legislation are also potentially significant. In *The Real*

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33. 15 U.S.C. § 78m(p)(1)(A)(ii).

34. Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 *FORDHAM L. REV.* 1315, 1338 (2013).

35. Nik Stoop, Marijke Verpoorten & Peter van der Windt, *More Legislation, More Violence? The Impact of Dodd-Frank in the DRC*, *PLOS ONE* (Aug. 9, 2018), <https://doi.org/10.1371/journal.pone.0201783>.

36. Melvin Ayogu & Zenia Lewis, *Conflict Minerals: An Assessment of the Dodd-Frank Act*, *BROOKINGS* (Oct. 3, 2011), <https://www.brookings.edu/opinions/conflict-minerals-an-assessment-of-the-dodd-frank-act>.



*Effects of Conflict Minerals Disclosures*, Baik et al., find that the reporting requirements result in an increase in a company's public commitment to responsible sourcing, possibly leading to other positive impacts within their supply chains.

However, others have critiqued the significant costs of compliance, the provision's vagueness, the inability to accurately track mineral origins, and the onus it places on the SEC to regulate and eradicate human rights abuses, a realm the SEC was not designed to regulate.<sup>37</sup> Section 1502 has also been subject to legal questions and critiques. Some argue that information regarding human rights issues does not fall into the materiality provision and likely would not affect a reasonable investor's decision to invest.<sup>38</sup> Others argue that Congress has exercised too much extraterritorial jurisdiction by regulating non-U.S. companies whose supply chains feed into companies that are listed on U.S. stock exchanges. A further critique is that the provision indirectly operates as a trade embargo, encouraging investors to either flee U.S. markets or leave the Congolese mineral industry, opening up the Congolese market to other international companies that are subject to much less stringent home-state regulation.<sup>39</sup> This flight from the Congolese market has real negative outcomes for the individuals at the center of legislation, with research demonstrating that the implementation of the provision has been linked to negative effects on the living conditions of miners relying on the mines for employment.<sup>40</sup> On the whole, the conflicting opinions around the Dodd-Frank Act demonstrate the need to consider the nuanced impacts of disclosure and the impacts on individuals at the center of the regime.

## 2. *California Transparency in Supply Chain*

Another example of a human rights-focused disclosure regime is the California Transparency in Supply Chains Act (hereinafter the "California Act"). The California legislature enacted the bill in 2010, with the goal of "ensur[ing] that

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37. Woody, *supra* note 34, at 1332–42.

38. David A. Katz & Laura A. McIntosh, *Corporate Governance Update: "Materiality" in America and Abroad*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (May 1, 2021), <https://corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/>.

39. Woody, *supra* note 34, at 1346.

40. Stoop et al., *supra* note 35.

[firms] provide consumers information regarding their efforts to eradicate slavery and human trafficking from their supply chain” and educating consumers on how to purchase responsibly produced goods, “thereby, improv[ing] the lives of victims of slavery and human trafficking.”<sup>41</sup>

The bill covers retail sellers and manufacturers doing business in California that have annual worldwide gross receipts in excess of \$100 million. Companies must disclose on their websites whether they 1) engage in verification of supply chains to evaluate trafficking risks, 2) conduct audits of suppliers, 3) require direct suppliers to certify that materials used in the company’s product comply with slavery and trafficking laws in the country in which direct suppliers are operating, 4) maintain any internal accountability standards for employees or contractors that do not meet their standards, and 5) provide training for employees and management about mitigating risks of trafficking and slavery.<sup>42</sup>

Unlike the Dodd-Frank Act, the California Act does not regulate disclosures to investors, but instead regulates disclosures to the public that are made via the companies’ websites, allowing them to reach a distinct audience. The goal of the California Act is to give consumers sufficient information to make informed, socially beneficial decisions.<sup>43</sup> The California Act encourages companies to scrutinize their supply chains and offers an important opportunity to bridge the information gap between companies and consumers.<sup>44</sup> However, the regime has been criticized for operating as a primarily symbolic gesture, inability to drive significant change due to a lack of enforcement mechanisms, unclear standards for different companies, and the average consumer’s inability to actually incorporate the new information in their decision-making process. Despite these challenges, the California Act offers an example of a strategy for making human rights information avail-

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41. S.B. 657, § 2, subd. (j).

42. *Id.*; Rachel N. Birkey et al., *Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010*, 152 J. BUS. ETHICS 827, 830 (2018).

43. Alexandra Prokopets, *Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010*, 37 HASTINGS INT’L & COMPAR. L. REV. 351, 357 (2014).

44. *Id.*

able to the public and possibly shaping consumer and company behavior.

### 3. *French Duty of Vigilance Law*

Yet another powerful example of a relevant disclosure regime, the French Duty of Vigilance Law, was adopted in 2017 and imposes responsibilities on companies to report on human rights risks and to act on those risks under certain conditions. The law applies to French companies with more than 5000 employees in direct and indirect French-based subsidiaries or more than 10,000 employees in direct and indirect subsidiaries globally. Under the law, companies must identify human rights risks in their activities and the activities of the companies they control and develop measures to prevent risks.<sup>45</sup> Companies must make their “vigilance plan” in response to these risks’ public. The law also allows for interested parties, including NGOs and trade unions, to request a judge to order the company to comply with the law and to request compensation under civil liability in cases where the company’s failure to act vigilantly has caused a harm. With no specific issue focus, unlike the Dodd Frank Act and the California Act, the law implicates a much broader range of human rights risks.<sup>46</sup>

The French Duty of Vigilance law addresses many of the practical failings of the Dodd Frank and California Acts by introducing binding obligations on companies to act in response to the risks that they identify.<sup>47</sup> However, the law is still not without critics or shortcomings. Because of some vagueness regarding which companies are covered, some companies can avoid reporting requirements, and some companies have treated the law as a mere reporting exercise without taking on any positive obligations.<sup>48</sup>

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45. BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *supra* note 7.

46. Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 22 HUM. RTS. REV. 109, 115-23 (2021).

47. Sandra Cossart & Lucie Chatelain, *What Lessons Does France’s Duty of Vigilance Law Have for Other National Initiatives?*, BUS. & HUM. RTS. RES. CTR. (June 27, 2019), <https://www.business-humanrights.org/en/blog/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives>.

48. *Id.*

#### D. *Corporate Disclosure and Statelessness*

The Dodd-Frank Act, the California Act, and the French Duty of Vigilance Law provide three options for human rights-focused disclosure regimes. One is investor-driven, another is public-driven, and the third combines public reporting with increased avenues for private enforcement. Each focuses on human rights issues that pose unique challenges and pushes the boundaries of what corporations have been historically asked to consider. A disclosure regime for statelessness might be informed by these three pieces of legislation.

Existing human rights disclosure regimes do not address statelessness or documentation issues. There has been a limited movement in the literature to explore the role that multinationals can play in alleviating statelessness, but the idea of using corporate governance standards to incentivize companies to examine documentation in their supply chain is not novel.<sup>49</sup>

In *Solving Child Statelessness*, Brewer and Turner propose a disclosure regime for statelessness modeled after the conflict minerals provisions of the Dodd-Frank Act. Their proposed regime would require companies to disclose the risks of child statelessness in their supply chain.<sup>50</sup> The legislation would require companies to file disclosures with the SEC that cover whether any company employees are stateless, describe the company's due diligence policies concerning the citizenship of company employees and their children, and outline policies that the company is implementing to reduce the number of stateless children.<sup>51</sup> Brewer and Turner propose that TNCs be required to conduct annual investigations to determine whether individuals "affected by statelessness are connected to that [TNC], whether directly or via a supply chain."<sup>52</sup> Corporations would also be required to take steps to ensure that their employees and their children are registered with the proper authorities and to engage with governments and other stakeholders to reduce the number of stateless children. A com-

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49. Mark K. Brewer, *Beyond International Law: The Role of Multinational Corporations in Reducing the Number of Stateless Children*, 19 TILBURG L. REV. 64, 70 (2014).

50. Brewer & Turner, *supra* note 5, at 99.

51. *Id.* at 98-99.

52. *Id.* at 99.

pany that complies with these requirements can then declare that they are “Supporting Stateless Children.”<sup>53</sup>

Brewer and Turner argue TNCs can supplement the protections offered by international law by pressuring weak or disinterested governments to act.<sup>54</sup> The potential reputational gains of being able to say that they are “Supporting Stateless Children” may incentivize TNCs to be more positively involved in initiatives combating statelessness. Further, requiring companies to report and take action on statelessness may incentivize them to pressure foreign governments to make documentation processes for citizenship more accessible and straightforward, allowing the company to more easily determine whether statelessness is affecting individuals in its supply chain. By virtue of their proximity to the communities in which they operate, corporations are well-situated to drive more tailored solutions.<sup>55</sup> Finally, corporations have the resources and influence to push for legislative solutions and solutions for specific stateless employees by providing support throughout the documentation process.<sup>56</sup>

This Note extends Brewer and Turner’s analysis by considering how a disclosure regime for statelessness might work in practice, weaving in examples from the statelessness crisis in the DR. Through these practical examples, this Note offers an analysis of the opportunities and the risks associated with this proposal. Although there is no current proposal for a corporate disclosure regime related to statelessness, it is critical to consider the potential effects of such a regime. First, as demonstrated through the various reporting requirements described throughout this Note, disclosure regimes are increasingly being looked to as a strategy to incorporate human rights into corporate decision-making. Continuously evaluating the advantages and disadvantages of varying applications of disclosure will be critical to ensure that such regimes are actually effective. Second, whether or not a disclosure regime is implemented, there may be other roles for TNCs to play in alleviating statelessness. Exploring the various consequences that may result from disclosure requirements can shed light on the po-

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53. *Id.*

54. *Id.* at 99–100.

55. *Id.* at 100.

56. *Id.*

tential risks or comparative advantages of other proposals involving TNCs. Finally, although statelessness implicates unique issues, many of the challenges that stateless people face may be similar to those faced by other populations—such as migrant workers, minorities, or children—that are marginalized by state systems or unable to assert their rights against the state. Understanding the ways that stateless individuals interact with corporations will also contribute to an understanding of challenges and opportunities that similarly vulnerable populations face.

## II.

### DOCUMENTATION AND CORPORATIONS IN THE DOMINICAN REPUBLIC

#### A. *History of Migration and Documentation*

Before turning to an analysis of a potential statelessness disclosure regime in the DR, it is important to outline the historical context and specific issues facing stateless individuals in the country. As of the most recent estimates, the DR is home to the largest population of stateless individuals in the Americas.<sup>57</sup> This population, combined with the significant population of individuals currently unable to access any form of proof of their nationality, represent a substantial group of individuals interacting within the labor market without any form of documentation. The vast majority of individuals impacted by laws that restrict access to nationality and by discrimination in documentation processes are of Haitian descent. Haitians and Dominicans of Haitian descent have experienced severe race and class-based discrimination in the DR since the country's colonial past, extending through and exacerbated by U.S. occupation from 1916–1934 and a brutal dictatorship in the mid-1900s.<sup>58</sup> Various waves of Haitian migration to the DR oc-

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57. INSTITUTE ON STATELESSNESS AND INCLUSION, *The World's Stateless: Deprivation of Nationality* 56 (2020), [https://files.institutesi.org/WORLD'S\\_STATELESS\\_2020.pdf](https://files.institutesi.org/WORLD'S_STATELESS_2020.pdf). The United Nations High Commissioner for Refugees, the United Nations agency tasked with addressing statelessness, stopped reporting the amount of stateless individuals in the DR in 2015, but the situation remains unresolved and advocates report that numbers are still significant.

58. Lorgia García Peña, *One Hundred Years After the Occupation*, NORTH AMERICAN CONGRESS ON LATINA AMERICA (May 25, 2016), <https://nacla.org/news/2016/05/25/one-hundred-years-after-occupation>.

curred throughout the 19th century, through both formal recruitment agreements and informal recruitment by sugar industry organizations.<sup>59</sup> Many of these individuals went to sugar cane plantations, known as *bateyes*, where many had their identity documentation confiscated by companies or the Dominican government, effectively forcing them to either stay on the *bateyes* or risk deportation.<sup>60</sup>

### B. Existing Documentation Issues

As a result of this significant history of migration and exploitation in the sugar industry, as well as other historical and ongoing factors, a large population in the DR lacks access to nationality or documentation. The issue has significantly worsened in recent decades, as a result of changes to Dominican nationality laws, Dominican Constitution, and a Constitutional Court decision in 2013 that stripped Dominican-born individuals of their citizenship if they were born to parents without legal residency in the country.<sup>61</sup> The decisions rendered over 200,000 Dominicans of Haitian descent stateless and have been denounced by the international community, human rights observatories, and the Inter-American Court of Human Rights.<sup>62</sup>

The Dominican government maintains that there are no stateless individuals in the country.<sup>63</sup> Since 2013, the Dominican government has issued various regulations to provide a pathway back to citizenship for individuals impacted by the

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59. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, SITUATION OF HUMAN RIGHTS IN THE DOMINICAN REPUBLIC 54–55 (2015).

60. *Id.* at 54–57; DOMINICAN REPUBLIC 2022 HUMAN RIGHTS REPORT, U.S. DEPARTMENT OF STATE (2022), <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/dominican-republic>.

61. Sentencia TC/0168/13 [Sentencia] [Constitutional Court], Sept. 23, 2013, Expediente núm. TC-2012-0077 (Dom. Rep.); Ediberto Román & Ernesto Sagás, *Birthright Citizenship Under Attack: How Dominican Nationality Laws May be the Future of U.S. Exclusion*, 66 Am. U. L. Rev. 1383 (2017), <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/dominican-republic>.

62. Amelia Hintzen, *Historical Forgetting and the Dominican Constitutional Tribunal*, 20(1) J. OF HAITIAN STUD. 108 (2014); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *supra* note 59, at 42.

63. Sentencia, *supra* note 61, at 75–76; Matt Chandler, *Stateless in the Dominican Republic*, ALJAZEERA, Dec. 28, 2015, <https://www.aljazeera.com/features/2015/12/28/stateless-in-the-dominican-republic>.

2013 ruling. These plans, while offering some constructive solutions for individuals impacted, have been criticized for their costliness, inaccessibility, significant delays, and failure to provide a solution for certain categories of affected individuals. As a result, many individuals impacted by the Constitutional Court rulings remain unable to access any form of identity documentation.

In addition to individuals impacted by the court rulings, there is another significant population of individuals that, despite being legally entitled to Dominican nationality, have been unable to access formal documentation. The Dominican “En Hogar” (“In Home”) survey conducted in 2017 found that 4.8% of the DR’s rural population did not have a birth certificate.<sup>64</sup> Lack of documentation often stems from complications or discrimination in birth registry processes, which becomes expensive and complex if individuals do not register their children within three months of birth. Parents that do not have identity documentation themselves face additional hurdles in registering their children, as they must first go through the extensive and often costly process themselves.

For the purposes of this Note, I consider both *de jure* and *de facto* stateless persons given the similar challenges that they may encounter in interacting with the labor market. Both populations face a higher risk of exploitation due to their inability to hold corporations accountable and their risk of erasure from any official reporting. Thus, it is essential to recognize the effects a regulatory scheme of corporate disclosure may have on both *de jure* stateless persons and individuals that are *de facto* stateless due to their lack of legal documentation.

### C. Corporations and Undocumented Populations

There are few widely available statistics on the number of workers that are working for corporations in the DR and do not possess identity documents. Sugarcane plantations have historically employed significant numbers of undocumented

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64. OFICINA NACIONAL DE ESTADÍSTICA, ENCUESTA NACIONAL DE HOGARES DE PROPÓSITOS MÚLTIPLES (2017); WITHOUT PAPERS, I AM NO ONE: STATELESS PEOPLE IN THE DOMINICAN REPUBLIC, AMNESTY INTERNATIONAL (May 2015), [amnesty.org/en/wp-content/uploads/2021/05/AMR2727552015ENGLISH.pdf](https://www.amnesty.org/en/wp-content/uploads/2021/05/AMR2727552015ENGLISH.pdf); Wendy Hunter & Francesca Reece, *Denationalization in the Dominican Republic: Trapping Victims in the State’s Administrative Maze*, 57 LATIN AMERICAN RESEARCH REVIEW 590 (2022).



individuals.<sup>65</sup> Many of these individuals and their descendants were forced to remain on sugar cane plantations for generations due to company and governmental deprivations of identity documents and extreme poverty.<sup>66</sup> The ongoing nature of these abuses is highlighted in a lawsuit filed in 2020 in U.S. district court against the Central Romana Corporation, one of the largest sugar companies in the DR, and its parent company, the Fanjul Corporation, for the company's forcible and violent eviction of over sixty families.<sup>67</sup> The lawsuit is just one particularly salient instance of abuse perpetrated by sugar companies; reports of hazardous working conditions, deprivation of pay and benefits, and unfree labor are rampant.<sup>68</sup> Major U.S. companies such as Domino Sugar and Hershey have been linked to companies with a record of poor treatment of workers in the DR.<sup>69</sup> As the sugar industry has declined, increasing numbers of migrants and undocumented individuals have shifted into construction and other informal industries, but sugar remains an important industry.

### III.

#### DISCUSSION

This Section explores a statelessness-focused disclosure regime that could be potentially applied to the statelessness situation in the DR, which has been marked by both documentation issues and historical abuse of undocumented workers by corporations. Various public international initiatives have

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65. VERITÉ, RESEARCH ON INDICATORS OF FORCED LABOR IN THE SUPPLY CHAIN OF SUGAR IN THE DOMINICAN REPUBLIC, (2016), [https://www.verite.org/wp-content/uploads/2016/11/Research-on-Indicators-of-Forced-Labor-in-the-Dominican-Republic-Sugar-Sector\\_9.18.pdf](https://www.verite.org/wp-content/uploads/2016/11/Research-on-Indicators-of-Forced-Labor-in-the-Dominican-Republic-Sugar-Sector_9.18.pdf).

66. VERITÉ, RESEARCH ON INDICATORS OF FORCED LABOR IN THE SUPPLY CHAIN OF SUGAR IN THE DOMINICAN REPUBLIC, (2016), [https://www.verite.org/wp-content/uploads/2016/11/Research-on-Indicators-of-Forced-Labor-in-the-Dominican-Republic-Sugar-Sector\\_9.18.pdf](https://www.verite.org/wp-content/uploads/2016/11/Research-on-Indicators-of-Forced-Labor-in-the-Dominican-Republic-Sugar-Sector_9.18.pdf).

67. *Victims of Forceful Eviction in Dominican Republic File Suit Against Fanjul in USA*, BUS. & HUM. RTS. RES. CTR. (Feb. 6, 2020), <https://www.business-humanrights.org/en/latest-news/victims-of-forceful-eviction-in-dominican-republic-file-suit-against-fanjul-in-usa> (last visited May 9, 2022).

68. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Dominican Republic (2021).

69. *The Bitter Work Behind Sugar*, REVEAL (Feb. 26, 2022), <http://revealnews.org/podcast/the-bitter-work-behind-sugar-2022> (last visited Apr. 23, 2022).

sought to pressure the Dominican government to address ongoing statelessness and documentation crises. In 2005, in *Girls Yean and Bosico v. Dominican Republic*, the Inter-American Court of Human Rights ordered the Dominican government to adopt legislation that facilitates birth registration and does not impose excessive or discriminatory obligations on Dominican-Haitian children.<sup>70</sup> The Organisation of American States has denounced the standards and judicial decisions leading to denationalization in the DR and called for the state to conform its laws with its international human rights obligations.<sup>71</sup> Other powerful civil society movements continue to pressure the Dominican government, yet the issues of statelessness persist, suggesting the need to continuously leverage all resources and actors possible to identify solutions to the stateless crisis. Without discounting the central importance and power of these civil society and international legal strategies, this Note analyzes another possible avenue for change.

A. *The Case for a Statelessness and Documentation Disclosure Regime*

Disclosure regimes thus far have largely focused on trafficking, environmental issues, forced labor, and child labor, among other issues. Although a disclosure regime has not yet been instituted that focuses on statelessness, considering the regime and a corporate role in addressing statelessness generally is not a futile exercise.

Individuals that lack documentation are much more vulnerable to the very issues that other human rights disclosure regimes have been intended to address. Because of their invisibility to the state, stateless individuals are less able to report slavery, unfair working conditions, and illegal recruitment procedures to the police.<sup>72</sup> Without a formal government record of their existence, these individuals face significant risks of being trafficked and are less able to hold the state accountable

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70. Inter-Am. Ct. H.R. (ser. C) No. 130.

71. *Denationalization and Statelessness in the Dominican Republic*, ORG. OF AM. STATES., [http://www.oas.org/en/iachr/multimedia/2016/Dominican Republic/dominican-republic.html](http://www.oas.org/en/iachr/multimedia/2016/Dominican%20Republic/dominican-republic.html) (last visited Feb. 4, 2023).

72. See JAMES FERGUSON, *Migration in the Caribbean: Haiti, the Dominican Republic and Beyond*, (2003), <https://www.refworld.org/pdfid/469cbfaf0.pdf>; NIMRUJI JAMMULAMADAKA, *WORKERS AND MARGINS: GRASPING ERASURES AND OPPORTUNITIES* (2019).

for violations or failures to prevent corporate abuses. Identity documentation and a nationality are crucial to an individual's abilities to access an extensive range of other fundamental rights, many of which have themselves been the target of human rights-focused disclosure regimes, such as the California Act. While not presuming the possible success of such a reason, this analysis does suggest that if we accept that those other regimes are worth consideration, then it is not unreasonable to imagine that a disclosure regime for stateless individuals—or similarly situated vulnerable individuals—merits consideration as well.

B. *Feasibility and Practicalities of a Disclosure Regime for Statelessness*

This Section begins with a discussion of what a possible corporate disclosure regime for statelessness would look like: What companies would be affected? What would they be required to report? Who would they be required to report to? Understanding these questions can help to understand the relevant advantages and disadvantages.

Because many U.S.-based companies may not be directly involved with stateless workers in the United States, U.S. legislation targeting statelessness would have to be able to regulate company activity extraterritorially. The regime could take the form of a securities regulation, such as the Dodd-Frank Act, a regulation requiring companies to provide information publicly, such as the California Act, or a reporting regime tied to legal accountability, similar to the French Duty of Vigilance Law. Each option has benefits and drawbacks. Working within securities regulation offers an opportunity to work within companies' existing legal and operational structures for reporting risks to the SEC and investors. Moreover, the consequences of failing to comply with SEC requirements are clear and well-known, such as shareholder suits for false and misleading statements made by the company.<sup>73</sup> Existing regimes of information disclosure, such as the California Act, carry less significant sanctions for failure to report. Under the current California Act, the only possible sanction for violations or failure to report is an action from the California Attorney General for in-

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73. See Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97, 117 (2013).

junctive relief.<sup>74</sup> But securities regulations may be more prone to legal challenges, due to the ongoing debate regarding whether human rights information is sufficiently material to be regulated under the '34 Act. A regime following the basic structure of the French Duty of Vigilance Law would likely have the greatest chance at enacting change, due to the requirement that companies take action and the option for affected individuals to pursue recourse in the judicial system if companies fail to act.

Whether implemented through securities regulation or information disclosure, a disclosure regime would require companies to conduct diligence on their supply chains and identify any risks of statelessness or individuals without any form of identity documentation, as Brewer and Turner propose. U.S.-based companies subject to the regulation would be required to work with their suppliers, NGOs, and other stakeholders to identify groups or individuals in their supply chain that may be at risk of statelessness. These companies would also be required to report on the steps that they are taking to address statelessness and documentation issues for groups of interest.

The regime would require companies to be aware of documentation and statelessness issues in their supply chain. The remainder of this Note considers the advantages and disadvantages of such a regime.

### C. *Advantages of a Disclosure Regime*

A disclosure regime for statelessness offers a way to engage TNCs in efforts to combat statelessness.<sup>75</sup> As previously discussed, public law initiatives to alleviate statelessness, while critical, have not been sufficient.<sup>76</sup> Public law, which is designed to regulate state behavior, is a difficult tool to wield particularly in cases where statelessness and documentation issues stem from state inaction or state initiatives that directly withhold nationality or documentation from certain groups, as is often the case. Although intended to regulate state behavior, public law lacks the teeth to force states to comply. Many of the public law initiatives that have been implemented in the

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74. *Id.*

75. Brewer & Turner, *supra* note 5, at 99.

76. *Id.* at 99.

past lack the necessary monitoring, implementation, or enforcement mechanisms to be effective.<sup>77</sup>

On the other hand, TNCs have significant sources of cash flow and investment and may thus be able to more quickly and effectively push states to implement measures to alleviate statelessness. For governments that rely on TNCs for cash flow and domestic investment there may be more of an incentive to respond to pressure from corporations to fix discriminatory or inaccessible documentation and nationality laws than similar pressure from international organizations that often lack the necessary enforcement measures. TNCs could use their resources to provide guidance and support to stateless employees throughout the documentation process.<sup>78</sup> Companies could be more effectively pressured to undertake these measures given that securities regulation comes with the teeth that public international law does not, such as sanctions imposed on the company for not reporting or for not addressing risks outlined in their disclosures. Whether these sanctions are actually applied and produce this incentivizing effect depends on the design of the regime. However, where reporting requirements are accompanied by judicial recourse mechanisms for affected individuals, there may be an opportunity for to implement a distinct form of regulation on statelessness that has accountability structures and incentives for change that public law initiatives do not.<sup>79</sup>

Furthermore, compared to the government, corporations are often in the position to interact with statelessness and undocumented workers on a more intimate level.<sup>80</sup> This puts TNCs in a uniquely powerful position to assist in alleviating statelessness. In the DR, for example, a 2016 study found that 43% of Haitian-born sugarcane workers at three major sugarcane companies did not have any form of identity documentation.<sup>81</sup> Of the Dominican-born workers, 35% did not possess any documentation.<sup>82</sup> These studies would suggest that on average, a third of a sugarcane company's workforce in the DR is undocumented and possibly stateless. These same individuals

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77. Sarfaty, *supra* note 73.

78. Brewer & Turner, *supra* note 5, at 100.

79. Cossart, *supra* note 47.

80. Brewer & Turner, *supra* note 5, at 99–100.

81. VERITÉ, *supra* note 66.

82. *Id.*

are often confined to sugar plantations and face restrictions on their freedom of movement because of the guards that patrol the plantations and the risks of traveling through the country without documentation.<sup>83</sup> Widespread deportations of individuals who “look Haitian” and are unable to present identity documents are common, leaving individuals in a precarious position when they travel.<sup>84</sup> Given the isolated position of stateless individuals, companies may be the most significant institution that such individuals interact with on a daily basis. A disclosure regime that incentivizes TNCs to identify documentation issues, provide support, and lobby governments to respond could offer an extremely powerful way to leverage this close relationship.

Finally, implementing a disclosure regime for statelessness provides an opportunity for increased access to education about statelessness. Human rights advocates and civil society groups can use information released by companies to pressure the governments perpetrating statelessness and better support undocumented and stateless persons, particularly those living on company plantations or in other isolated areas. The information made available via disclosures would also offer the opportunity to raise awareness about issues of statelessness. Mandating disclosure of statelessness-related risks will bring these issues to the attention of consumers who will then have the necessary knowledge to select companies that do not abuse stateless workers. Knowing that their supply-chain practices are up for public scrutiny, corporations are likelier to ensure that statelessness-related risks are properly addressed. Authors who have written about the Dodd-Frank Act have argued that leveraging securities law for a given human rights issue increases the visibility of human-rights related issues.<sup>85</sup> Placing human rights risks alongside financial risks sends the message that human rights, including statelessness, are an issue that companies must prioritize. The issue of statelessness is often overlooked due to the challenges in finding statistics and affected

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83. See INTER-AM. COMM’N ON HUM. RTS, *supra* note 59; Sandy Tolan & Euclides Cordero Nuel, *Paramilitary-Style Guards Instill Fear in Workers in Dominican Cane Fields*, THE INTERCEPT (Oct. 14, 2022), <https://theintercept.com/2022/10/14/dominican-sugar-central-romana-fanjul-domino/> (last visited Feb. 23, 2023).

84. See *Id.*

85. Sarfaty, *supra* note 73.

individuals, but a disclosure regime presents an opportunity to make this information more accessible.

D. *Possible Risks and Unintended Consequences of a Disclosure Regime*

Although the opportunities of a disclosure regime appear exciting, there are special risks that must be considered because of the vulnerability of stateless and undocumented individuals. A disclosure regime that fails to account for and meaningfully address these serious risks would do more harm than good. Individuals without any formal documentation already experience significant difficulties in accessing formal labor markets, and they face a risk of abuse and exploitation when they manage to actually enter the labor market. If a disclosure regime exacerbates these risks such that harm outweighs the possible benefits, then disclosure is not the appropriate solution.

Requiring TNCs to conduct due diligence on the citizenship status of their workers could raise the risks of deportation or dislocation for individuals who are already at risk as a result of government policies regarding persons who lack identity documents. In the DR, for example, the arbitrary deportation of Dominican-born individuals is a serious ongoing issue.<sup>86</sup> Requiring companies to flag the workers who lack identity documents raises a serious risk of those individuals just being passed on to immigration enforcement, even in cases where an individual was born in the DR, has never migrated, and merely lacks documentation of their nationality or residency in the DR. The DR also requires that contractors of temporary workers repatriate workers upon the expiration of their temporary work permit.<sup>87</sup> In theory, this policy does not impact undocumented and stateless workers, but in practice, this policy offers companies the cop-out of simply having the government de-

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86. See INTER-AM. COMM'N ON HUM. RTS, *supra* note 59; Allison Petrozziello, *(Re)producing Statelessness via Indirect Gender Discrimination: Descendants of Haitian Migrants in the Dominican Republic*, 57 INT'L MIGRATION 213, 220 (2018).

87. Ley General de Migración, Art. 58. *Republica Dominicana* (2004), available at: [https://www.comillas.edu/images/institutos/migraciones/Documentaci%C3%B3n/legislacion/Republica%20Dominicana/Ley%20General%20de%20Migraci%C3%B3n\\_No.285-04.pdf](https://www.comillas.edu/images/institutos/migraciones/Documentaci%C3%B3n/legislacion/Republica%20Dominicana/Ley%20General%20de%20Migraci%C3%B3n_No.285-04.pdf).

port undocumented persons who are unable to prove that they are not in fact migrants.

Due diligence on employee citizenship status also raises risks for other vulnerable populations. As in the case of the DR, stateless workers frequently work in industries alongside undocumented migrants who are at risk of deportation and have no meaningful pathway to documentation.<sup>88</sup> Conducting due diligence on the citizenship of all workers, without providing any form of support for workers to navigate documentation processes, risks exposing other migrant workers to harm. A database or document of the citizenship of all workers compiled by a corporation may enable the government to summarily deport other migrant workers without the due process those workers are entitled to under law. Instead of contributing to a solution, such reporting would risk adding to severe existing issues of arbitrary deportations.<sup>89</sup>

Requiring companies to provide support to individuals who do not have documents could also result in firings of those workers if the company does not want to provide that support. For example, reports of companies firing undocumented workers in the DR at whim, sometimes right before payday, are already rampant.<sup>90</sup> This risk is exacerbated by the prevalence of informal labor and verbal work contracts, leaving workers unable to prove their terms of employment and seek recourse.<sup>91</sup> In the context of widespread under-employment, companies can simply fire any individuals that they may be required to support and find individuals willing to do the work who do have documents. Authors noted similar concerns with the Section 1502 requirements, noting that strict mineral disclosure requirements could simply push companies to leave the Congolese market, leaving the market to “black-market” operators that are subject to far less regulation.<sup>92</sup> The Dodd-Frank Act pushed companies away from the mineral market. Requirements for statelessness could push companies away

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88. VERITÉ, *supra* note 66.

89. INTER-AM. COMM’N ON HUM. RTS, *supra* note 59; Petrozziello, *supra* note 86.

90. Effie Smith, *Livelihoods in the Balance: Haitians, Haitian-Dominicans and Precarious Work in the Dominican Republic* (2020), <https://etda.libraries.psu.edu/catalog/18182ees238> (last visited Apr. 24, 2022).

91. *Id.*

92. Sarfaty, *supra* note 73.



from the *human capital* market, leaving stateless and undocumented workers without work and forced into even more abusive situations in order to survive.

E. *Weighing the Costs, Benefits and Potential Opportunities*

This Note has presented a range of benefits and costs associated with a possible disclosure regime for statelessness. Possible advantages include increased governmental attention and resources towards statelessness, as well as increased public awareness of the issue. Disadvantages include the severe risks to individuals' status within their country of residence, as well as corporate abuse of the provisions to threaten workers' employment. Given the severe risks, I propose that a disclosure regime should only be considered as a solution for statelessness if at least three central elements are included: 1) enforcement; 2) reporting mechanisms for employees; and 3) stakeholder involvement. If designed with these indispensable protections, a disclosure regime might be able to leverage the power of corporations to address the crisis of statelessness.

Enforcement is necessary to ensure that a reporting regime results in support and aid for stateless persons, not merely exposure and increased vulnerability. Given the serious risks involved, a successful enforcement regime would require companies to pair their due diligence investigations with adequate support mechanisms for addressing issues of statelessness that may be uncovered. A disclosure regime without strong enforcement measures to ensure that corporations actually support stateless persons erroneously assumes that corporations will use the information that they obtain from their due diligence for good. If reporting is not accompanied with clear avenues through which corporations are required to provide support along with information they are reporting, there is a risk that the information will at best merely serve as a symbolic gesture, and at worse, cause severe, life-altering harm to stateless individuals.<sup>93</sup> For *de facto* stateless individuals who are eligible for citizenship but have been unable to access proof of that nationality possible support mechanisms could include linking individuals with funding and non-profits that support

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93. Rachel Chambers & Anil Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. OF INT'L L. 323 (2021).

individuals to navigate the documentation process. For *de jure* stateless individuals who have no pathway to citizenship under established laws, support mechanisms could include lobbying governments to take action to address gaps and discrimination in nationality laws that result in statelessness. These enforcement and support mechanisms are both challenging and critical. Past disclosure regimes, such as the California Act, have demonstrated the difficulty of designing mechanisms that actually respond to the human rights abuses that are disclosed.

Reporting mechanisms go hand-in-hand with enforcement. As the many instances of abuse and exploitation in the DR show, corporations have immense power to control, exploit, or fire stateless and undocumented employees. Stateless and undocumented persons have few forms of recourse if they are fired or deported without cause. To ensure that corporations do not abuse reporting requirements or simply fire or further exploit their undocumented workers, a disclosure regime should include realistic methods for employees to report abuse of the provisions, such as WhatsApp hotlines or repeated visits from monitoring bodies that are free from corporate interference.<sup>94</sup> If it is deemed that these avenues do not realistically exist, this should weigh against the consideration of a disclosure regime.

Finally, a successful regime must involve participation from all stakeholders. Stakeholder engagement is crucial for pushing businesses to comply with their human rights responsibilities and implement human rights-focused programs.<sup>95</sup> Because combatting statelessness often involves difficult issues such as discrimination and inaccessible bureaucracies, stakeholder engagement in designing and maintaining the priorities of a reporting scheme is particularly important.<sup>96</sup> Stakeholders would also be able to more aptly identify exactly what

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94. WhatsApp can offer a free, accessible reporting mechanism. For an example of possible WhatsApp hotlines for reporting abuse by vulnerable individuals, see e.g. Warnings about risks of human trafficking, UNHCR NORWAY, <https://help.unhcr.org/norway/warnings-about-risks-of-human-trafficking> (last visited Feb. 4, 2023).

95. BRINGING A HUMAN RIGHTS LENS TO STAKEHOLDER ENGAGEMENT (2013), <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/Shift-Workshop-Report-3-Bringing-a-Human-Rights-Lens-to-Stakeholder-Engagement.pdf>.

96. See Refugees, *supra* note 1, at 22.

should be reported and what other elements would be necessary to include in a disclosure regime to ensure that the regime is helpful rather than harmful. Local advocates and community members will be critical for monitoring possible unintended consequences and risks and can flag issues much earlier and faster than an international regulatory body can. To incorporate stakeholders, any advocates proposing a statelessness disclosure regime must work extensively with a range of affected communities before bringing forward any possible regime. If a regime is considered, the SEC would be required to receive public comments about the regime, which should incorporate analysis from advocates and stateless populations.

Given the challenges outlined above, the French Duty of Vigilance offers the most powerful existing example to look to for the possible design of a statelessness disclosure regime, although the regime would need to be adapted and strengthened with the protections explained above. The law's design allows for much more stringent enforcement and would enable the kind individual complaint or reporting mechanisms that are necessary to ensure that stateless and undocumented individuals have an avenue to report if they are harmed by reporting requirements. Through the individual complaint mechanism, individuals can hold companies accountable for preventing abuse of stateless and undocumented individuals and supporting programs that alleviate statelessness. There may be some challenges in showing that statelessness and documentation issues are caused by a company's failure to monitor, which would be required to bring it under the purview of the law. However, where a company is engaging in the abuse of stateless workers or benefitting from stateless workers' lack of legal status in any way, there is a very strong argument that harms are in part due to a company's failure to vigilantly respond to human rights abuses.

#### CONCLUSION

The various advantages of a disclosure regime may make it a powerful and enticing opportunity to address ongoing statelessness crises. The growing success of Economic, Social & Governance campaigns suggests that a disclosure requirement targeting statelessness could draw corporate attention and resources to a dire human rights issue. However, stateless indi-

viduals occupy an immensely vulnerable position within supply chains. Given the risks that stateless individuals face, it is critical to understand these risks when crafting a disclosure regime, as well as any other strategy to leverage corporate power to address statelessness.

As this Note demonstrates, such relationships must be pursued with extreme care. Without the necessary enforcement and reporting mechanisms, and stakeholders who can help facilitate a responsive and evolving regime, a disclosure regime risks bringing more harm than good.

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12TH ANNUAL SPORTS LAW COLLOQUIUM<sup>1</sup>

PRESENTED BY:  
NYU SPORTS LAW ASSOCIATION  
NYU JOURNAL OF LAW & BUSINESS

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Friday, March 24, 2023

WELCOME REMARKS

**Nick Sloan:**

Hi everyone. Thank you so much for joining us. My name is Nick Sloan and as co-president, it is my pleasure to welcome you to the NYU Sports Law Association's 12th Annual Sports Law Colloquium. This year's program features three incredible panels and a keynote conversation all touching on some of the most pressing legal issues in sports.

The first panel up will be the Future of Sports Broadcasting, followed by the Rise and Impact of Legalized Sports Gambling, and the last panel will be a conversation on the Professionalization of College Athletes. Finally, we'll conclude with the keynote conversation with Brad Ruskin, co-chair of Proskauer Sports Group, moderated by Professor Cameron Miler of the Tisch Institute for Global Sport.

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1. Editor's Note: The transcript has been edited for clarity.

We'd like to thank our board members for assisting in putting this together, you all for attending, and of course, the moderators and panelists themselves as this event would not be possible without them. A considerable amount of time and effort has gone into planning this event, so we truly hope you all enjoy and learn some new things about the fast changing sports law world. Without further ado, I'll turn things over to our treasurer, Caleb Paasche, to introduce the moderator for the first panel.

## I.

### THE FUTURE OF SPORTS BROADCASTING

**Caleb Paasche:**

Thank you, Nick. My name's Caleb Paasche. I'm the treasurer of the NYU Sports Law Association, and we'll be kicking off our colloquium today with a panel discussing the future of sports broadcasting, which will be moderated by David Aldridge.

Mr. Aldridge is a senior columnist of *The Athletic* and also the editor-in-chief of *The Athletic*, Washington DC. He's worked for nearly 30 years covering a variety of sports, but primarily the NBA. Mr. Aldridge is written for companies such as Turner, ESPN, and the *Washington Post*. In 2016, he received the Curt Gowdy Media Award from The Naismith Memorial Basketball Hall of Fame and the Legacy Award from the National Association of Black Journalists. I'll now turn it over to David to introduce our panelists and begin our conversation today.

**David Aldridge:**

Well, thank you very much. I appreciate that. Thanks to everybody that's taken part. We have kind of a tight schedule, tight window, so we want to get right to the discussion. I think it's going to be very innovating and I'm going to try to not talk very much so I can learn from our great panel. But let's get started. Let's introduce the panel.

We'll start with John Lasker, who's the Vice President of Digital Media Programming at ESPN, where he is the lead programming and acquisition executive responsible for ESPN+. Mr. Lasker also works to maximize ESPN's audience reach, rights and revenue opportunities across various digital platforms, a capacity within which he works closely with Disney+.

ESPN and Disney Marketing and Hulu and more in order to support integrated content acquisition, distribution and monetization. Mr. Lasker has worked at ESPN since 1999 and has led live streaming efforts at the company since 2006, including the launch of ESPN3.com, Watch ESPN and ESPN+. So John, thank you for joining us.

**John Lasker:**

Thank you, David.

**David Aldridge:**

Ivan Parron has more than 25 years of experience as a transactional lawyer and senior executive within the sports, entertainment and media industries. He is the founder of the internationally recognized law firm, Parron Law, which specializes in providing counsel to sports, entertainment, and media companies. As the named partner at the firm, Mr. Parron has played a critical role in negotiating television broadcast and global media rights agreements. He also has experience representing some of the largest television production companies in the world. So Ivan, thank you for joining us from sunny Miami.

**Ivan Parron:**

Thank you for having me.

**David Aldridge:**

Tony Iliakostas, who is also known to some of you as Professor T or Prof T, is the senior manager of ABC News Rights and Clearances, and in his fourth year as an adjunct professor at the New York Law School teaching Entertainment Law and Intellectual Property. In his role at ABC News, Tony handles complex copyright licensing for various ABC news programs and works closely with the News Division's Business Affairs and Legal Departments on various risk assessment matters when licensing photos and videos for the broadcasts, as well as mitigating any legal claims of copyright infringement. Professor T, thank you for joining us.

**Tony Iliakostas:**

Pleasure, David. Thank you.

**David Aldridge:**

It's a great panel. I have been given questions here, but I do want to start with this, and I forwarded this and warned everybody. I want to go really quick about what's going on with Valley Sports/Diamond Sports because we've got the start of the Major League Baseball season is next week and half of the league is on Valley Sports or is on Diamond Sports, almost half of the league I should say. I just wanted to take a quick sampling from everybody. What do you think is going to happen with those games? Are those games going to be aired or are they going to be aired on Valley or is MLB going to have to step in and air all these games and broadcast all these games? I'll just start with John and we'll just go around from there.

**John Lasker:**

Yeah, sure. Thanks, David. I don't think there's any doubt that the games will be broadcasted and made available to fans. I think the question, to your point, David, is where and how. That's the biggest question. I would bet that the games, at least for some period of time, remain available through Valley and hopefully through the remainder of this season. But obviously, there's a lot sort of pressing against this, but also know that the leagues are certainly preparing themselves for alternatives. Today, as I know we'll talk about, it's a lot easier for the leagues to find an alternative and a lot easier for fans to actually navigate to those alternatives than it's ever been, which is maybe the silver lining and good news here.

**David Aldridge:**

Ivan, what do you think?

**Ivan Parron:**

Well, it's interesting as opposed to say 20 years ago when you originally had TNT and ESPN for instance, when they started the movement over from broadcast television over to cable, the effect was really more of a pull effect on the leagues where for economic reasons and so forth, they were able to draw the leagues over toward the cable side.

Whereas in this situation, it's more a push situation where the realities are forcing the leagues to reexamine and study where they're at as far as the rights go. And it's a real tightrope that needs to be walked here because you have competing situ-



ations between antitrust issues that could occur with respect to one company distributing a large amount of the entertainment without competition.

Then there's also the 800 pound gorilla in the room, which is a monopsony. A league would want to avoid having one large player having all of these rights and lose out to where their distribution strategy, where they've been very successful in cutting up the rights in different distributors and maximizing their revenues.

**Tony Iliakostas:**

To piggyback off of what everybody said, I mean, I think this is going to be a very. . . This might really set the landscape for media broadcasting or sports media broadcasting as we know it for sure. For people who aren't aware, Diamond Sports, I believe, is a subsidiary of Sinclair, which is one of the major affiliate companies out there. They're kind of up there with Hearst, Nexstar, Cox Media Group, that kind of thing.

So something like this, which is by the way, chapter 11 bankruptcy, which from what I understand is a reorganization type of bankruptcy. I mean, I think to piggyback off what John said, I have no doubt also the games will be shown. It's just a matter of when and where. I also still think that it's a matter of whether or not Diamond is still going to exist. Are they going to kind of hand over the keys to somebody else that's going to be rebranded into something brand new entirely?

The thing to bear in mind here is that I think this is a small snapshot even into the larger picture with what other media companies are dealing with their streaming platforms. You have platforms like Paramount+, Peacock, Netflix that are doing quite well over the course of the last half a year, so far six months. But then you have companies like Disney+ that have had a marginal growth and even I think Hulu had a marginal growth as well.

How do you retain viewership? How do you avoid losses and subscriptions in a landscape like that for media entities? I think in the same vein, when you're a media company and you're hosting games over basic cable like this, is this an issue? Did this happen because people aren't subscribing to cable? Is this happening because the accessibility to the games is a problem? There is a lot to consider here, but I definitely think this is one for the books for sure.

**David Aldridge:**

Well, let's pivot to direct to consumer because that's obviously where this thing seems to be heading. Right? So I mean, we all understand that the NFL's got Thursday Night on Amazon now, and MLS is going to be on Apple for the foreseeable future. So my experience in these sort of things is that once it starts, it doesn't stop for a good long while.

So where do you guys think this landscape is? What's it going to look like basically in five years, 10 years? Are we going to see the majority of sports on streaming or direct to consumer, or still have some hybrid with cable and other over the network entities? And let's reverse the order this time. We'll start with Tony this time and go back.

**Tony Iliakostas:**

So I'm a communications major, so naturally I'm inclined to talk about older media that existed. My Fordham professors always told me about how yes, we were entering an age where these things, these computers and websites were going to be the way we would read articles. Would that mean the death of the newspaper? The newspaper industry has been hit drastically with the rise and the proliferation of websites and paywalls, but you can still pick up the physical media.

So I'm using that as an example because I don't think we're at an age yet where we're willing to give up set top boxes or over the air cable as a method of broadcasting games.

Now that said, the acquisition of Apple TV for MLS and Thursday Night Football with NFL, you're starting to see almost like a redefinition, if you will, of the big three in sports broadcasting; ABC, CBS and NBC being those juggernauts that broadcasted all the major sports games once upon a time. And I think we're seeing that to this day, and I honestly think it's a smart strategy because the ad models are going to look much different for the networks, for these platforms and for these sports leagues. I think the accessibility will be much better because you may save yourself the stress of having to pay a lot of money to buy a cable package if you know that you're only buying it just for the sports games.

**David Aldridge:**

Yeah.

**Tony Iliakostas:**

And I think that all around, it's going to be a really workable model. Obviously, I think the only thing that I would be a little bit worried of is the whole blackout situation because that's just been an ongoing issue across the board. I feel like it's never been quite remedied, but all in all, I can only see good from here. But to say that we're quick to omit basic cable or other traditional forms of media from sports broadcasting, I think it's a bit of a premature thought, but maybe in 10 years we might be having a different discussion.

**David Aldridge:**

Ivan, what do you think?

**Ivan Parron:**

Well, I think that the professional sports leagues are going to continue with their slicing up their rights and distributing them and experimenting with new experiences for the consumer.

You have situations with the growth of, obviously, for instance, sports betting and sports data has opened up a whole new world and part of these rights these large sports data and betting companies are acquiring, usually sports betting and data rights include a couple of different things: historical sports data, real-time sports data and real-time streaming of the actual live events.

That's going to create new combinations and new players within the industry that there may be experimentation with. There's also new technologies like artificial intelligence and ARVR and so forth that will create new types of platforms that they'll probably be experimentation with. Platforms with Twitch, but there may be experimentation with.

So I think we'll continue to see a distributed menu of these sports on different platforms and new platforms and so forth as we move forward.

**David Aldridge:**

John?

**John Lasker:**

I don't disagree at all with what Tony and Ivan said, and I actually think Ivan talked a little bit about this before with the

regionals, and Tony I think was smart to speak about the history here. It's important to look at the history of sports on television. When the NFL was on NBC or on ABC for Monday Night Football, the reason for that was ABC was trying to get a huge audience to their platform to then drive their primetime television ratings and promote the other shows that are on the rest of the week. That was the reason for it.

Cable comes around and sports navigates to cable because folks like ESPN and Fox and others are trying to drive a dual revenue distribution model. They're getting bigger fees when they have sports on their networks. And now you have, like you mentioned, the Apple TVs and Amazons of the world that are buying sports for very different reasons than ESPN is buying sports and very different reasons than ABC historically was buying sports. And I think the best example of this is the subsequent sort of announcement that Amazon and NFL had where they they're going to do for free, ungated, the Black Friday game. Right?

**David Aldridge:**

Yeah. Right.

**John Lasker:**

They're doing that. That is a huge moment for Amazon. They're getting a lot of people to their platform to buy a bunch of stuff, right?

**David Aldridge:**

Sure.

**John Lasker:**

And they're using the NFL's audience to make that happen. So I think you'll see a lot of these companies testing out how sports can actually help them drive their core businesses, and that's the reason. Amazon's not trying to be ESPN or Fox Sports, neither is Apple. They're doing this stuff for very different reasons.

And I think just in streaming in general, regardless of the model that's supporting the streaming, it's going to be ubiquitous. And I think in two ways: the things that we're used to seeing maybe exclusive to the MVPD, vMVPD universe are go-

ing to be available in various forms across streaming and then there'll be more available.

I think there's an expectation that's continuing to grow where my daughter is playing in a soccer game in name your county, and I should be able to watch that wherever I am in the world. So I think those two forces are going to continue to grow over time.

**David Aldridge:**

I had a brief question about legal framework of these new deals. Are they the same as the traditional TV rights deals in past years?

**Tony Iliakostas:**

For the most part, they are. I mean, I almost think of it kind of like a lending of rights, if you will. These distributors, these streaming platforms are operating like distributors in the traditional sense where they're being asked to broadcast the games, but eventually the content is vested with the league.

So we all know that Major League Baseball, like towards the . . . when it's wrapping up, when they have that announcement that says, "The contents of this game may not be redistributed in any way, shape or form without the expressed written consent of Major League Baseball Advanced Media." So it's the kind of thing where the only reason why the entity, the distributor is involved there is because they're the ones broadcasting the game.

In my time doing tons of licensing at ABC news, I've done quite a few sports shows. One of our most recent one was on Kobe Bryant and a lot of the games that we had to license had to go directly to the NBA, we had to get that license. But for the other stuff, maybe off-court interviews, maybe little maybe pre-workout warmups kind of thing, that was ESPN. So we had to license it from them directly, that kind of thing. So they operate essentially the same. I wouldn't see that part of the legal model changing anytime soon.

**John Lasker:**

Yeah, I agree. David, the only thing I'll mention is what's sort of just progressively changing, and Ivan mentioned this too, just how the rights holders are breaking up their right sets to the most sort of finite slices as they possibly can, is these

deals are very, very finite and the leagues are trying to put as much sort of bars around what the right is that they're actually licensing to Amazon, to ESPN, to Apple in order to protect their ability to do other things like gambling, like metaverse which I think we'll talk about those types of things. Where in the past, at least in my early days at ESPN, there was a lot of all means in media deals that we enjoyed, which are a thing of the past.

**Ivan Parron:**

And another interesting element about the whole process is when these deals are made, it's not just about the rights, there's also all of the production that's involved. And that's a big question. Whereas formally it you'd have the Valley Sports or the Diamond Companies.

Basically they're funding all of the production, hiring all of the talent, doing all of the interviews and the play by play, and then they're funding that obviously through their revenue sources and so forth. So that's an important part of the mix in figuring out where that production, where the financing for that production is going to come from specifically.

**David Aldridge:**

Well, I wanted to kind of pivot to that and talk more about the fragmentation that we've seen. I mean MLB is on, I think, 11 different platforms now.

**John Lasker:**

That's it?

**David Aldridge:**

And I get it, and watching MLB games on Apple is a completely different experience than watching it on Fox. And that's okay. It's fine because you're trying to reach different consumers. But I just wonder like, where do you think this is. . . How fragmented can a sports league be when trying to reach so many different types of people in different consumers where they are? How far can they go in their fragmentation of their sports rights?

**John Lasker:**

I'll start. I think that there's a couple of different ways to think about it. Number one, when you talk about Major

League Baseball and other leagues that have a lot of inventory, NFL aside where their inventory is very finite, they do have to be careful about balancing their distribution with making sure that they're keeping their product special, at least on a national basis and not watering it down.

And I think there's a lot of pressure on these leagues to continue to increase their rights fees revenue, and it's gotten to a point where you can't do that without engaging multiple partners and more partners than maybe you would have in the past.

And then the other piece of this is then slicing the other way of like, here's the game and you have television or cable or broadcast rights, and then somebody else has the gambling distribution rights and somebody else has the metaverse distribution rights and the league retains some rights, et cetera, all to make sure that they're monetizing as much of it as possible. They don't want to give anything to these national broadcasters that those national broadcasters aren't going to monetize themselves and take on themselves.

**Tony Iliakostas:**

One point that John's bringing up here that's really interesting and important to note also, is that all these sports leagues are essentially kind of doing their own quasi IP audit, if you will, where they're assessing the value of their league from an intellectual property point of view. The games, the trademarks, the players' likenesses, all of these are integral to the function of the league. That's why you have sports jerseys being sold exclusively on Fanatics. That's why you have DraftKings as the exclusive sponsor of the New York Mets or whatever, because there are these partnerships that the leagues and teams individually are brokering with these various entities.

And on one hand, there's the primary stream of revenue, which is bringing people to the game, buying tickets. Then the other way you have the streams of revenue is by these other ancillary ways of marketing and monetizing off this other IP. Whether that's by way of doing merchandise licensing in its traditional sense, or television distribution models like acquiring the rights with Apple TV or Amazon, or even the creation of something like NFL+, having then ad space on those types of platforms. It's definitely a game changer for sure.

**Ivan Parron:**

Yeah, and it's an excellent point as far as the fragmentation goes, because as consumers, you have different demographics that are used to a certain presentation. I mean, for years we were used to the broadcast presentation, for instance, of the NFL. When they started making the switch, they basically took a lot of the production and tried to emulate the same production. But now you have new technologies with Amazon. You have the version that they have with the video game playing and so forth.

It's opening up, and I think that the leagues are really now so data driven that they're studying all of these experimentations and seeing where is the market going, where is the larger market, and how is it that they're going, where is the larger market, and how is it that they're going to consume their product and what is the best way that they consume? At the end of the day, it's all about the consumer and what the growth markets are.

**John Lasker:**

These deals have also become very long term, which also plays for the leagues as they want to make sure that they have as much flexibility to take advantage of the market conditions as they progress over those next . . . If it's a 10-year deal, they want to make sure they didn't sell rights to somebody that they're now not able to monetize or control on their own, which is a big part of this as well.

**Tony Iliakostas:**

Right.

**David Aldridge:**

Tony, you had mentioned intellectual property, and I did want to ask about that and just how the changes in these delivery methods affect the stakeholders intellectual property rights and claims. What's going on in that space?

**Tony Iliakostas:**

I think that there isn't really much to say. IP is IP is IP. I think that even though we're in this space now where NFTs and the metaverse are coming up, a lot of people think that now the rules of intellectual property don't govern. Well, I



hate to be that guy, but I think that that's just not true. I've told my students that the rules of the fiscal universe equally apply in the digital universe. I think that if you're committing criminal copyright infringement by recording baseball games or NBA games, you're selling that on platforms that you shouldn't. That's criminal copyright infringement in the same way as if you went on some streaming website, you decrypted the platform, you record that footage and then you, again, sell that footage in an improper manner. Bottom line is it's actually, if anything, maybe up the ante for leaks and teams individually to continue making proactive efforts to police their brand in a way that would be important for them to do, as it is the case all the time.

Let me put it to you this way. The NFL manages hundreds, I would even venture to say maybe close to thousands of trademarks for their teams, their leagues, or all their entities that are associated with the league itself, even down to the Vince Lombardi trophy, which is registered as trade dress in the U.S. Patent TriMark office. If they're being proactive about trademark enforcement for that kind of thing, I am certain that they're being proactive in protecting the IP and other aspects now with the proliferation of the digital landscape of sports media as we know it. So yeah, I honestly think that the landscape of IP is evolving with the growth of all these new streaming platforms, but then with it comes this responsibility to do a really good job of enforcing it. So to quote the great Ben Parker, "With great power comes great responsibility." So we got to . . . through on that.

**David Aldridge:**

I've heard that word metaverse thrown around and I'm old now, so it's not where I live, but do we anticipate separate metaverse deals, rights deals in the coming future, in the next round of rights deals, negotiations?

**John Lasker:**

I think it's a simple answer, Dave. I think, yes, it's not dissimilar to we're in this now with the wagering distribution rights. A lot of leagues. Were smart to carve those out. It's something that's been happening actually in Europe for a long time that's been now replicated here as that becomes legalized across the country. I think the metaverse is one of those

things, like I was mentioning before, it's an unknown, but everybody sees it as a opportunity. I don't think leagues are, at least at this point, willing to just hand those rights to a media company outright and package it in with regular distribution rights. They would hold it back and try to figure out a way to monetize those rights in the metaverse themselves, whether with that partner or separately and on their own.

**Ivan Parron:**

Yeah, I think with respect to that, the leagues will continue to be with a conservative approach, as we saw with situations sometimes in technologies like with FTX, things can go wrong and you can overcommit to certain technologies and companies, but I think that the sports betting and data area is going to create a lot of innovation. I think it's being driven by the nirvana of sports betting, which is the prop bet. The biggest obstacle that they have is the real-time broadcast of a live sporting event. That's a real issue because between all of these platforms, you could have eight to 30 seconds of time delay

**David Aldridge:**

Yeah, right.

**Ivan Parron:**

I would see that as eventually leagues may find that as a new area of revenue where they might create a segment of the fastest real-time signal versus the delayed signal and try to capitalize on that and generating greater to revenue from maybe the sports betting area.

**Tony Iliakostas:**

One thing also to bear mind too, with the metaverse, and I would even branch this out even into artificial intelligence 'cause it's inevitable, it's probably going to permeate in the sports base for sure, and definitely sports media. We have to bear in mind if there could pose any potential conflicts of interest with the broader business of the company or certainly, the integrity of the sport also. So this is an example, a very loose example, but I'll wrap back to allude to why I'm talking about it. Actually, I just recently talked about this on my podcast, End Scene, with my co-host, Evan, End Scene. We talked just this past episode about how at one point the Writer's

Guild of America was entertaining using artificial intelligence ChatGPT as a way to create screenplays scripts that then they would give to writers to then touch up. Then if they touch it up, oh, they're going to be named first writer.

The actual physical author will be named first writer. But the problem with that is Hollywood studios around the world take great pride in registering the copyright for every last thing associated with the film; screen treatments, scripts, screenplays, storyboards down to the finished product. The U.S. Copyright Office has made it extremely clear that anything that does not have substantial human involvement, it wasn't written from soup to nuts by an actual human being with flesh and blood, that is not going to get copyright protection. So even if you have something that was generated by AI and is mildly touched up by a human, it's just not going to get copyright registration. So bringing it back to here, if sports leagues and even sports media entities are going to be reliant on these new media, which is all wonderful and innovative and fantastic, they have to ask themselves these exact same questions, will it bear some type of conflict of interest?

Will this clash with existing law? Will it clash with some type of business model that we have going? Not to say that it's not going to happen, and I hope it does, and it's integrated in a way that is unique and ingenious, 'cause I see a lot of great promise with the metaverse, with AI, even with NFTs and coalescing together, but there has to be a sound business strategy going into it. So I'm optimistic for it, but pretty much what Ivan said is on the money. You can't have a all buy-in model like what you did with FTX because the ramifications are great. Now you've got athletes being sued individually for they had insider knowledge. How would they have known they just signed the endorsement deal and called it a day? So how is Tom Brady personally liable?

**David Aldridge:**

Right. Is there a lesson to be learned from that? I dabbled in trying to learn about this particular . . . and theoretically it makes sense what they're talking about in terms of selling experiences and individual experiences. But is there a lesson to be learned by everybody and Larry David and the whole world at the Super Bowl jumping on the train that is now derailed

and lying in pieces? Is there something that we can all learn from that?

**Ivan Parron:**

I was just going to say we're an extremely litigious society, and it somehow finds its way into everything. You look at the experimentations with the metaverse as we were just discussing. Over at the Sports Lawyers Association, we had a panel back in November discussing specifically the metaverse and how there's new issues as far as crime within the metaverse and different legal liabilities and so forth within the metaverse. These are all things that general counsels that all the sports league really have to review and advise the leagues before they get involved, "Look, these are all possible ramifications, so let's go slowly, let's study this, but let's do it conservatively."

**John Lasker:**

I think there's just so much money flying around, so much excitement, some FOMO, if you will. To me, the lesson is don't get involved, don't lend your IP. Don't invest in something you don't fully understand.

**David Aldridge:**

Right.

**John Lasker:**

I think a lot of people got caught in that vortex, and the metaverse, I think could be the same thing.

**Tony Iliakostas:**

Yeah, on the money. I think it is a case of FOMO that we saw happening, unfortunately. But I even think that even for individual entities, you have to think if they're working with the celebrities like Larry David or Tom Brady, these people, if I'm working with an agent, one question I would make sure going forward with any brand deal that I do is, what do I do to get out of this? I'm not talking a la morality clause, or even a reverse morality clause, although that actually could work, but which actually we also talked about on my podcast too, but reverse morality clauses would be what if the company did something that was improper that allows me to get out of that contract?

**David Aldridge:**

Yeah. Yeah.

**Tony Iliakostas:**

So actually that would be the way to carve out, so maybe that is going to be the landscape for a lot of agents going forward with their clients going forward.

**David Aldridge:**

Yeah. Yeah. Let's pivot to rights fees because I am always dumbfounded by the notion that it's always more, it never goes down. It always goes up. It was mentioned earlier, the NBA is looking for 75 billion. I'm like, "Who could do that? Why would you do that?" So-

**Tony Iliakostas:**

Keith Cohen.

**David Aldridge:**

Yeah, right. So-

**John Lasker:**

Let's go, Mets.

**Tony Iliakostas:**

Let's go, Mets.

**David Aldridge:**

Well, right. Right. There's always somebody, there's always one owner. But how do your different organizations and everyone think about the value of these rights fees, and how do you go to your boss, unless you're Ivan and you're your boss, how do you go to your boss and say, "Yes, let's keep investing. Let's keep spending more money 'cause this is the value of it?"

**John Lasker:**

I think it depends first, David, what your business priorities are. We talked a little bit about Apple selling devices. Amazon is selling groceries and trying to make the math work, and the value of a game or a league asset might be very different to Amazon. Their math will be a lot different than ESPN's math or Apple's math. What we like to think about is just simply that. So recently, our priority on the ESPN side has been ESPN

Plus in driving our direct consumer service. The valuations that we put on deals are largely with that in mind, and sometimes you put a premium on those because you do need to upstart the surface and you might maybe pay a little bit more than it actually pencils out with the hope that adoption comes and other things happen to make good for it on the back end.

But the other side of this too is it comes the NBA or Major League Baseball is a great example, at least on the ESPN side as we get into our second year of our new deal is, we cut the number of games that we were doing nationally by maybe about half. I can't remember what the actual number is, but we stopped doing weekday games, Wednesday games, and Monday games because it just didn't work anymore. We knew we wanted to be in the baseball business, so we had to focus on the thing that was most important to us that was going to continue to drive the business, which was Sunday night baseball primarily. Then that opens the door for Major League Baseball to engage with more partners to then make good on what they need to make good on their expected license fees.

**Tony Iliakostas:**

So I'm in a unique position because I work under the same company John, we're ABC News, so we're sister companies. But the interesting thing for us as a news organization that we deal with when we're securing rights for a game or some program from let's say, ESPN or another entity that relates to sports is we think to ourselves, and this is the question we always ask ourselves with all our news programs, "What kind of story do we want to tell?" I guess this is the way I've framed it for some people. I'm half-Cuban, my grandfather came over from Cuba in 1960. He was a cardiologist for the state hospital in Havana. He had read a book in the style of *Animal Farm* in the mid-1950s that predicted essentially what happened in Cuba, which was an entire coup of an overthrow of democracy and in comes Communism.

So he knew that he had to get going and told my grandmother, "We have to flee." He had to even sew his medical diploma in the lining of his coat to escape because he feared that if Cuban police officials had access to it, they would tear it up and he wouldn't be able to practice medicine here in the U.S. Thank God he walked in just fine and no issues, no harm, no foul. But I think to myself, imagine if he had a camera cap-

turing that story, or imagine if there was the Operation Peter Pan and people invading the Bay of Pigs having cameras there. We didn't, but that would've been profound to the news storytelling process. I think that where we are now with user-generated content in this day and age, what's happening in Ukraine and what's happening even here locally in the U.S., across the world, we as a news organization are sober lining on any and every bit of content that will help effectively tell the story that we're trying to emit.

Certainly, with sports content, we value not just the game footage, but even the interviews, the heart-to-hearts that athletes may share in their story of what they dealt with. We've done a bevy of different sports shows on this exact matter and missing one bit of video makes a big difference in how good the show's going to be. So on one hand, I totally understand where the NBA's coming from in terms of trying to expect that type of revenue. It's just a matter of whether people or entities like ABC News are willing to buy into being a part of that licensing model and are willing to invest in that type of content going forward, or if there are other entities out there, they're willing to partner with the NBA on a broader landscape to help create some good revenue going. But I guess it's like an it depends answer, but I'm in a unique space in my place at ABC, where we value the content that we license and it's an ever-growing machine constantly. We're constantly licensing every single day.

**Ivan Parron:**

Interesting point by Tony, both my parents are actually Cuban.

**Tony Iliakostas:**

Oh, wow. Nice.

**Ivan Parron:**

But what's interesting, and I think John nailed it earlier, is these competing interests at different types of companies and how they're valuing the content is what's really going to determine where the numbers go. You think of the old concepts in retail with the Big Box retailers Best Buy, where they used to sell CDs under price at a loss called a loss-leader because their priority was to get people into the stores.

**David Aldridge:**  
Right.

**Ivan Parron:**

And the similar, Amazon may be interested in certain rights as loss-leaders to drive prime memberships. So that's a whole different approach with different priorities than a company that's maximizing the revenue by ad revenue and partnerships and so forth. So that's really what's going to determine, and that's the constant competition here as what's getting the prices up.

**John Lasker:**

We talked about that before too, just like in the history sports was used to drive television ratings and primetime viewership and then to drive the cable to revenue stream model and now to get people to buy groceries on Amazon. It hasn't proven to be less valuable than it was the year before yet. So I think companies are still going to find a way to find value in the audience and the passion and the connectivity that sports bring and how they can translate that into whatever their core business is.

**David Aldridge:**

Right. Right. We've got about 10 minutes left, so I just want to make sure we hit on a couple of topics here that are left. One of them obviously is gambling and how this just seismic rise in sports gambling in the last five years, how that impacts the media rights landscape. What are the effects known and unknown maybe that we are seeing and that we anticipate we will see in the years to come?

**Tony Iliakostas:**

I think it's very interesting to reminisce of the days back in 2015 when they were those FanDuel Draft Kings riots outside of the New York Attorney General's office. Is it a game of skills at a game logic? Here we are eight years later and you have basically a variety of different states have legalized sports gambling and basically this type of gameplay. It's truly remarkable how just a minor perspective of what this can mean for the economy, it's pretty magnanimous. I only see it going up from here if I'm being perfectly honest. This is a really, really great



way for people like casual fans like myself of certain leagues that if I'm feeling it, all right, I'll throw in 20 bucks in this game and see what happens.

It's the kind of thing where I'm not going to become addicted to it. It's like I've gamified the game, if you will. I think that that's almost the drastic change that we're starting to see. Also, how can you make the fan be involved in the game aside from actually consuming the contents of the game, watching this player get X points, this player get this number of rebounds? So I think sports gambling it's truly had a very, very interesting meteoric rise. It's been very impressive to see just the massive growth across the space.

**John Lasker:**

I think it's going to do two things primarily, and it already is, I think 'cause fantasy sports, I think, has been the more above board and legalized way to gateway drug.

**David Aldridge:**

It's a gateway drug.

**Tony Iliakostas:**

Yeah. Exactly.

**John Lasker:**

Right. You can talk about it in that way. My oldest daughter is an example of that where I put my family in a fantasy football league and she wound up having, Tyreek Hill was on her fantasy team two years ago. He obviously killed it, crushing it every single week. Now she's a Kansas City fan. Even though now he's in Miami, she's a Kansas City Chiefs fan, which is incredible. So it shows you the gamification, whether it's actually wager as we all think about it or gamification in a fantasy type of world is going to help these leagues expand their audience, actually get these casuals in. Then I think Ivan mentioned the in-game prop bet types of things. The folks that are already watching interested in sports engaged, these types of things are going to help people stay more engaged, spend more time with sports, which ultimately, means more money for everybody that's involved. So I think those two things are just, you're going to see the leagues, the networks, the gam-

bling companies continue to push audiences to engage in this stuff because of those two drivers.

**Ivan Parron:**

Yeah. I think with the sports betting, you have a whole different set of priorities and new reasons why. The thing with sports betting, they have an insatiable appetite for content because they want as many possible bets to be placed. So what I see sports betting doing is actually increasing competition as far as different sporting events, different concept. One of my clients is Dimayor, which is the Colombian Soccer Federation for the country for professional soccer. That was interesting. We ended up negotiating with Genius Sport and so forth, but in that country there was one national network that owned all domestic and international broadcast rights. We negotiated away the international rights and then basically sold it to sports betting company Genius Sports. They're broadcasting the games live in casinos of Macau. So it's an insatiable appetite for more and more content. I think that's going to be interesting to see the different competing sports and different entries into the market to see how it affects everything.

**John Lasker:**

David, one thing I think gets overlooked too when we talk about gambling is just the data. We use it at ESPN, and we actually have an exclusive data partnership with Caesars. So they basically provide all of our lines, which by the way, fuels a ton of storytelling. It's another way, even if you're not interested in placing a bet, it gives you more context. It gives more storytelling opportunities into why a game matters, doesn't matter or what the-

**David Aldridge:**

And beats, right?

**John Lasker:**

Exactly. Exactly.

**David Aldridge:**

Yeah.

**John Lasker:**

Yeah, so totally. So there's a lot of things outside of just getting people to wager involved.

**David Aldridge:**

Right. Let's close on the notion of younger sports consumers because I am both fascinated and terrified, and I'm sure you all are too, with the decreasing connectivity, especially with younger viewers and consumers. You see it in college, I think, with attendance. Kids just don't go to their school's games as much. They don't show up, and even if it's for free and it's almost always free and they give them food, and they don't come. Kids aren't interested in sports increasingly, and they don't watch live sports. I just wonder how do you begin to attack that problem? 'Cause it is a problem and maybe gambling is the entree to the younger viewers, but how do you think about that and game plan it and attack it?

**John Lasker:**

I could start. Yeah, I think you're right, David. Gambling is certainly an opportunity to help get younger audiences to continue to engage in live sports. We talked a bunch about streaming, just that notion of taking game and putting it on a streaming platform does help. The average audience age on ESPN Plus today is 35, versus your high 40s for ESPN, so that certainly helps. Then the engagement on, at least the way we look at it at ESPN is we don't try to think about any of these platforms or reach mechanisms as cannibalistic to another one. So being very active in the Snapchat, TikTok, Instagram, Facebook worlds, maybe Facebook is a little bit older than what we're talking about here. Sorry.

But the point being is just being where those fans are and trying to engage with them. I think that's the thing that we have to all do better at, oh, and one other thing is just trying other ways to do broadcasts. I don't know if any of you all saw, but we did a Washington-New York game last week and did a parallel broadcast using Big City Greens, which is one of the best Disney shows on Disney Channel as an alternate telecast, which is an amazing execution. The average age that we saw watching that game was 14-years-old.

**Tony Iliakostas:**

Wow.

**John Lasker:**

So it tells me that if you build it the right way, you can engage the audience. I just don't think it's, take the game as you've been producing it.

**David Aldridge:**

Yeah, right.

**John Lasker:**

. . . five, 10 years ago and just expect people to show up. You have to work really hard to speak to the audience that you're trying to engage with. But I do think it's possible.

**Tony Iliakostas:**

Yeah, Nickelodeon did that with the NFL with those games. That's another perfect example of how you're immersing or engaging with the younger audience at that point. One thing I will say that all the sports media entities and leagues have to bear in mind is that the average attention span of the person has dropped 25% since 2000. I think we're down to 8.25 seconds, which is lesser than a goldfish. But Yahoo did a study quite recently that Gen Z's attention span is 1.2 seconds, so that's a bigger challenge. So all that to say, I think that short form video user-generated content that you find on TikTok, Instagram, that's the way that you're seeing these people engage. They're constantly moving like this on their phones all the time. So I think you have to compromise or figure out how you're going to marry the traditional sports media, the traditional content you find on these platforms with this newer media, which can be a virtue, maybe a vice, but certainly a virtue and a consequence, in a time like this,

**Ivan Parron:**

Having an eight-year-old and watching what he watches on YouTube, it's just like short-form video after short-form video. The endorphins, how they operate and the attention span must be like whack. I don't even understand it. We look at historically sports with baseball, which had a certain speed, and then we went NFL and then NBA, the speed of sports and the attention has adapted over time. I think what we'll see is

creative ways of doing it with what you guys have been doing with having an audience like having the two brothers watching.

**David Aldridge:**

The Manning cast.

**John Lasker:**

Oh, the Mannings.

**Ivan Parron:**

Correct, the Mannings watching the game and commenting. That's right up the youth's market because they love watching Twitch and watching someone playing a video game and talking about it and so forth. That's a new creative way of breaking into that market. I think we'll probably see more of that – younger influencers who are appealing to younger kids and getting involved in that commentary situation. It's going to be interesting to watch.

**John Lasker:**

David, I don't have the data for this, but I believe where the bigger drop off is going to be is in the tonnage of Live, less with things like the Super Bowl and the NBA Finals. The things that really matter are the most sacred and where you can get fans, young and old, to engage, be interested, and care.

**Ivan Parron:**

The World Baseball Classic was a great example this past week. It did amazing. I haven't even seen the numbers as far as the rating goes, but the Miami Marlin Stadium was packed the entire time.

**David Aldridge:**

It was a great experience. I am fascinated by, to your point, Ivan. My kids would be watching other people play video games on YouTube. I said, "Wouldn't you rather just play the game yourself?" They're like, "No, this is how we learn." It was fascinating to me, like, "Okay," it's interesting to me, but it was really an eyeopener.

But look, I want to thank you all. This was fantastic, a great discussion. They told us we have to wrap up. Thank you

for your insights, for your intelligence, for your experience. It was a terrific discussion. Appreciate all of you.

## II.

### THE RISE & IMPACT OF LEGALIZED SPORTS GAMBLING

**James Whitty:**

Good morning everyone. My name is James Whitty, and I'm the Vice President of NYU Sports Law Association. Our moderator for the Rise and Impact of Legalized Sports Gambling panel is Dr. Daniel Kelly who joined NYU School of Professional Studies in 2019 as the Academic Director of Graduate Programs and the Clinical Assistant Professor for Preston Robert Tisch Institute for Global Sport.

Dr. Kelly has consulted on strategic leadership and global business initiatives with international sports organizations based in Spain, Argentina, Qatar, and elsewhere. He has also organized recruiting events with various professional teams such as the New York Mets, Boston Celtics, among others. Dr. Kelly will now introduce the panel and get things started for us.

**Daniel G. Kelly II:**

Thank you and good morning, everyone. Very excited for today's panel. Looking forward to a very positive conversation and to get to a lot of legal knowledge. Today's panel, the Rise and Impact of Legal Sports Betting, explores the rise and impact of legalized sports gambling in the United States since the Supreme Court struck down a 1992 federal ban on sports betting in *Murphy versus NCAA*. 33 states and District of Columbia have legalized sports gambling. In 2022, New York State approved mobile and online sports betting. In that first year, 18.3 billion was wagered in New York, generating about 762 million in state tax revenue.

**James Whitty:**

This panel will address considerations arising from legalization of sports gambling such as tax rates, regulation issues, and league responses to the new league created industry. Joining me on the panel today is Senator Joseph Addabbo, Chairman of New York State Senate Committee on Racing, Gaming and Wagering. We also have Ben Margulis, Partner at Boies

Schiller Flexner, LLP and Jonathan Fishner who is the Senior Director of Federal Regulatory Compliance for FanDuel.

To get us started, our first question, and this will be open to all of the panelists, what has the unregulated illicit market looked like since the passages of legal sports gambling? And we'll start with Senator Addabbo.

**Senator Joseph Addabbo:**

Thank you, Dr. Kelly. Good morning, everyone. That's the problem. When we have an illegal market, you see for a New Yorker, it was very easy to see the money going to Jersey, Pennsylvania, Connecticut, surrounding states. GeoComply and other technology would show where our wagers were going. They were just going over a wage or so forth.

The illegal market is a little bit more difficult to gate because they're in the shadows, and we know New Yorkers were doing it illegally. They still are. In terms of iGaming, they still are. That was the one part where we really knew it was happening, but it was tough to quantify. Of the information we had, we figured between the other states and the illegal market, New York was losing before we did mobile sports betting or sports betting in general. We were losing about a billion dollars a year.

I think when you regulate it as a state, when you regulate sports betting, when you do mobile sports betting or even iGaming, you not only make it a safer product for your residents, you not only get the revenue, but you also create, again, an addiction program that can now help people who are in the shadows. So, the illegal market is a very tricky one to deal with.

**Daniel G. Kelly II:**

Next, we'll go to Jonathan.

**Jonathan Fishner:**

I would echo very much what the senator is saying. First and foremost, thanks for having me and for being on the panel. With respect to the illegal market versus the legal market and the tools we can offer our customers, I think we'll talk a little bit more about that as the panel goes on. The size of the illegal market is very difficult to say. I think the AGA last

year estimated it could still be three times the size of the legal market in the United States.

People don't love to confess to committing crimes no matter how minor they might be, so I think it is very difficult to get a sense. We know that a lot of our growth comes from people who are already gamblers. So, the illegal market is entrenched. In the area that I work, which is very focused on crime and criminal activity, we still see indictments and we still see arrests of illegal bookmakers including sports bookmakers in New York and in and around New York City.

So it's still out there, but the legal market is a huge push away from that, and I think it's always important to remember that I started my career working as an investigator in the Manhattan District Attorney's Office Rackets Bureau, and bookmaking is a small piece of what is typically a larger criminal operation. It may seem like, "Oh, what's your Neighborhood Booky? Why does it matter? But the truth is, organized crime still exists. And that's not something we want our fellow citizens to have to be exposed to.

Lastly, I would just add that at FanDuel, less in New York than in other states that don't have legal markets, but we are seeing more and more what we think of as illegal operators who are operating as faux fantasy-type platforms, so they're operating illegally while we're operating legally. The industry, as a whole, is paying a billion dollars in taxes. So, that's something to consider as well.

**Daniel G. Kelly II:**

All right. Next, opening statements from Ben.

**Ben Margulis:**

Hi, everybody. Thank you for having me. I'd be remiss if I didn't say everything I'm about to say is, from my perspective, not attributable to the firm, also not legal advice. So, let's just be clear.

I want to echo what my co-panelists have said. Since 2018, when the Supreme Court in *Murphy* struck down PASPA and opened the door to state-by-state sports gambling regulation, before then it was just blanket illegal by federal fiat. The market has changed, right? The fight has changed. If you're looking at it from litigation perspective, it used to be what can you



do to play around in the margins or in states where there was no regulation, what can you squeeze by?

Now, in New York, New Jersey, or one of the other 30 states or so that has some sort of legalization framework, the real legal issues are how do you work within the framework for the illicit market?

Obviously, they're outside. New York has some legalization mechanism, but it's tightly controlled. Not everybody who wants to run a sports book can run a sports book, and there are specific requirements.

If you go into the illicit market, you run into problems of potentially not backed but you're not as protected, obviously. There's nothing there to stop it. Payment structure becomes a problem because credit card payers or payment processors don't necessarily want to work with illegal operations, especially when they have the option of working with an established sports book.

Not to repeat what everybody else has said, but that's essentially one of the main differences between legal and illegal, which is formed after you start having some sort of regime. You have established structures, established ways, or ways that are being established and tested in courts, or just through negotiation and completely unregulated Wild West where you're taking your money into your own hands if you really want to do that. And if you have the option of a legal sports book, you're gambling money without actually having the fun of the gambling aspect of it, if that makes any sense.

**Daniel G. Kelly II:**

Very good point. For my next question, it lends into what you mentioned, but I'm going to get to you in a second. The next question is in what ways the day-to-day overall operations, the regulatory agencies shifted since legalized sports gambling? I would like to start with Jonathan for this first question though.

**Jonathan Fishner:**

I'm going to hold New York and our more recent legal states to the side for a moment. But when I started at FanDuel three years ago, I don't want to say our regulators were unsophisticated because that isn't true, but they were very new to the space, just like we were.

While we are still partnering and we will always partner with our regulators, we were also at that time doing a lot of educating and really finding our way together. I think with our new entrance, in terms of states that have become legal, you can see the sophistication is one level up from where we started. So, the shift from land-based retail regulation, a lot of these folks had just shifted from being retail regulators into the online space, so there was a lot of education there. We're seeing more and more sophistication.

I'll bring New York back into it now. We continue to see, and a great deal of partnership. In the area I'm in, we work as closely together as we can to identify criminal activity and share information. I think we are all improving together. We've heard from the New York regulators that the number of customer complaints we've had is in the low hundreds which, considering something like 16 billion has been wagered, shows that FanDuel and other companies are doing a very good job of servicing the customer, and customers are getting what they need from the regulators. So, I think we're really moving forward together, and we're having a lot of success.

**Daniel G. Kelly II:**

The same question on day-to-day overall operations shifting since legalized sports gambling for Ben.

**Ben Margulis:**

Look, I'm a litigator, right? So, I don't necessarily see the day-to-day, I just see when the day-to-day breaks down. But generally speaking, just looking at it from a 10,000-foot view, what Jonathan said, I echo. When it began, there was a lot of educating that had to be done because the structure was different. It's not a brick-and-mortar casino. You don't walk in, put chips on a table, and then get your winnings or not if you lose, right? There's more to it. There are server farms – how do you relay signals? You have potential questions of where's the information transmitted, information security, all those things.

It's not so much the day-to-day, but it just opens up another set of issues that you need to consider as you're iterating on the established regulations. Either they're too harsh because they're written for a brick-and-mortar business or because they just don't contemplate a certain thing.

And then, there's the secondary issue. Right now, Maine is an example. There are discussions about how do you advertise these things? Who can advertise? How much can you say? How much can you promote it? The grappling is less with should it be legal versus not and more to how do you deal with the secondary questions that then come up once you legalize and regulate?

**Daniel G. Kelly II:**

And then lastly, for senator, with your role on the Committee for Racing, Gaming and Wagering, I'm sure you dealt with large-scale issues, but then the day-to-day operations were also good to be informative. Were you having these conversations on the committee meetings?

**Senator Joseph Addabbo:**

Oh, no question, Dr. Kelly. Jonathan and Ben both got it right. The bottom line is when working on, say for instance, the mobile sports betting legislation in New York, my legal counsel, my legislative director, we had a new frontier. We had a new area for New York and new legislation. We got it started from scratch and looking at other states and their legislation, but figuring out the guardrails and the guidelines that we put into the statutory language, and then working in partnership with the Gaming Commission to make sure that the safety measures and protocols and all the new regulations are being implemented correctly.

But there's partnership, whether it be with the legislation, the Gaming Commission, the governors of administration, or even the partners that we have in the operators that obviously perform in New York at such a great product. The bottom line is when we all work in concert together, it makes for a better product for the safety and for the benefit of our people in the state.

Like I said, this is a new frontier for us. It's only been around for a little over a year, the mobile sports betting aspect for New York, but again, it's new regulations. It's new implementation. And again, we're working really with the legal field to make sure that we're doing everything right.

**Daniel G. Kelly II:**

Thank you, Senator. Next question is for Ben. How has the legalization of sports and gambling impacted other areas of law? I'm guessing that it has trickled into your other work with the firm as well.

**Ben Margulis:**

It has. The start of that experience was obviously with daily fantasy sports, which then later on sports books became the question du jour. But it trickles in because, again, once you create a regulated market for something, you have all the knock-on effects that then flow from it. So, I mentioned advertising, right? The question is how much can you legalize sports betting or sports gaming? And how does that interplay with First Amendment issues or established regulations for casinos?

Then, the next question becomes, well, some states have established casino businesses like on reservation land or something. What happens if those businesses already operate, and they want the sports books, the regulations allow for sports book elsewhere, and then you have a fight over those kinds of issues. IP becomes a big deal. It starts flowing into it because you're having patent disputes, you're having copyright disputes and trademark disputes because now you have a market, which is lucrative. And obviously, you have bad-faith actors coming in trying to take advantage of that.

The spillover just becomes all these ancillary issues that pop up once you create a market for something that's legal. When it's illegal, it's a little easier to get away with misusing names or playing in the gray area. But once it's in the light and once there is a structure, you have to deal with, "Okay, this works. Now, we need to get the bad-faith actors out."

**Daniel G. Kelly II:**

And then, I'll open this question up also to Jonathan and to Senator Addabbo. Regarding Sports gambling impacting other areas of law, is this a conversation that you're seeing in other meetings and in other areas of your work?

**Senator Joseph Addabbo:**

No question. When we do legislation certainly to expand any gaming in New York, first question is constitutionality. So, we incorporate our legal team right away to figure out if it's

constitutional. The previous governor, Governor Cuomo, for years, felt mobile sports betting in New York was not constitutional. Until COVID hit us with a 15-billion-dollar deficit and all of a sudden, it became constitutional. We always knew it was constitutional. Once you put the server on the land of the licensed casino to accept or validate the wager, you know it's constitutional

We have to figure out the constitutional aspect, and then all the other issues. Are minors using the mobile sports betting? Employees or those contracted with the leagues can't bet. It opens up a whole new area for legal issues that we, the legislature, have to deal with. So, as we expand gaming in New York, we're going to have to address new legal issues on the horizon.

**Daniel G. Kelly II:**

And Jonathan?

**Jonathan Fishner:**

I can just add in one of the areas that I work in. I spend most of my time is our anti-money laundering program. Casinos are financial institutions under the Bank Secrecy Act, which is the federal law that governs money laundering and anti-money laundering programs. It was updated in 2020, and they're still working on some of those regulations. But I can tell you that the legislation that was passed in the 1970s, which is still in effect, did not contemplate that a casino might be online and operating in 16 to 20 states with partner licensees and other things.

We are very much at the forefront of anti-money laundering programs from a practical perspective. That's just the area I work in. I could go from colleague to colleague, and they could raise something similar. We're operating a state-regulated business that, because of how the internet functions and media functions in the 21st century, is sort of national. There's just so much there. You could really go on forever.

The last thing I would say that I've seen in the last three years is you see more law firms, more consulting companies, you can really see the infrastructure that's necessary to support an industry like this developing. I think over time, it will be very helpful.

**Daniel G. Kelly II:**

Okay. We'll keep the conversation with Jonathan. You mentioned money laundering to now being taxed. New York has a very high tax rate on mobile sports betting at 51%, which is astronomical. Is this model sustainable? What does the future look like? Will the high tax rate impact consumption patterns?

**Jonathan Fishner:**

First and foremost, we're happy to be in New York State. We're a New York-based company. I'm a New Yorker, but 51% is higher than all the other states, and we don't think it's sustainable. Of course, we'd never leave the New York market, but it will impact our investment over time. We think that decreased investment will lead to a decrease in the breadth of the taxable base and eventually may lead to a decrease in revenue. I suppose the short answer is no, but of course we're here, we're happy to be here, and we're proud to be here.

**Daniel G. Kelly II:**

Same here. I'm a proud New Yorker as well. Senator Addabbo, a response to the high tax rate, especially considering in comparison to other states, not asking for an official statement but just your thoughts on the 51%.

**Senator Joseph Addabbo:**

And again, I thank Jon. The FanDuel's been great. In New York, we have nine operators, and they're all top shelf and professional. Again, I thank Jon for FanDuel. The 51%, we can have a panel discussion just on that. It was always 51%. Negotiated with Governor Cuomo's administration, it was always 51%. There was no secret here. The state wanted the money. It was no sunset. It was 51% forever. Everybody negotiated knowing it was 51%.

Now, look at it over a year later, I think roughly 20 billion in handle, which again, I'm hopeful that it's helpful to our operators. It seems to be like the number one product in the country, so we're doing very well. But I've always said that legislatures should never stand on the sidelines and go, "Hey, we're done. We did mobile here in New York. We got a great successful product and we're done."

No, for the sake of New Yorkers, we always look to improve our product, and that's where the partnership comes in with the operators. If someone makes a credible argument that by reducing the 51% or increasing the number of operators, it's going to make the handle or the larger or increased revenue, which equates to educational funds in New York. For those of you who don't know, 95% of which goes to education, that revenue from mobile goes to education.

So, if somebody's going to make the argument that by reducing the 51% and maybe increase the number of operators, but that's going to make a fiscal positive for New York. It's going to make fiscal sense, then we're all ears. Somebody has to make that argument, and this is budget time so it's a great time to make the argument.

**Daniel G. Kelly II:**

And then, next for Ben. Just thoughts on if you think other states may follow New York's lead on the 51%, seeing as how it is falling in line with the Constitution for the state and with a lot of the regulatory practices.

**Ben Margulis:**

Look, I'm a litigator, and I'm not necessarily on the side of negotiating on tax policy but just to take a step back, it's a state-by-state issue because there's no federal mandate one way or the other. As you just saw the conversation between the senator and Jonathan, this is a give-and-take discussion of what is the right number to allow for the state to have the benefit of the business within the state and for, obviously, the businesses themselves for it to make sense for them to operate within the state.

Other than that, could states follow? They very well could. There's nothing necessarily stopping them one way or the other. There's nothing, I mean other than practicality, stopping them from trying to set it higher. It's just a question of whether at some point they're going to start losing businesses within the state. They're just going to drive them out. At the moment, and I say that's just a knee-jerk reaction, it doesn't seem like a litigation issue. It's a negotiation point of where that number is.

**Daniel G. Kelly II:**

Senator Addabbo, you mentioned earlier legalized sports potentially fueling gambling addiction. You've mentioned potential resources and programs to address these issues from the state side. Could you give us more of a backstory on some of the resources?

**Senator Joseph Addabbo:**

Oh, sure. Again, we can never in New York expand gaming without having at the forefront as a priority for the gaming addiction issue. We have the Office of Addiction Services and Supports (OASAS). We monitor, we work with them, we monitor their phone calls to the HOPEline or a helpline, and we see where we can help.

In the mobile sports betting statute, in the actual language of the bill for mobile sports betting, we increased an additional funding of 6 million dollars a year for addiction. And when we drafted the iGaming legislation, that was an additional 11 million dollars. But it's not so much how much money we allocate, it's how it is spent. It's looking at programs that work, making sure they're accessible, and what you want to do, again I thank my problematic gaming advocates who probably never embrace what I do, but they're very thankful, I suppose, that we include them in our statutory language.

But to catch an individual before the addiction, find out a person who's on the path to addiction. So, before they lose the house or before they lose their job or their family or worse, to get them on the road to addiction to stop them. For instance, one of the safeguards in the mobile sports betting language was a \$2500 annual cap. So, when you hit that \$2500 mark, your account is frozen, and you're contacted to make sure everything is okay. And that's aside from the \$2500 cap on credit card usage and that's aside from the self-exclusion and all the other safeguards that we built into roughly a dozen into the mobile sports betting language and replicated into the iGaming language.

So, again, it is about trying to catch a person before they get to the addiction. It will always be a priority for New York as we go forward in expanding gaming in our state.



**Daniel G. Kelly II:**

I'll open this question up to the other panelists as well. Any thoughts on remedies for sports gambling, potentially fueling addiction?

**Jonathan Fishner:**

I would just very much echo the senator. Responsible gaming and supporting our customers are a priority for us. It's a part of everything that we do. We have a dedicated, responsible gaming team led by a VP with a great deal of experience coming out of the alcohol world. We've got a team. We're committed to responsible gaming. We offer tools to the customer directly that include timeouts, deposit limits, time limits. We also monitor customer activity.

There is a dedicated team that looks at customer behavior for red flags, reaches out proactively, and can impose, if necessary, actions like exclusions, timeouts, deposit limits. Their responsibility is to think about the customer. It's not to think about the bottom line, the money for FanDuel. We also fund treatment via nonprofits. We promote state problem gambling research. We offer any customer that wants it a subscription to something called Gamban, which you can use to exclude from all operators so you can avoid these apps. We have a nationwide advertising program around setting limits. That's just some of it. It's something we talk about constantly.

March is Problem Gambling Awareness Month. We do our training this month. Everybody is trained. We had a day in September that we dedicated like an offsite where the entire company participated in related to these issues. So it's really important to us. We want our customers to be long-term customers. We want customers to enjoy our product and to enjoy our product responsibly, and we want to help them do that as much as we can. It's really important for us and for the industry.

**Daniel G. Kelly II:**

And then, Ben, any thoughts on the litigation side of resources for gambling addiction?

**Ben Margulis:**

Well, before I get to that, just taking a step back. The idea of responsible gaming and how to address that has been a

point that's been raised since 2018, because when DFS was still the issue du jour and when Sports Works were first coming up, the big pushback or part of the pushback was, "Well, what about gaming addiction?" I think companies have always been sensitive to making sure that there are some mechanisms there to protect against people who may have a problem with gaming or who have problem gaming habits.

The other thing, just to take it back to a point that we had talked about before, in terms of what does the legalization of sports books sort of mean for other industries? Well, you're seeing the rise to some extent of another ancillary industry, which is services that allow you to control for problem gaming habits. It's the exclusion services or monitoring services, or it's ways for third parties to come in and say, "Okay. This person has met too much, or this person does it too often or too big," or whatever it is.

From the litigation perspective, I guess the sensitivity, and I can't point to anything in particular because it's always case and situation specific, but the sensitivity is, while that is something that needs to be accounted for and addressed, and there's a legitimate reason for it, the thing to watch out for is overreach. The push and pull always is protecting people who may have a problem with gaming versus doing too much and limiting it for customers who don't, and thus, harming the operations of the businesses themselves.

And like I said, I don't have a specific example, but if there were to be some fight over that, that would be the thing. It's that, "Yes, there's a legitimate interest, however this goes too far," that kind of issue.

**Daniel G. Kelly II:**

For the next question, we'll open up to the entire panel. To what extent can stakeholders, such as leagues and teams, participate in New York sports wagering framework? To provide some context for this question, are there any antitrust concerns with league deals providing player data to companies? Are there any overreaches in your relationship with professional sport teams and leagues?

**Jonathan Fishner:**

On the data issue, I think in particular, those data deals are actually meant to be for the benefit of the customer be-

cause you wouldn't want the operator to be able to decide whether Saquon Barkley rushed for 74 or 75 yards and then have a player prop wager decided on that basis. I can understand why having to enter into a deal with the NFL for the official data might make things difficult for a smaller operator or an operator that's just starting out.

But I think it's important that operators not be able to decide or interpret statistics. You see, these things happen all the time. I think a couple weeks back, Giannis was fooling around going for a triple double. He was credited with the rebound and then they took it back the next day. You wouldn't want to have operators deciding that inconsistently or based on what they've got in their book. I think from an antitrust perspective, the fact that it's certainly colorable that it's for the benefit of the customer is counter that argument. But I'm not an antitrust lawyer, so I can't say for sure but that's sort of one aspect of that.

We do have partnerships with teams. We have sports books at the United Center. We have a sports book at the Footprint Center in Phoenix. So we do have some of these deals, and we're sort of continuing to develop them in the states where those were permitted. And those books are very popular.

**Senator Joseph Addabbo:**

Just build on upon a little bit what Jonathan said when drafting the legislation for mobile sports betting. Yes, the league data was critically important. It was a major issue for the statutory language, but we wanted to make sure, to Jonathan's point, that it was consistent throughout, so that all customers were getting the same information. Lead data becomes very important for consistency and for accuracy, which I think is important. You'd want to open up to legal challenge over some fraud or, to the point, different call a day later. So, consistent lead data for its autocracy and, again, consistency I think was critically important for what we did here in New York.

**Daniel G. Kelly II:**

Okay. Ben, any comments on this subject?

**Ben Margulis:**

Apart from echoing what my co-panelists have said, I don't have much to add. I admit now I'm not an antitrust attorney. I'm more of an IP/tech guy. But that said, the fact that all of this stuff is almost always a measure. It's question of degree.

It's that the data is standardized especially if it's coming from sort of a central clearinghouse for league rather than per team. If you have the resources, you can enter into that relationship, and it's not so prohibitive that maybe smaller operators may not necessarily be able to access that. But it's not like they're saying, "Well, and then you're going to give us 90% of all your revenue, regardless of who you are. We're just going to take it all."

At least from an outsider's perspective, it doesn't seem like the system is designed to allow for a league or a team to say, "We're going to work with you, and we're going to stop everybody else." They're going to work with anybody who can come into the door with the resources necessary. Because again, it is for the customer's sake.

**Daniel G. Kelly II:**

To build off of this question, as the senator pointed out, there's been many changes since 2018. The conversations are constantly happening about the regulatory environment. In other states, teams are able, teams and leagues are able to have in-stadium sports betting sites. And owners in certain states can choose which sports books operate at their stadiums. Do you see any pitfalls in the future regarding this kind of flexibility?

**Jonathan Fishner:**

If I could answer from the perspective of us as an operator, New York has a little bit of a different history and geography than other cities. But I was recently in both Phoenix and Toronto. What you'll notice there where they have these sort of downtowns where all the sports facilities are is that each facility has its own. So where the Diamondbacks play, maybe Caesars is there. We are where the Suns play. So, I think it's a model that, where it's permitted, is very popular and you kind of end up with all the big operators each with one corner in a similar neighborhood.

When you see a sports book inside of a sports facility, perhaps your question would be, what's the connection? But we run these operations completely separate. The team does not have any involvement in the day-to-day operations of the sports book. They don't have any knowledge of where the money is, which side the money is on or what have you. And we work very diligently to keep it that way. I think the gambling conversation has already become so much a part of sports conversation. To some degree it has been for a long time, that I think as long as we continue to do our job as we are, the risks are very much manageable.

**Senator Joseph Addabbo:**

Jonathan alluded to it. New York is very unique, not only in terms of size but in terms of its fiscal situation and obviously it's size. And so then you look at the uniqueness of having some of the major leagues having their headquarters in New York. It's a little different than other possibly smaller states. But when dealing with, for instance the mobile sports betting and the partnerships between the leagues and the operators there, we were assured that the legal team on both sides would obviously cross the Ts and dot the Is. They would do the due diligence needed to make sure that any agreement was a legal one. It is different for each state based on the size of the state and its potential with gaming. But a bigger state like Jersey, Pennsylvania, possibly New York, it becomes possibly more complex.

**Jonathan Fishner:**

We work very closely with the leagues from an integrity perspective. We collaborate. We share information when we can. Protecting the integrity of the events and of people's wagers is of utmost importance to all involved. So, it's very important to us.

**Ben Margulis:**

To the question of pitfalls, and what I'm about to say, I'm not saying anybody's doing it. But being a cynic and pessimist by profession, you could see the concern like, "Why did they choose this business, versus why did this team choose this business?" For the most part, as far as I'm concerned, everything has been at arm's length and everything is on the up and up.

But you can see that being a potential pitfall of something down the road, if it's a smaller or somewhat unscrupulous actor.

But again, then you get into a different issue of well you have the sports book in the stadium. How does the infrastructure comport with the regulatory requirements within the state? Where are the servers? Where's the communication coming from? How do you process payments? Do you advertise the sports book within the stadium, outside the stadium when you advertise the team, when you put out ads in the newspaper? It's just the pitfalls aren't necessarily unique. They're just magnified, because now you're linked with a particular team. You kind of have to consider it from the perspective of them doing business. And how much does their business affect or touch the sports books?

**Daniel G. Kelly II:**

I want to stay on that pitfall comment. I think we have a common thread there. Senator, seeing how the pitfalls are so diverse, how do you really regulate it? It seems like it can be such minutiae of where the servers are located, the in-stadium advertisements, the overall transaction, where it took place. Were those conversations happening in your committee meetings?

**Senator Joseph Addabbo:**

Without a doubt. When we did mobile sports betting, and we had to convince then governor's administration, Cuomo, who was just not interested in expanding gaming really at all. He had this aversion to it. And we kept saying for years, ever since the Supreme Court said we could about mobile sports betting. What bothered me the most was the fact that we were losing money to other states and the illegal market. I was there in 2013 when the state legislature actually created the idea to do sports betting, at least in gaming in New York. And we went back to the 2013 constitutional language, and we said, "Hey, there it is. It's constitutional." And then you look at the intent. The intent was to make it constitutional. And by just him throwing out the word, unconstitutional, it was frustrating. Because we knew we had the language and the intent on our side, and we knew we were right.

When he does it back in 2019, again, we all knew it was the right thing to do. But it's a constant conversation that we do have with our legal team and the administration whenever we want to do anything gaming wise, especially expansion of gaming to make sure it's constitutional and it's done right. The legal parameters are in there. And then sometimes you don't leave it up to the administration. You put it into the statutory language to make sure that it is definitively stated what the guardrails, what the requirements, how to implement to make sure that there are certain procedures in place to make sure it is a legal product legislatively and administratively in the state of New York.

**Jonathan Fishner:**

I would just sort of add to that. The regulations are voluminous, as they need to be. All of this is covered. We employ well over a hundred compliance and legal professionals to help ensure that we are satisfying all the regulations in New York and in other places, plus the technology folks, plus the law firms, plus all other, many other groups that sort of support those things too. We take those things very seriously. And we don't leave anything to chance. But I think it's clear if anybody spends time with the regs, the New York regs, the New Jersey regs and others. You can see how carefully things were thought out. And hey, we have bumps in the road, things we some sometimes need to revisit. We've done that with states. We've talked about how to interpret certain things so that they work for both the regulator and for the operators, and it's been very positive.

**Ben Margulis:**

And forgetting the word choice, when I say pitfalls, it's really just considerations. It's the same considerations, for the most part, that any sports provider would have if partnering with a brick and mortar casino. Because again it's, where are your servers? What's the advertising going to look like? What's happening inside the building, outside the building, mobile apps, et cetera. It's just that here there's an additional layer to it, because you now have a sports team that advertises in a different way than a casino does. And there's just a different relationship with the consumer once they get into the building.

**Daniel G. Kelly II:**

And then back to Jonathan, you mentioned there's this investment of hundreds of compliance officers for this initiative. How was that process? Was it full all hands on deck from the beginning? Was it an evolution that increased to now we have 100-plus regulators? How was that process to get to this point?

**Jonathan Fishner:**

When I started three years ago, our compliance team was about six to eight people. We weren't all under one umbrella at that time, but legal was, I think, similarly sized. We're now one team reporting into my boss, who's the Chief Legal and Compliance Officer Carolyn Renzin. So we've grown 30 to 40 people each year. We've also gone into a handful of states each year. And we are now really focusing on efficiency, technology, how we can work a little better. No company can afford to just throw bodies at things. And the regulations are complex enough that it just won't work.

But we have grown exponentially. We continue to grow. I think our legal and compliance function is something we're very proud of. We have great partnerships elsewhere in the company. We are a technology company, so a lot of our engineers and product employees, while they're not in compliance, they definitely have a compliance mindset. I think one of the things that we've achieved very successfully here, even as we've doubled in size since I joined three years ago, is that tone at the top. Winning with integrity is one of our corporate values, and we take that very seriously. You can't be winning with integrity if you're out of compliance with marketing regulations and other things. So it's very important to us.

**Daniel G. Kelly II:**

Let's stay on this same train of thought, but my next question will be directed towards Senator Addabbo. What are your thoughts, seeing that an organization, a company like FanDuel has made this type of compliance and legal investment to make sure that they fall into regulatory compliance?

**Senator Joseph Addabbo:**

We're totally appreciative of the effort. I mean, in the end, my constituents, my residents throughout the state, bene-



fit from that. And that was the concern when we had not had mobile or even sports betting in New York, because we knew New Yorkers were doing it. We knew they were going to Jersey, Pennsylvania, and Connecticut. But it's that illegal market that we started this conversation over, that concerns me most of all. Because that again, you really can't monitor much at all. And I've had constituents lose some money to an illegal market. The bottom line is this. We appreciate all operators who have at their focus and priority not only their business but that of their customers and in turn, again, the residents of New York to protect them from the pitfalls and technical difficulties. And the idea is, we appreciate that. When we were starting mobile sports betting, I was very proud of the nine operators that the state selected, because these are top shelf. We knew we were in the right arena to be in a very competitive arena of mobile sports betting going into it, when other states around us had been in there for two years more or so.

It was kind of a little scary to go into this kind of competitive arena. But when you have the nine operations we do, and FanDuel is of course included, the bottom line is: I felt very confident. We were not only going to do well, but we're going to have a safe product for the people in New York. So, I'm very appreciative of their efforts.

**Daniel G. Kelly II:**

And then my last question on this topic, back to Jonathan, of course, because this is your world with the compliance and regulatory measures, were you surprised that the tone at the top, as you mentioned, was so proactive to invest? I mean 30 new headcount per year, that that's a lot of investment. And were you surprised that they were so forthcoming with the resources?

**Jonathan Fishner:**

I wouldn't say surprised, no. I think our CEO, Amy Howe, really understands what we're doing, really understands the importance of all this as a person. Of course, tremendous integrity herself. But I also think that one thing we understand is that, as a whole here at the company, that this is a business that is coming out of the illegal or gray world. And when you're doing that, it is of even more importance. I mean it's always important to follow the rules. I come from a banking

compliance background. We always did our best to follow the rules. And banking as well, banking is a core part of people's lives. You don't have to take any shortcuts.

But I think when you're moving from the illegal world into the legal world, it's that much more important, because many people will be skeptical. Many people are skeptical, and we want to show them that gambling wagering on sports and other things can be a normal part of life and culture as it is in other countries. And we are the number-one operator, and we want to lead by example. And so I think because we all understand that here, I'm not surprised. I mean it's always . . . I've spent a lot of time in legal and compliance. Resources can always be an issue. You have to show the need, you have to evidence it, document it, answer as to why. But I think given how seriously we take all this, no, I'm not surprised.

**Daniel G. Kelly II:**

Yeah, no, no. The reason why I'm harping on it is because there's this for the students. If I see that there's opportunities there, I think. . .

**Jonathan Fishner:**

Yeah, and I think there are. I think this is a great industry to work in. It's fascinating. It's a sports company. We're a technology company, and it's growing. I spent time working at a legacy banking company. These are sort of shrinking industries in some ways, fintech and all of that. Law firms, I started my career at a law firm, which is a great place to work. But this is such a dynamic environment. There's so many issues. We've talked about a lot of them today. There's really no end to what you can do and where you can find yourself.

**Daniel G. Kelly II:**

Right, thank you. Moving forward with the questions, this one is open to any of the panelists. Do you think the courts will ever be willing to entertain claims from bettors who lost money on games with foul play or cheating, imposing a duty of care, where courts have been reluctant to find one in *Olson v. Major League Baseball* in 2020? Jonathan mentioned this quasi with the Giannis, with the triple-double being taken away. Any other thoughts on the courts being willing to entertain claims from bettors who lost money on games?

**Ben Margulis:**

I suppose I might as well start. As a knee jerk reaction, judges do whatever they want. So maybe there will be the odd case. But it's on any negligence claim or anything like that, there needs to be a duty on the person you're suing to do a thing to protect you from the harm. So the claims will need to necessarily depend on what exactly happened. If it's a fault on the part of the sports book or of the operator of the sports book, maybe that'll be entertained in some way. But if it's just there's a triple-double, then it's taken away, well what does the sports book have to do with that?

They just trend. They just have the data, and they deal with the data as it comes in. If the call is then changed in the game, you can try. But courts are going to be pretty, I feel like pretty reluctant to say that there's any duty on the sports book to . . . What are they going to do, go down there and argue with the ref? That's not them. Claims like if there's cheating, if there's data manipulation, if there's some sort of data breach, or if there's a third party sitting in the middle between whatever, the league or the team and whatever's happening in the sports book tech, maybe. Because then there could be possible faults that you could point to. But just hey, I lost, because something beyond anyone's notice within the tech itself was going on and affected the game. Seems like a bit of a stretch, absent something else.

**Daniel G. Kelly II:**

Very good point, very good point. Any thoughts from the senator or Jonathan?

**Senator Joseph Addabbo:**

I would just say, given the fact that it's probably more losers than winners, if every loser had an illegal argument, our courts would be clogged and congested and ridiculous. But it does, every time a state goes into, again, the arena of either sports betting, mobile sports betting or gaming, you are certainly with sports betting. You're going to have this opportunity. And it's something that again, from the legislative, from the initial legislative point to the administrative point to a judicial branch or the judicial branch of the state, they got to be prepared for these kind of new arguments as, again, that state enters into the arena of sports betting.

**Daniel G. Kelly II:**

All right, great. We're coming up on our last question for today's panel. In what ways has and will legalized sports gambling affect consumer experience and consumption of sporting events? And then we'll get into our final thoughts.

**Senator Joseph Addabbo:**

I'll just state that I have constituents. And one of the reasons why I was so adamant about starting sports betting in New York, mobile sports betting, again, tired of seeing New Yorkers go to another state. But going to the local coffee shop and getting the complaints from my constituents, "Why do I get in my car and go to Jersey?" And you realize that obviously we have an issue here. But I've also heard from these same constituents who now have experienced sports betting in New York, they're a more interested fan base. They are more into the sport. They're more into a particular player. And that was part of the residual effect that I was hoping would happen in New York, that basically when you got a great fan base but to help the leagues, to help the sport.

I'm a baseball guy. I love to play, but I love sports. And I don't have an account for mobile sports betting. Sorry to say, Jonathan. I don't do that. But the bottom line is I think the sports and the leagues benefit. I do. I think we have a much better, energized fan base in New York since we have done sports betting.

**Jonathan Fishner:**

Yeah, I would agree. I think it's sort of our view that people are more engaged, that when people are betting responsibly, they're more focused on every snap or every pitch and that it's good for TV ratings, good for sports ratings, good for the leagues. I think the leagues recognize that as well. And so our slogan, one of our slogans has been on television, if you've seen it, is make every moment more. And I think responsible wagering can certainly do that.

**Ben Margulis:**

Yeah, I would echo everything that the senator and Jonathan said. And that's been the case since daily fantasy sports. You don't even have to go as late as sports books. Fantasy sports in and of itself, you're either a fanatic, or you're just

doing it for fun, because you want to follow the games. You want to know what's going on with your teams, and you want to have some fun with your friends. And then the daily, the DFS just heightened that. It just creates, as they've said, a more invested fan base, a more passionate fan base. People are going to be much more invested in what's going on, because it's just the daily change. They want to know, they want to see, they follow the games. It's good for the industry, good for the teams, the networks, honestly everybody involved.

**Daniel G. Kelly II:**

All right. Thank you, everyone. Thank you, Senator Joseph Addabbo. Thank you, Jonathan Fishner, and thank you, Ben Margulis. This has been a fantastic panel, and I will send it back to Nick Sloan and the rest of the team at the NYU Sports Law Association. Thank you for a great day.

**Jonathan Fishner:**

Thank you.

**Ben Margulis:**

Thank you for having us.

**Senator Joseph Addabbo:**

Thanks, guys.

### III.

#### THE PROFESSIONALIZATION OF COLLEGE ATHLETES

**Caleb Paasche:**

Thank you, everyone, for joining. My name is Caleb Paasche, outreach chair for the Sports Law Association. And I'll just go ahead and introduce our moderator, and then I'll get out of everybody's way. The moderator for our next panel for the professionalization of College sports is Professor Jason Chung, who teaches at the Tisch Institute for Global Sport and Headsy Institute's eSport and Gaming Initiative. He is also an attorney leading the development of eSports business programs at major U.S. universities. As part of his legal practice, he also heads the eSports gaming and media practice at Zuber Lawler and currently co-hosts the Metaverse video cast, What the Meta, for Virtual Times. He previously served as the founding executive director of eSports at the University of New Ha-

ven, where he developed and led innovative undergraduate and graduate programs at Popaic College of the Business of the Business Center and as a visiting clinical assistant professor at the sport management at New York University, where he created and launched the first courses studying eSports businesses.

**Jason Chung:**

All right, well thank you very much for that introduction. It's always nice to be introduced, but I think it would be great to hear directly from my distinguished panelists who they are and how they engage with the space. With that, I'd love to turn over the days to Andrew Brandt from Villanova University. Andrew, thank you for joining us on the panel. If you could share a few words about who you are and what you do, that'd be great.

**Andrew Brandt:**

Thanks, Jason. Glad to be here, glad to be. And I said to Jason before, I'm a little underdressed, but I wanted to wear my NYU sweatshirt. I am a proud father of a graduate who's trying to make it in the music world after graduating from Clive Davis School of Music at Tisch a few years ago. And he was in New York, and now he moved to LA where the world is so more focused on the music out there. So yes, good to be with everyone. My background is kind of three chapters in my career. After graduating Georgetown Law, I was an agent for many years with a group called Pro Serve Out of Washington DC representing NFL and NBA players. I switched from the labor side to the management side. And as you see behind me, I was with the Green Bay Packers for 10 years, negotiating against all those agents that I was once one of and managing salary cap, dealing with all our player issues, being the liaison with the NFL Management Council for all our player issues.

And then the third chapter of my career, the past 10 years or so, more in media and academia kind of breaking down what really goes on behind the scenes in sports business, sports law from my perspective as an agent and a team executive. And I've been doing that on the media side for ESPN, for Sports Illustrated, for my podcast, for my newsletter. And then on the academic side, I've been teaching first at Wharton at University of Pennsylvania. And now I run a program at Villa-

nova Law School, where we teach and talk about sports law, sports business, sports thoughts, sports policy and have our own concentration program and everything else. So that's my three chapters of my career, good to be here.

**Jason Chung:**

Thank you very much. Tim?

**Tim Slavin:**

Yes, this is a Georgetown Law panel. I'm a Georgetown Law graduate too. And I too have three phases of my career. I started off as an M&A lawyer, left practice after about eight years. I was most recently with Simpson Thatcher in New York. Left there and took a job with the Major League Baseball Players Association. I worked with the union for the better part of 12 years, doing legal and business work for them. I left there as the president of MLB Players, Inc. Three years ago, we founded a company called One Team. I am its general counsel. And of relevant note to this panel, we've expanded our business beyond the pro space and now represent the better part of 10,000 athletes in the college space in group licensing programming. I'm delighted to be here. Thank you for having me.

**Jason Chung:**

Thank you. And finally, David.

**David Feher:**

Hi. I'm David Feher. I'm co-chair of the sports practice along with David Greenspan now. It used to be Jeff Kessler, but Jeffrey is co-chairman of the firm, and so it's one less title. Does not mean much for Jeffrey at this point. And at Winston and Strawn, and I've been in the sports space for 30 plus years now, ever since the 1992 Freeman McNeil trial where I worked with Jeffrey at another law firm where we and Jim Quinn and a whole bunch of other lawyers won free agency for the NFL players for the first time ever in the Reggie White settlement that followed that.

My career started at a kind of white shoe Wall Street firm, not having anything to do with sports. As a matter of fact, I had no interest in sports at the start of my legal career. I just wanted to be the best lawyer I could, and one day Jeffrey said

to me, "I'm sorry, there's a personality conflict between one of our experts and one of the senior associates in the McNeil case. I know I promised you that you would never work on sports, but as a favor, could you do it because I know you're good with numbers and economics and understand this stuff?" And so I said, "Oh, okay." After that, it ended up 30 years in the career.

Apart from our work for the NFL Players' Association, which has been on a continuing basis, written every single collective bargaining agreement since then, dealt with every major legal dispute in the NFL since then, except for concussions, which are third party council, and the NFLPA isn't really directly involved in that per se. Also represented the NBA Players Association for 30 years, in collective bargaining agreement negotiations right now. Actually, speaking from the union's offices where a bunch of people are meeting with the NBA virtually on other things. We're trying to push to try and get an agreement by month end.

We represented the Women's National Team in the historic equal pay resolution, where there's a lot of litigation and an unfortunate district court decision, but we were appealing, and I think we were about to get a good outcome in the appeal. But more importantly, I think there was sufficient turnover in the Federation where they realized that their prior position, which got them worldwide scorn was unsustainable. Importantly for today's panel, along with our California co-counsel, we represented the class of college football players and basketball players in the Jenkins and Alston case, which yielded a trial before Judge Wilken in California, was upheld by the Ninth Circuit Court of Appeals focusing on educational benefits, but most importantly a nine-nothing Supreme Court decision that kind of rip the curtain back because the NCAA and the various schools have been relying for 40 years on a mid-1980s Board of Regions case where they took some dicta that they claimed, gave them deference to basically do whatever they wanted in the "amateurism" space, and lower court judges kind of heated what they thought was direction from the Supreme Court in a backhanded way.

Then over the course of 40 years, as more and more facts came out and the industry changed, we'll talk about that more, we got a nine-nothing Supreme Court decision where essentially the court said, "No, it wasn't even dicta, and it was



so long ago,” and essentially issued a decision that was along the lines of, “You’ve got to be kidding,” along with the concurrence by Justice Kavanaugh, who said that the NCAA should be treated no differently than any other business. We’ll get into the guts of that, but the whole notion that there is an antitrust exemption in order to justify zero pay so that you can make more money with the sham amateurism argument that nobody has believed for decades really hasn’t held water. It led to NIL change along with all sorts of related pressures. Just like we’ve fundamentally changed things in the NFL and have helped to keep things fundamentally at least decent in various ways in other industries, we brought that change to the NCAA. A host of other sports litigations and work over the years. The list is too long, but that’s the gist for the stuff that’s important for today.

**Jason Chung:**

Thank you very much. And as everyone can see, this is the right panel to discuss this, and we will get into *Alston* very, very soon. But just to kick us off, Andrew, what are some of the cultural and let’s say legal forces which caused the NCAA to reverse its decades old policy? Obviously, the Supreme Court had a lot to do with it, but what are some of the other factors where they felt that they needed to make some changes before the change came?

**Andrew Brandt:**

Yeah, thanks, Jason. What’s interesting to me is that we have this new world, and I know we’re going to use this phrase a lot in the last year and a half, the Wild West of NIL without enforcement, without regulation. And of course they’re going to go to Congress to try to change that. But I think what’s important to look back, what really changes things and especially important to this audience in anything, as all these guys know, is lawyers and legislation and litigation, three Ls. So, we’ve had a case law history *O’Bannon*, maybe before that in 2009 leading up to *Alston*. We’ve had legislation from California, from Florida, from other states, kind of putting pressure on the NCAA. But I can tell you that in the two years up to July 2021, there was a ton of work being done by the NCAA to sort of establish these guardrails around the NIL, put it in place, do something

they'd never done, make college athletes just like any other students.

And disclosure, I was working with the Big East conference and Val Ackerman, who was in charge of putting this study together with other ADs and other conference commissioners, and here's what happened. On June 22, 2021, the *Alston decision comes down nine days before July 1 when the state laws were going to go into effect. The bottom line in all of this is the NCAA threw up their hands. They abdicated responsibility, they punted, whatever metaphor you want to use. So July 1, 2021 comes, and we have this name image likeness revolution starting at midnight that day, and the NCAA is completely hands off. Completely hands off. They are scared. I think it's no secret of lawyers and antitrust litigation after Alston, so Alston spooked them, and they have no enforcement. So everything we're going to talk about is kind of like, yeah, I guess the states enforce it. Maybe the schools do, maybe the conferences, who the hell knows? But we do know the NCAA is not enforcing it because of this history they've had in losing in lawyers, litigation, and legislation.*

**Jason Chung:**

David, in terms of, you mentioned obviously the work in *Alston* and everything like that. Could you summarize for the audience what the goals were, what you had hoped to accomplish there, and what you think has taken place after it? Is it really the Wild West after the decision, or how would you characterize the environment now?

**David Feher:**

I think the goals are to have the NCAA and the major conferences subject to the same laws like anybody else. I don't think it's the Wild West. I think that's known as competition. I think guardrails are, and with all due respect to Andrew, because we've been on these panels before and we have slightly different perspectives, but the difficulty is, and I'll be very blunt about this. The NCAA for decades and decades and decades has been engaged in a pattern of suppressing any and all competition on grounds that had nothing to do with the antitrust laws on the basis of claimed kind of social policy grounds that have no recognition under the antitrust laws, and that make no sense. If law firms wanted to get together and suppress young lawyer salaries on the grounds that it would make

them better lawyers, and so it would be better for society because young lawyers are a national treasure, then people would laugh you out of court.

The Supreme Court dealt with that in the *Society of National Professional Engineers*. You cannot suppress competition on the basis of uneconomic arguments, where unless Congress gives you an antitrust exemption, which Congress, apart from a few strange political deals in the sports field, like the Sports Broadcast Act where the NFL has an antitrust exemption, but they agreed not to compete against college football on Saturdays and high school football, which most people have no idea happened, and other smaller kind of strange individual bargains like the New Orleans Saints and extensions and whatnot. Apart from those political deals, this country has, on the whole, prospered by saying that the antitrust laws are the charter of economic liberty, and the market on the whole is better placed to make decisions as to economic outcomes other than bureaucrats who are deciding in a command economy that people shouldn't get paid at all, which is essentially what the NCAA and the major conferences did here.

And what I want to say in terms of what changed . . . And by the way, that doesn't mean that I'm against . . . Politically, I'm from a New Deal Democrat family and a union family, and those views have persisted with me, but my views in terms of competition are fine with regulated markets wherever they're needed. But here, it's essentially a dictatorial command economy where the pay is essentially zero. You could argue with some folks that education is being provided, but for so many of these athletes, education isn't being provided because they're being told not to go to classes, or "You can't become a doctor because I need you to practice." I'm going to differ a little bit with Andrew on this and that I think the change wouldn't have happened without the lawyers, because we needed to make a decision whether to invest as a firm an ungodly amount of money in a fight that lasted years and years and years and had not a certainty of success, but was something that we believed in and we devoted our resources to, as did the other firms. But, it was a change in the world.

It was a change in people having information they didn't have, and in a sense, kind of the whole facade of fiction's just kind of being ripped away from people's eyes. I think if you asked me what changed the most, it was the NCAA and major

conference overreach in insane ways, like saying cream cheese on a bagel was a meal and you could get your program disciplined as a result of that, but if the bagel didn't have cream cheese, you wouldn't get it. Which yielded things like press conferences where the winning point guard in an NCAA championship basketball team told the press when he was asked about how good he felt, he said, "Well, it's hard because days I go hungry because I'm asked to practice so much. The cafeterias aren't open." And people said, "What? Are you kidding?"

Or watching, God bless him, a player on Louisville break his leg in a horrific fashion on national television, and everyone realizing that the coach of that team was going to make probably then \$5, now it's \$10 million a year or something like that, and that young athlete would get nothing as a result of devoting his broken body to the efforts. And so I'll close by, when we filed the *Alston* case, I looked at the comments and the reaction, and it was kind of split 50-50 when we filed *Jenkins*. Then a lot of people said, "Oh, these kids are privileged. They really don't deserve anything. They should thank their lucky stars they get anything." Now I'll tell you, there was a piece in *The Times* which just offended me, by the president and someone else affiliated with Notre Dame where the headline . . . Maybe they didn't write the headline, but it said that "Student athletes aren't employees, they're a national treasure." Then, the article went on to argue about how schools shouldn't have to pay athletes and kind of said NIL was okay, but third parties are paying them.

Then I looked to the comments, and at least within a few hours after the article was published, most of the comments were like, "You've got to be kidding." And I got to tell you, coming from Notre Dame, which has its own individual broadcast contract with NBC, which I think brings in ungodly amounts of money. And I say this as someone who was educated by Jesuits at Georgetown, and so I understand that schools have missions, but the problem is that the schools, the NCAA, the major conferences became enterprises that were focused on making billions of dollars with many millions of dollars that were going in disproportionate ways to administrators, to assistant coaches, to coaches, where if it was a freer market, more of those benefits would be going to the players. And the players were getting, to use a legal term, bupkis. And

the NCAA and the officials kind of . . . I'm not saying they enjoyed it, but they persisted in being obscenely, overly strict and not sharing really anything.

It became so corrupt and so unjust that you had Justice Kavanaugh writing an opinion that boiled down to, like I said, "You've got to be kidding." So, I think a lot of this is behavior. The whole notion of pay for play is a sick joke. This isn't play. Play is when kids go to a playground and don't generate billions of dollars. Here, athletes break their bodies on behalf of multi-billion-dollar businesses, and they're not getting anywhere close to their fair share. And so, the world has changed, and I think that assuming Congress doesn't have the wool pulled over their eyes one more time and give the NCAA some kind of backdoor protection, which they seek to do. I saw, just to wrap it up quickly in terms of beware, I saw an article about the head of the then Senate Commerce Committee trumpeting a reform for the players, and then I looked at the actual text of the bill, and it gave the players a few nickels on NIL, and then it gave the NCAA a big fat antitrust exemption on everything.

Read the fine print. The NCAA and the major conferences are not to be trusted. There are some educators involved in the process, but they are consistently rolled by the administrators and the coaches who are making ungodly amounts of money. So I know that that view may seem a little nuanced, but given all of the destructive effects I've seen over the years, my main kind of shame . . . It's not a shame, but my main kind of pity is that the generations of players who came before didn't have the same opportunity. So many people with broken lives I've talked to over the years where they weren't able to make it in the pros, because hardly any make it there, and so many other people profited. That is just, apart from legal, it's a sin.

**Jason Chung:**

Excellent. And Tim, obviously we've heard a couple of different perspectives on it. I want to talk about a little bit more about the student athlete, collegiate student athlete perspective. How have they been monetizing in this current landscape? How has life changed for them in the past few years?

**Tim Slavin:**

Look, I think it's a terrific development. We, at OneTeam, we are exclusively in the space of group licensing. We don't do individual endorsement NIL deals for athletes. We stay within our scope of experience doing the same thing for college athletes that we do with pro-athletes. But in response to your question, look, I think it's opened up a wealth of opportunity for all athletes, not just those in high-visibility sports. In terms of OneTeam's role, we are the business that's behind the grant of rights to the brands that use these athletes in their products. For example, you see the jerseys on the names and numbers on the back of jerseys that are sold in the bookstores. That's us. We grant the rights, we license the use of those rights to Fanatics and others and ProSphere and some of the local distributors to be able to allow them or to enable them to sell those products.

It's been really interesting to hear some of the comments from the athletes themselves. Comments from the athletes who are less known are the most interesting to me. It's, "I can't believe I can now walk into the bookstore with my mom and dad and go and buy my jersey." I like that because our interests remain central to the athlete, not only economically, but sort of holistically. Each athlete matters to us.'

Regulation, I think, is needed at some level. Policy is needed at some level because I do think there is some abuse. It's not that I would want to take away the opportunity for players to make money. I certainly would do nothing of the sort. But I think that the abuse by the collectives that are occurring around sports, the fact that the influence of those collectives on student athlete decisions is significant. Those have to be addressed on a go-forward basis, or many athletes could be hurt.

I'm not surprised that we don't have any policies or regulations yet. I think we have to see how things are working and identify what we can do to address problems. Moving too quickly could introduce more problems in the long term.

**Jason Chung:**

This is a follow up for all of you, and Andrew, maybe we can start with you. Who should be doing the regulating, right? I mean, if this space is ripe for abuse and you've got student athletes perhaps being exploited by more economic actors,

let's say in your view, who do you think should be responsible for this? Who should be wielding the hammer here and dictating the rules?

**Andrew Brandt:**

That's a good question. The NCAA seems unprepared and unwilling and to do it, so they're looking to Congress to take that role and be the regulator and have an antitrust exemption for them as part of that. One thing I think about is what restrictions should they have? If we talk about these guardrails that were initially in the plan, such as not using the school logos, such as not being able to use the school facilities if you're doing an appearance or an autograph signing, and those seem to be kind of like passé now, and schools are selling jerseys, as Tim said, with logos, without logos. People are doing . . . .

I think the one thing that, if we want to get a handle on, is this idea of fair market value. The NCAA was putting out RFPs for someone to come in and say, "Is this a real deal?" And when collectives are paying a player to go to a birthday party for \$50,000, that's something that you have to say, "Well, okay. Is that fair market value?" No one's doing that. So, I think one thing that we should have, some kind of blue ribbon panel that's figuring out what is right for these athletes. And I know people can say, "Well, whatever they pay," but it's clearly not market value in order to get a player to do something for a school, basically come and play there. The collectives have been mentioned.

The whole goal of NIL before it became involved was it's not going to be about recruiting. That was the whole goal. The one guardrail that was put up there at the top was not about recruiting, and now it's become all about recruiting. Collectives are all about recruiting. What's the package? Players are going players, agents, players, parents. What's your package? What's the package up for me? Transfer or high school? What's the package? And the package is a number. They want to know a number. What do I get if I come there? But there's always supposed to be a quid pro quo, so what do you do for the number? And as I said, it seems like they're showing up to charitable events, birthday parties, meet and greets, which is fine, but they're making money that's not fair market value for doing that, so who's going to police that?

So I guess my answer is I don't know who's the right person to police it, but I think we should have a standard where we have some control over what's the number for doing X, Y, Z versus, just like I keep saying, Wild West.

**Jason Chung:**

David, I can see you itching to respond to that.

**David Feher:**

Yeah. What I want to say is that the premise of a lot of this discussion is that it's okay for conferences and the NCAA, who enjoy market power, to collectively agree that they will pay the athletes zero and that they'll be fine with letting third parties pay. It's just that they don't want to pay. And when you look at the way the current rules are drafted, the reason why the quote doesn't make sense to some people is because it's the same situation that has persisted for years, which is that when you have rules that don't make economic sense, which are fairly blatant violations of the antitrust laws and which are trying to be justified on irrational grounds, people try and find a workaround. So the goal of NIL is to provide fair market value under the current system for the value of name, image, and likeness. But seriously, are we going to have a regulator decide how much anyone is worth? That's about the worst outcome I can possibly imagine, because everyone has gotten it wrong over the years.

When we did the NFL free agency trial, the NFL lawyers argued that quarterbacks and running backs would get paid the most and that everyone else and the linemen especially would get nothing. Well, it turned out when the market was allowed to operate, the running backs didn't get paid as much because, just in terms of how supply and demand worked, and unfortunately the shortness of careers and the market risk, they're not getting as much, and who is getting a tremendous amount of money but offensive linemen who protect quarterbacks who are the most valuable assets in the current NFL system. Nobody predicted that. You can't have people putting a pen to paper and deciding what you're worth. And honestly, the NCAA and the conferences should do a serious look at their overall rules, which currently make no sense, but the problem is that they enjoy their current monopolistic profits as a result of paying zero on these collective rules.



And the thing I'll say is it's hurting real people with real families, and when you look at NIL decisions that are being made, and I'll just say without revealing anything confidential, but we've been in discovery for years on the NIL case in house, which is for damages in the past. And so we've been doing deep dives on NIL conduct and kind of what's happened, what may happen. Just from my own personal perspective, the notion that athletes are going to make decisions based purely on just who waves the largest number of hundred-dollar bills isn't really true. When you look at the vast majority of athletes who are at the best in skill level, still predominantly they're looking to go to schools that give them the best training and preparation for pro careers, because that's where they think they're going to monetize, and a lot of the best players don't want to be bothered with NIL because it'll distract them from developing their skills to be good pros.

There are other athletes, however, who maybe they're 5' 8" instead of 6' 2", and they're a great college player, but they're never going to be a great pro, and their economic incentive may be to monetize as much as they can get right now, because they're never going to make it. They know that, and they're doing their best, and for someone like that who's going to have a different decision, God bless them. And so if you ask me what shouldn't be done, no regulator anywhere should decide what somebody is worth, and the NCAA and the conferences should do, finally after all of these years, a hard look in the mirror, maybe make a decision that their foremost goals should not be their own personal budgets and their personal salaries, but focusing on the educational mission and focusing on the athletes and not thinking up terms like student athletes just to avoid paying players, workers' compensation benefits when their bodies get busted, and the schools don't want to give them anything.

These people are generating billions of dollars for these schools, and people are forgetting that it's not something that should be determined by other people. People should be in charge of their own lives, and if someone stepped in and told us that our lives are going to be different because of something that they've decided as to what's right or wrong, that's reserved for hardly any categories. Largely when we're going to war and we're drafted, or we're told not to violate criminal laws. Economic activities should be left in the market or when

we're polluting the environment or other things that have third party effects. But when we're just entertaining people on television or in stadiums, there's no reason to restrict economic behavior.

**Andrew Brandt:**

I guess my question to you, David, is that the long-winded answer to the question that Jason asked me in terms of who should regulate your answer is no one? Is that basically what you said?

**David Feher:**

In terms of anyone with market power who has an economic incentive to profit themselves absolutely should not be the regulator. If you ask me whether or not . . . And by the way, when you look at other industries, there's not a regulator who determines the price, but there are joint ventures, by the way, who get together and have recommended standards because they have market efficiencies so that they promote economic welfare for everyone. So, if the NCAA got together, and this is a little off the cuff, but if they figured out what they thought was a standard form for NIL that didn't affect compensation but had disclosure rules and is consistent with what people generally do in market economies where it's like best practices, where you have organizations informing people. . . .

When I'm suggesting that you shouldn't have regulations, I'm talking about command economies telling people how much they should or shouldn't receive in money. That's a little bit different from whether or not people should get best practices together and encourage people to share information and call out people who are frauds. Okay? Our economy has tons of problems with fraudulent folks. They get prosecuted all the time. They get sued all the time. People who engage in that kind of behavior should be subject to the full weight of the law. But that's different from saying, "I think you should get paid less because I'm a school, and I have some kind of other objective that I want served." Like I said, what I want to have happen is the conferences and the NCAA be subject to the same laws as everyone else. It's not a big ask.

**Jason Chung:**

Tim, if you were looking for . . . You mentioned the regulator and you brought it up. In your mind, is there a structure that would work? Is there sort of an idea that you've been noodling on? In your ideal world, would it operate the way it is currently, or would you think that there's an opportunity for another entity to step in as a safeguard?

**David Feher:**

I wouldn't have another entity step in terms of setting market prices. I think that the NCAA and the conferences should stop thinking like monopolists and should start thinking like joint venture partners and trying to figure out what behavior the joint venture partners do in regular economic activity that helps the marketplace and is pro-competitive, because they come up with justifications to that don't make sense. In prior antitrust cases, for decades they were saying that you couldn't have any restrictions on . . . You had to restrain third party contributions to athletes because if anyone paid athletes NIL more than a few dollars, then consumer interest in sports would wane and nobody would watch because they'd view them as semi-pro leagues.

The ratings for The Final Four this year and for football this past year were through the roof. That argument made no economic sense at the start. It's been proven to be a falsity. So if you ask me what should be done, they should chuck these arguments that are used to support monopolistic behavior and instead focus on legal behavior and legal levels of cooperation that entities without market power do all the time to try and have markets operate efficiently. That's done all the time. Why do you think we're watching Zoom on Apple or PC with common standards that have plugs that work with each other? It's because they're allowed to do that, okay? There are antitrust lawyers that they could hire who would tell them what they can do and not do. It would be really beneficial in terms of doing things in the NIL space, in terms of encouraging behavior that would be beneficial to everyone without trying to be a command economy dictator, just so that administrators and coaches can get way of super competitive salaries, because they're substitutes, because they can't compete directly for players. That made a lot of people nauseous, to tell you the truth. In every experience, I've had in the legal system, in

terms of what broke the back, these witnesses were no longer educators. They were people with salaries, that were beyond the pale. It'd be fine, if in a market economy, that's what they were getting, but they were, in effect, diverting money, that would be competing for the players, into their own pockets, and people got sick of it.

**Tim Slavin:**

As mentioned, I come from a baseball background. I was with the union, in baseball, for 12 years, and I remember my former boss, Michael Weiner, saying that under no circumstances, was he going to take the pen out of an owner's hand, when he was prepared to write a check, to an athlete. That's generally how I feel about NIL, but I think circumstances are a little bit different. I said earlier that I think there's some level of regulation that needs to be in place because I do think there is a measure of abuse here. And the scope of it is currently unknown. We need to understand the totality of it before we can propose meaningful change.

In terms of the people who could solve it, I think you need representation from different viewpoints, on the issues. Interests of the university, there are interests of the athlete, there's interest of the fans. I don't think it would be advisable, to have the NCAA make the determinations on its own. A committee of relevant interested parties, would seem, to me, to be the most appropriate way to find solutions for the problems we face.

I think these are questions that are going to be answered, over time. The court's decision in *Johnson* is going to be a big factor here. It certainly will influence the speed with which we need to address these issues.

**Jason Chung:**

With the 10 minutes that we got left, that's a beautiful transition. I want to talk a little bit about the idea of pay to play, right, and what's going on in *Johnson*, and David, if you could summarize, really briefly, what *Johnson* is, and what's at stake, I'd love to discuss it.

**David Feher:**

Well, just briefly, it's pending, right now, before the Third Circuit, and the question is whether or not, and this is an area

I'm not expert in, but whether or not the NCAA, and the schools, and the conferences, supervise the activities of the athletes, to such a level, and a money-making enterprise, and their services for it, such that they should be considered employees, for purposes of, at least, I think, the Fair Labor Standards Act and minimum wage rules. And I think, in some ways, it's a question, of what's the question. Okay. And before you get to the answer, because if you're an employee versus a "student athlete," a student athlete is not a category that's recognized under the law. That's PR that the NCAA made up to avoid workers' compensation payments. And so, if you're an employee, it could have all sorts of consequences, under the law, in terms of safety standards, in terms of minimum wage laws.

Would it mean, absolutely, complete free rein in everything? That's a broader question. The antitrust laws would still apply, whether you're an employee, or an independent contractor. That wouldn't really fundamentally matter, but there are all sorts of regulations that would apply. I don't like the phrase "pay to play," as you may have had a sense of, because I think it's a mischaracterization, but it's typical of what's been done in the propaganda battle. The one thing I do want to address, just briefly, going back to what Tim said, there are ways to address this, and it's interesting, if you're an employee, can you form a union?

Do you want to form a union? In some states, there are rules against state employees forming unions. It gets really complicated.

I think, in professional sports, you have clear collective bargaining units, which also enables the regulation of agents, which because they're representatives, of the collective bargaining representative. Here it's a little bit different, and we have an association, that's not a union, that's trying to protect the interests of the college athletes, to the extent that a legal regime could somehow be constructed to have some kind of analogue. Where there is better information, and maybe, certification of people, so that it's like a UL label that you get on electrical appliances, so that you know they're not going to electrocute you, hopefully.

Where, if somebody's dealing with you, they've jumped through certain hoops, in terms of education, in terms of training, in terms of prior contract experience, and they're

not somebody's brother's tailor, who's just giving you \$500, that you really need today. That kind of thing is something that I think should seriously be explored, as to exactly how it would be structured. That's another question, but I think that even under the current antitrust law, collecting information that's useful to making efficient market decisions, is something that's generally encouraged. So I think there are pathways here, to eliminate, or obviate some of the stuff, that's happening at the margin, without affecting the core, that really has been destroying people's lives over the years.

**Andrew Brandt:**

I just want to jump in on the issue of agents because this is something I've seen firsthand. As people know, I think a lot of the audience, has maybe an interest in being an agent, but agents of professional athletes, are certified by the unions of those sports, MLB PA, NBA PA, NFL PA, and there's a process, and you go through, and you take a test, etcetera. There's no such thing for NIL agents. So they've come out of the woodwork, and this is a new category, where if you're a young person, I want to be an agent, and you don't have the bandwidth to go to the pro players, here's a way to get in. And we've seen that, and I've seen firsthand, these contracts, and this is something not discussed enough.

You have some abuse out there: either an agent didn't look at it or there's no agent involved. Where I've had players come to me, or parents come to me, and say, "Look at this," and they're getting \$5,000, or free merchandise, or whatever it is, for shout-outs on Instagram, and this company has their rights, in perpetuity, or they have their rights, into their pro career, or they have their rights, the entire college career. Which they may go somewhere else, they may transfer, they may. . . It's just amazing to me, that there isn't regulation, or there isn't any kind of standards, that help these athletes, in this maze. And I know there are these platforms like Opendorse, and things like that, but I'm seeing these athletes have no contract, of course, or have a contract that's written on a napkin, and give away their rights, in perpetuity, so that's a sad thing out of this.

**David Feher:**

And by the way, some of that stuff you're describing, is not consistent with the current legal structure, otherwise, or some of it may just be fraud, and to the extent that there's more information, but some sort of sensible, rational certification regime, for people who are trying to represent. However, it's figured out, structurally, it's not something I'm discouraging. I think that it's important that people have greater protection, in terms of knowing who's who.

**Jason Chung:**

Yeah, so if anyone at NYU Law is listening, it sounds like there's an opportunity here. Before we wrap, I wanted to ask you a little bit more about current events, right? So we're talking about the employment status, as you mentioned, David, of student athletes. Rick Pitino, recently left Iona College, and he said he's going to let go a lot of St. John's players, at his new school, because they probably won't be back next season, because they're not a good fit. Andrew, you work at a university, you deal with student athletes. Does that feel like employment to you? If a coach can come in, and basically say, "Hey, you don't have a spot on the team next year," or would you characterize it differently?

**Andrew Brandt:**

No.

**Jason Chung:**

How would you characterize the ability of a coach to come in, and make wholesale changes, and get his guys in there?

**Andrew Brandt:**

I think that's what David would call market power. These coaches have immense, especially, a big name coming in like that, have an immense power to change their teams. I have a son, who is student manager at a school, and it happens, where these players get the feeling that they're no longer wanted, and they're pushed to the transfer portal, so they can bring in their own players, or new players. It's, again, the professionalization of college sports. We hear about that kind of thing all the time, in pro sports. We hear about new coaches wanting their own players, releasing, or trading players, that

are there, and bringing in their own. Yeah, it happens in college sports.

What happened at Villanova last year, is we lost one of the icons, in the coaching industry, when Jay Wright retired. We had recruited a top 15 player to Villanova. What happened in the moments, days, hours, after Jay decided to retire, was complete chaos, because now, this player was getting offers, calls, from all the coaches around the country, trying to see blood in the water, and snatch him away from Villanova. And it took a full court press, and an NIL package, to keep this player, at Villanova. Yeah, I saw it firsthand. The moment Jay Wright said he is out, oh my God, the bloodhounds came, for this player, and the guy who kept him here most, was Jay. But this is the incredible competition out there, for the top players, and we see these packages all over.

**David Feher:**

Can I react very quickly? A lot of what you're saying reflects, that at a lot of the schools, it's just pure business. Some of the schools, college sports is truly educational, and they're D3, or they're somewhere a little higher, but not much, and it depends on the fit for the player. I think a lot of players, and a lot of teams, are a lot better now, with the movement, because they find better fits. And so really good players who would be sitting on benches, instead are finding the coach, that's a better fit, somewhere else, and their careers can end up taking off. It's a question as to how do you manage it, in a way, and I'm not talking about a regulator, but I think, in some ways, by this athlete figuring out what kind of school does he want to go to, in the first instance, is a lot of the sorting that goes on. And I think having greater choice, in general, is better for everyone.

But it is a problem when coaches move, because players will want to follow them, because like I said earlier, a lot of the value is from the training, and relationships, they get from that coach, and you can't really blame the player. If someone, who is key to their value, has moved on somewhere else, with complete freedom of action, and then, to tell them, "Oh, you're not allowed to follow them." It's real tough. And so, the market needs to sort itself out, a little bit better, that's for sure. But that should be something the market can and should do. But I think people have benefited in all sorts of ways, too.



**Jason Chung:**

Tim, final word, how do you feel about the situation?

**Tim Slavin:**

In as much as a college coach can make determinations about the players, on his or her team, players should be able to make a similar determination about whether they want to play. Respecting players' ability to make decisions, after receiving material information, is also, I think, fair. And the fact that there was competition for a player is a good thing.

**Jason Chung:**

Well, thank you very much. That's the time that we have today. Thank you to the panel, Tim Slavin, Dave Fair, Andrew Brant, wonderful insights. I wish we had more time to delve into this NIL stuff, and all the employment situation, and I'd like to thank the SLA for inviting us to be part of this great day, as well. So thank you. If you've any questions. . . Does anybody here have a Twitter or LinkedIn, they'd like to plug?

**David Feher:**

I don't deal with Twitter.

**Tim Slavin:**

Neither do I.

**Andrew Brandt:**

I'm very active, on Twitter, as people know but-

**David Feher:**

Especially now.

**Andrew Brandt:**

. . . I'm sure they can find me. Yeah.

**Jason Chung:**

Perfect. So thank you very much.

**David Feher:**

Thank you so much.

**Jason Chung:**

Thank you guys.

## KEYNOTE CONVERSATION

**Caleb Paasche:**

Thank you guys, for that lively discussion. Up next, we have our keynote conversation, with Brad Ruskin, the co-chair of Proskauer's Sports Law Group.

Professor Cameron Myler will be moderating our keynote conversation, with Brad Ruskin. Professor Cameron Myler is a professor at NYU's Tisch Institute for Global Sport, where her teaching, and research, is focused on legal, and governance issues, in Olympic, and international sport. Professor Myler previously practiced law, for a decade, in New York, where she represented Olympic athletes, sports organizations, and executives, in regulatory, eligibility, anti-doping, and ethics matters. She's also an arbitrator, and has heard cases, both before the American Arbitration Association, as well as the Court of Arbitration, for sport. Professor Myler was a member of the US National Luge team for 14 years, winning the national championships seven times, was named US Female Luge Athlete of the year, nine times, and represented the United States, at four Olympic Games. And in 1994, Professor Myler was elected by her teammates, to carry the American flag, at the opening ceremonies. Thank you both for joining us. I'll turn it over to you.

**Cameron Myler:**

Thanks so much. Great to be here, and I think everyone should join me, in welcoming Brad Ruskin. We have such an accomplished attorney, and person, with us today, and I'm really excited for the conversation. So I'll do a quick intro, and then, we will hear from Brad, directly. So Brad Ruskin is a senior partner at Proskauer Rose, and co-chairs its Sports Law Group, which has been recognized as the country's top sports law group, by Chambers USA. His practice has spanned a variety of high stakes commercial cases, representing clients such as Major League Soccer, the National Football League, the National Basketball Association, ATP Tour, WTA Tour, NHL, Major League Baseball, Big East, PAC-12, and Madonna. I had to get that in there.

Brad has also represented ownership groups, and clubs, in all of the major US professional sports, including the Washington Nationals, Florida Marlins, New York Jets, although I'm a Giants fan, the Philadelphia Eagles, and the New Jersey Devils. Brad handles a variety of work, in addition to his sports

work, and I think we'll hear some more about that in our conversation. But I did want to mention that throughout his legal career, Brad has been a passionate advocate of public service. He's a Director, and the Audit Committee Chair, for the Student Leadership Network, and a recent recipient of it's The Man We Love Award. He's a member of the ADL Sports Leadership Council, on the board of Sports for Youth, and a membership of the Jewish Theological Society's Advisory Board, and a recipient of its Simon Rifkind Award. So join me in welcoming Brad to this keynote conversation. Brad, great to be here with you.

**Bradley Ruskin:**

Cameron, thank you. That was a little bit too much, but thank you, and very sweet. And as nice as it was, I guess, I'm happy to have done all of that, carrying the flag at the Olympics, that's another level. So I'm thrilled to be with you today.

**Cameron Myler:**

It's always great to have a conversation with you. So Brad, let's start with something kind of on everyone's mind, I think. We're just three years now, out from the beginning of the pandemic, and it's had an impact on everyone, in all aspects of society, but certainly, in the context of sports. So love to hear a little bit of your thoughts, about how COVID-19 has impacted sports, and what changes we might see, going forward.

**Bradley Ruskin:**

Cameron, look, I think for everyone on the call today, obviously, we've all lived through COVID, and had our personal experiences, but everyone has also seen it through the lens of sports, and sports in our lives. And I think, as you asked the question, it's one more area, where sports is such a lens for our society, on how we view developments, in a variety of areas. And I think, in terms of the public return to life, and a whole host of issues, sports was at the forefront, for many of us, as we thought about that.

For me, I remember, I think, probably for most everybody here, that March 11th, 2020, was an inflection date. Before that we had heard about COVID, we knew a little bit about it. People knew, in varying degrees, started to know people who may have contracted it. I remember I was at the NBA All-Star

Game, in February of 2020, and on the radio, on the way to the office, heard that the second case in the United States had just been diagnosed, and it was in Chicago.

Fast-forward, a short fast-forward to March 11, the NBA announces its shutting down. And frankly, if there was a single inflection point that was a before, and an after, I really think it was the NBA's announcement. You may remember one of its players, a player on the Jazz, Rudy Goebert, tested positive and then Donovan Mitchell, the next day. And literally, within 48 hours, a number of sports, that shut down and a number of college conferences shut down their tournaments. The NCAA announced it wasn't going to have March Madness and, I think, for people, their lives changed. I know for me, it was March 14th, three days later, we decided to leave the city, for a few days, to see what would happen. I think people's lives all sort of immediately got affected, and sports was a bit of a trigger there.

In the same way, it was sports that was part of the first pieces of a return to public life. And so, the NBA announced that they were going to have a bubble, down in Florida, and they were going to continue the league, and play a few final regular season games, and the playoffs, and then, Major League Soccer, really the first league to start in full, with its own bubble, down in South Florida. Those leagues, and the return of live sports, was a significant moment.

Of course, we also had the legal issues that tied to all of that. From the Firm, we actually sent three associates down to the NBA bubble, who were there, and lived in the bubble full time. And obviously, it was a little bit of drinking out of a fire hose, but it was just every kind of issue, and some of which were more business, some of which were practical, some of which were the need for immediate legal advice, on whether A or B could be done. But again, a fascinating part of all this.

**Cameron Myler:**

And I think on the Olympic side of things, certainly the big impact with Tokyo 2020, delaying a year, postponing the Olympics a year. And I think it was really remarkable that the games actually happened, during the pandemic. But I imagine, Brad, a lot of your clients' force majeure provisions were put to the test, during the pandemic.

**Bradley Ruskin:**

Yeah, so I think there were a number of legal issues, that came to the floor immediately. As you would expect, in our firm, I think, probably, it was both the employment lawyers, and people who dealt with contract issues, that had the most immediate issues. I think for workplaces, again, for all of us who were in the workplace, whether it was sports, or not, but particularly, in the sports field, there were a host of issues, about where people could be, when you could have people in an arena, how all of that would work.

There were insurance issues, and a number of insurance cases, about the scope of insurance coverage, and whether or not it covered COVID-19, and, of course, that's contractual, typically, and dependent on the particular arrangements. And as you just said Cameron, you have force majeure, sort of the classic lawyers who try to anticipate everything and, of course, never quite fully do so. And, I think, for all the things one can anticipate, no one, or few, anticipated this quite exactly, but parties had contracts, parties had provisions. And then, another whole area, not really a legal issue, but, I guess partially a legal issue, and I think even ongoing as sports returned, was the whole area of vaccinations, and how that plays into the issues. And again, with all of this, the overlay of societal politics, and how people think about that, has been yet another layer.

As well, as for many of our clients there were the international aspects in all of this. And I think one particular example is tennis, which had to deal with these issues in the way that every other sport did, but with the overlay of its events being international. So when the ATP Tour and WTA Tour, thought about returning and having matches, one of the first questions was, "How would players get to that country? Could they come to that country? Would that country allow live events or not? And if so, under what conditions?" Probably, the most notable example, and there were a lot that were happening before that, was when Novak Djokovic tried to go to Australia, and was told that he couldn't, or had to leave the country. And then there at least, appeared to be some level of ambiguity, in different ways, and ultimately, he didn't play.

Past forward, now to 2023, and US law is such that if you're not vaccinated, you can't come in from a foreign country. And that's being applied equally to him, as it is to others,

and it's interesting. What a debate, right? It's one of these areas where sports engendered a high level of debate and post a lot of tweets on it. People are very well divided on it. Some say the policy is outdated. Others say this is a special individual, let him play. Others say, it has to be applied equally to all. And yes, maybe when the policy changes, and it's about to, then fine, but you don't make special exceptions, just because he's a talented tennis player.

**Cameron Myler:**

On the issue of vaccines, there were even some problems going into the Olympics, in Beijing 2022, with Russian athletes, who had been vaccinated, but the Russian vaccine was not recognized as being, I guess, effective enough, so athletes were not able to compete in the games, as a result. But Brad, circling back around to your point, about sport being really one of the few things, that brings people around the world together, any additional observations on experiences, you've had over your career, as to how that rings true?

**Bradley Ruskin:**

Look, Cameron, it's one of the fascinating things about being in this industry, and we can talk a little bit about it later in connection with my life as a litigator and as a counselor in this area, about how sports is a little different in so many ways. But I think one of the joys of being in the industry, one of the reasons the industry is as successful as it is, is how important it is in people's lives. And I think that it's really hard to think of many other things that across our country where you can think of as many people having a common interest. And perhaps right now, at a time of incredible divisiveness, one of the few things, where people can, at least, have commonality in certain areas by virtue of their fandom, or otherwise. And I think significantly, and happily, sports has played, because of that, an outsized role, and an outsized positive role, on societal and important social issues. And I can think of a lot of the examples.

I mean one can point historically to the significance of Jackie Robinson breaking the color barrier, and how that modified civil rights. And in the United States it was, at least, a start towards a movement thinking about racial issues differently. Maybe even more, in my life, I thought one of the most dra-

matic examples, was when Magic Johnson, and David Stern, appeared at a press conference, and Magic announced that he was HIV positive. And at that moment, as a long time New Yorker, we all knew people who had died of AIDS. But Magic Johnson being HIV positive changed the conversation and how the world responded to this horrendous disease.

By the way, the one thing you didn't mention in the bio, as nice as it was, but an important thing, is that I'm an NYU Law grad, so that should be added here. Proud NYU Law grad. But anyone who lived in New York City, as I did, graduating law school in '81, quickly knew people who died from AIDS. And the extent, to which it went from a few people, to a scourge in the city, was dramatic, and horrible, on a national level. It was one of those issues where, regrettably, you had a great number of people, treating it as a disease for others, and in particular, for gay individuals, in New York. And the moment when Magic came out, it was a dramatic change, at least, across America, in accepting that this was something that had to be dealt with, in a different way. And which we can talk about whether society should have gotten in there quicker: it certainly should have. But that moment, and the power of a sports that sports figure, and the power that sports can have was clear. If people haven't seen that press conference, I think it's on YouTube. It was just a fundamental change. And again, we can think of so many areas where, I think, sports is able to do that. Billy Jean King, from her match against Bobby Riggs, on giving a different lens to gender equality, and the start of a shift, that is significant, and puts us in a very different place, thankfully, in 2023, than where we were 30 years ago, or so. You can think about it with Colin Kaepernick, and putting a different light on police brutality by the actions he's taken. And I think, most recently, are issues of mental health in sports.

I think this was an issue that three years ago, four years ago, the notion that pro athletes, who didn't want to show weakness, would speak about mental health, would seem rare. But we have Naomi Osaka coming forward, and talking about her battles and her issues, doing that. I think, frankly, and again, not easy for any of these athletes, and not without criticism. There's some out there who if someone puts themselves out there, criticisms follow. But I think that's been a significant step, and I think that such athletes coming forward hopefully

will cast a different light. Related to that, I don't know if you saw Mardy Fish, another tennis player. There's a documentary on his battles with mental health. I think it's called *Untold: Breaking Point*. And it's just a remarkable story where literally, he had a panic attack on a way to, I think it was this quarter-final match at the US Open. And it was a late round match and he just couldn't play. It's a fascinating story, and I think it helps people better understand issues that we should all understand better.

**Cameron Myler:**

Given that athletes have a public platform, and even more so these days, with all sorts of options to be on different kinds of social media and being in the public, do you think athletes have an obligation to speak out on social issues?

**Bradley Ruskin:**

Yeah, I guess I'd answer that no. I don't think anyone has that obligation. I think there are people who are comfortable with it. I think either side of the extreme there, I disagree with. As I said, I don't think players have an obligation. But as to those who say, "Just go play," I would disagree with them on most every occasion. I think when people have a public forum and have important things to say, they have right to say it. I think athletes and others, including or example owners, have a duty to make sure they're informed when they speak, because the special light they get by being in the sports industry does give them extra voice. So doing their best to be knowledgeable about issues is important, but then, whatever their voice is, I think they should use it and use it powerfully. And for the reasons I described, I think it often allows things to be much more front and center in public dialogue in a way that is quite valuable.

**Cameron Myler:**

So Brad, your remarkable career as a lawyer has intersected with sport in so many different ways, and I'm sure the students in the room particularly would be interested in hearing how did that happen? How did you come to have a sports-related law practice?



**Bradley Ruskin:**

Like most things, probably, a little bit of direction and a lot of bit of luck. And by the way, I'll give one caveat here. I was lucky enough three weeks ago or so to speak in Professor Balsam's class to the sports law class. And so to the extent there are people on the call today who were there, I'll try not to be too repetitive. But if I repeat a story or fact or two, you'll forgive me. And hopefully, if I end up telling stories inconsistently, you can call me on it. That's fine. But I started, I summered, at Proskauer. When I came to Proskauer, I didn't know that it had a sports practice.

By the way, there was barely any sports practices at any firm or anything that was a serious sports business industry at that point in time. But the firm had started representing the NBA back in the late '60s, early '70s. And there was a significant amount of litigation in the mid-70s, both on player issues and then on issues relating to the ABA and the like. And when I was a summer associate, I went to a deposition of Dave DeBusschere, but I didn't come to Proskauer for that reason.

But there were two lawyers in particular who helped me follow this direction. One was George Gallantz. George was the person who brought the NBA to Proskauer and a remarkable mentor. He died at a hundred years and one day, which I think tells you something about the kind of fortitude he had. But he was a remarkable man. And he's really the person, frankly, that David Stern and Gary Bettman and other commissioners, and within our firm at least four litigation chairs and three labor chairs would tell you he was their mentor. He really had quite a legacy. And then Michael Cardozo, who was one of those legacies, but in his own right became a great mentor. And Michael was actually the office mate of David Stern, and ultimately was Corporation Counsel for 12 years under Mayor Bloomberg. But I happened to work with Michael as a first-year associate on a case involving the importation of galvanized steel from Korea.

It actually was a pretty interesting and fun case. But I told him if a sports case came up, I'd love the opportunity to get involved. And as it happens, on May 15th, 1984 at midnight, Donald Sterling moved the Clippers without asking permission of the league from San Diego to Los Angeles. And I told the story to the class a few weeks ago, but I just think it's a fascinating piece of sports lore. So David Stern became commissioner

of the NBA on February 1st, 1984. And when Sterling took that act without asking permission of the league, it was really David's first major legal challenge with a member of the league violating the rules flagrantly. Sterling's position was that in light of the Ninth Circuit's recent decision finding that the NFL had unlawfully conspired to stop Al Davis from moving the Raiders to Los Angeles, that the NBA couldn't stop Sterling.

And so he didn't have to ask permission. Our view was, "We'll apply the appropriate standards, but you've got to follow the rules. If we do it wrong, then you can say we violated the antitrust laws, but we're going to do it right." But as I say all that, when Adam Silver became commissioner, as probably many on the call know, his first major challenge was dealing with the racist comments of Donald Sterling, and making a decision about how to deal with when an owner had engaged in that kind of conduct. And I think Adam stepped up quickly and stepped up strong to say that there was no room for that in the league, and ultimately removed him as an owner. But the fact is that over that course of years for both David Stern and Adam Silver, their first major legal challenge or legal issue was dealing with the same person, Donald Sterling.

So anyway, I digressed a little there, Cameron. But I got a call from Michael telling me about the case and asking, "could I work on it?" Truth is I had literally pulled my first, I was, I guess, at the end of my third year going into my fourth year. I had pulled two all-nighters in the prior week, which I hadn't done before, and I had been very busy. But when he said, "Did you have time to do it?" My answer was, "Of course." And happily, one of those cases settled within the next three days and I got involved in the Clippers case. That case went on six years. And among other things, I was the point person to deal with all the inside lawyers for every team and all their outside lawyers. And so I literally got to know people at every single club across the country, both inside and outside lawyers. And as you can imagine, those people, some stayed but others that went to other leagues, other sports and the like.

In all this, I think a really interesting fact is in 1980, when I was a summer associate, the Dallas Mavericks purchased by Donald Carter for \$12 million. We just were involved in selling the Denver Broncos for \$4.6 billion. And that evolution obviously way outpaces almost, not probably number one, but it's

the very top of outpacing most all businesses in its growth. And so I've had this great good fortune to have got involved, then got involved as the business was just becoming an industry, on an incredible ride up. And with that, size of the issues, the dollars involved, and the complexity and breadth of the legal issues just continued to grow. And so it was in all the best ways, a perfect storm. And we were there early, and made the decision to be all in with a sports practice, and served. I think because we were there, many people came to us, and hopefully we did a great job and built upon itself.

**Cameron Myler:**

Great. So I just want to interject for the audience, if you have any questions for Brad, please put those in the chat, or I think there's also a Q&A option on the webinar controls. So please, any questions, send those to us. So Brad, we've been talking about different aspects of sports law, but how would you actually define that? What do you think sports law is?

**Bradley Ruskin:**

Yes, that question gets asked all the time. The first thing I guess I would say, and we talked about this a little bit in the class too, but in part coming from the litigation side of all this, because everyone feels they know something about sports or overtly doesn't, it so colors the business, certainly the litigation side of the business. And it's fascinating. As I've told people before, people on the call who have read decisions have seen how federal judges, who are highly educated men and women, and who are sophisticated lawyers, suddenly fall prey to needing to use sports metaphors, and talk about how the NFL couldn't score a first down with that argument. Or more often, hopefully if we're representing them, scored a touchdown with that argument. And Cameron, it's even to the point that as I think about it, literally in every case and usually at the very beginning of the case, a judge will expressly make a comment about whether it's yes or no about whether or not they're a fan of sports, and whether or not they're a fan of that sport.

And so more often it's that they are, right, but if they're not a fan, they feel that part of the dialogue is, "Well, I'm not really an X fan." And whatever that X may be. And again, most industries and other industries in which I litigate, people don't say, "I'm not a wireless communication fan." But even if it's a

product, they don't really talk about the industry. And again, with apologies for people in the class, but I told the story of the Chicago Bulls case. We represented the NBA against the Bulls and WGN in a case that was litigated over many years in Chicago courts. And it was one of the seminal cases establishing the right of the league to control the national distribution of its television product. But the judge in that case, Judge Wilf, and I'll tell a truncated version of this, but Judge Wilf was a very famous judge had handled lots of major cases, including antitrust cases that had gone ultimately to the Supreme Court.

But on the very first day of the case, when we had a conference and he was trying to learn a little bit about it and asking us about why the league felt it was important to adopt certain rules that affected the licensing of games by an individual club, we talked about the concern with overexposure of the product, of saturation of the product and the like. And that was important from a league perspective to be able to control its distribution avenues. I know there's a lot of discussion about that issue today on broadcasting and how leagues think about that as technology evolves. So we said saturation was a concern. And Judge Wilf's immediate, without really missing a beat, maybe he thought for about three seconds and then he said, "Ah, saturation. My grandson will watch as many games as there are out there. You can't tell me there's any such thing as saturation."

And that wasn't a flip comment. It really was a core view of how he thought about it. That case went up to the Seventh Circuit twice, and we had three hearings from us before him. And he really never deviated from that core view in terms of how he thought about it. So that's a partial answer, I guess, in terms of sports. The other part is people used to say there was no such thing as sports law. But I think in fact what sports law is all of the legal issues that tie to the business of this industry. And the industry is pretty wide-ranging in a whole host of ways. But it starts when you think about with questions "what is it that sports is?" At its core, it's an entertainment product. It's a product that gets sold, it's a product that people attend, it's a product that people consume through various forms of media.

Beyond all of that, it's a product where talent is an essential element of what people want. And it's a product where there's a series of rules and the like. And that creates the legal issues of eligibility, of discipline, of a whole host of other

things. It's a governance structure, and the governance structures of each of the leagues are significant in the decision-making of those leagues, from a corporate point of view, from an M&A point of view, from a financing point of view, and also from an antitrust point of view. So I've spent a great deal of my time litigating sports antitrust cases. And again, when you think about it, it's comes from the structure of leagues and how people look at leagues, and the participants to some extent, as competitors, and not as a single corporate entity.

But they are a highly interdependent venture. And so what they can do and what they can't do can be subject to antitrust challenge. And I think because it's so public, as I say, this isn't an agreement that someone reaches as some secret agreement between two competitors. Leagues have to operate as wholly integrated ventures. But their agreements, if you will, the rules they adopt, are completely open, and their rule books are published. And almost with every rule, there'll be somebody who's upset, who feels the rule is adverse to them. And in the antitrust area, that list is extensive. But issues about territories, about relocation, about ownership, about telecast rights, about expansion, about contraction, about license product, about online product, player issues, eligibility issues, international issues, amateurism, some discussion about that earlier today. Agents, ticketing, certifications and the like, of what level you're at. All of those decisions can be subject to antitrust challenge. And more often than not, at least we're able to show that the rules are reasonable and appropriate. But they are subject to challenge.

Beyond that, again, the list, Cameron, it just goes on. It's really every area you can think about including, as we said, the whole body of player discipline issues, on court or field, or off-field issues. It's all those series of labor issues, collective bargaining issues and all of their applications, particularly in league sports. It's the corporate and JV, joint venture issues that I mentioned before. It's licensing, it's media rights, it's distribution of product, it's gambling laws. As we also heard earlier today, it's bankruptcy issues. I think there was a mention of Diamond Sports earlier today and its recent bankruptcy involving regional sports networks. So there you combine the array of bankruptcy law, media and the like. So it's all of the above. And it's criminal law when athletes or others get involved in that and the particular aspects. So in our firm, it's

important. It really is such a cross-disciplinary practice. So there's no day that goes by that I'm not talking with my corporate colleagues, my finance colleagues, my tax colleagues, my labor and employment colleagues, because all of these issues intersect.

**Cameron Myler:**

Absolutely agree. And I think another issue, and you mentioned a little earlier, technology, which has rapidly evolving certainly in the context of sports. So with the evolution of tech and rise of AI, what legal issues do you see arising in the sports space in the coming days?

**Bradley Ruskin:**

Yes, so it is interesting, because combining that question with one of the things we've talked about, Cameron, I think the other thing that sports has done historically is it's been a first adapter for so many technologies, in so far as where people and consumers start to utilize technology in a variety of ways. And so if you think about just using your phone to watch sports content, initially clips and now people are comfortable watching whole games on their phone. That felt unheard of not that long ago. And then suddenly that becomes commonplace. Every form of technology often gets applied, and as I say, utilized through sports. As we come to this point in time, I think there are a number of areas, but AI certainly is top of mind, and I expect for others, a common experience. I think on December one, I had not had a conversation about ChatGPT.

This is a group of NYU Law students. So they probably were ahead of me, but I hadn't had a conversation. And then suddenly over the course of December, there were a couple of conversations that I had, and then a conversation with my daughters about it. And suddenly in the month of January, I don't think I went three days without it coming up, including it then being a topic at a conference, and focus on it and demonstrations of it, and demonstrations of it in a sports context. Or just "Write me a demand letter," "Write me a brief" or the like. And so the speed with which it's moving, and I think we're so obviously in early days, but it's a technology that we have seen on the horizon suddenly now moving to a different

point. And it's going to certainly be important, already is important in sports in a whole host of ways.

And so whether or not it's the ability to create user-generated content, whether or not it's the analytics that it will provide to clubs and others who want to know more about their consumer base, and be able to get more information quicker in more sophisticated ways. Suddenly it's continued geometric growth. And with that come the array of legal issues. Who owns rights? So there are property interests, contractual rights, obviously privacy issues, and general data issues, that tie to all of that. I think all of those will be part and parcel of any evolution of the technology. And so certainly, that is a focal point right now, but its among many others.

**Cameron Myler:**

Great, thank you. Well, we're getting to the end of our time, so we have one question from the audience. So let's get that in, and then we'll see what else we have time to chat about. So question for you, how has your professional proximity to sports affected your personal relationship with sports and your fandom?

**Bradley Ruskin:**

So it's a great question. One of the things I say maybe relates to it is, as you can imagine, as people in this room are interested in sports, an ungodly number of people who come to interview or otherwise, when the first thing they say is, "Oh, I just love sports. I'm really big fan." You've just put yourself into a group of 225 million. In truth for me, and as much as I've loved sports and fandom, I've also loved the business of sports. I mean, for all the reasons that we've been talking about today, because it is such a leader in our society. And so the pulse, I found the legal issues and the business issues to be exhilarating and the like. But with all that, I'm a huge fan. For me when I was younger, I played tennis pretty seriously. I played three hours a day and played juniors.

And so if you had told me when I was 15 that I would get to be in a meeting at Wimbledon with the board of directors of the ATP and WTA Tours helping make decisions, I'm certain I would've said, "Sign me up today. You don't have to pay me a penny. This is it." So I do feel crazy fortunate. I will say I love all of our children equally. So every league and every team.

But still be pretty passionate. And, the only one quick anecdote I'll tell is some number of years ago, maybe many of you might remember, in the middle of the playoffs, the Knicks were playing the Heat and there was a bench-clearing brawl. And the NBA had a rule at that time. Very important rule that no one can come off the bench and go onto the court to participate in a brawl that is on court.

And of course, these are people who are between six foot and seven foot tall; powerful men. The idea you want to do everything you can to deescalate a fight, a very important rule. A lot of Knicks came onto the court that night. As to sport fandom, I would say that I was lucky enough to note in this week where Willis Reed passed away that I was at game seven in the high blue seats in Madison Square Garden for one of the greatest sport events of all time. So I've been a Knick fan for that long. Sure enough, we had to take the NBA's side and the NBA suspended six players over the next two games. It was three a game, the way it worked. And neither of my daughters was particularly happy with me that day. And so it's more at home where it might matter or when I was representing the Marlins, when I've been a diehard Yankee fan. And when the Marlins were playing the Yankees in the World Series, I was in the middle of representing the Marlins and friendly with the owner and the executives. And so occasionally, there's that, but with all that it is pretty easy to combine the two.

**Cameron Myler:**

All right. Great. Well, I think this is a great segue into maybe our last question, but what advice would you give to students or others who are interested in having a career at the intersection of law and sports?

**Bradley Ruskin:**

So look, the first thing I would say is that if you looked at 50 people out there whose careers you might think are appealing, they probably did it 52 different ways. And there really isn't a single path that leads to success, particularly as a lawyer. I think one of the things that's interesting is how many people in the sports business are lawyers, both acting as lawyers and also acting as business people. So it is a great entry. And I've commented on the past that I think interestingly. . . Slightly different than your question, Cameron. . . . But one of the



things that I think makes practicing in this area so rewarding is that because there are very good lawyers at the leagues and other places who really appreciate what lawyers can bring to the table, and hopefully what they think very good lawyers bring to the table, lawyers are often seen as people who can be the best problem solvers rather than in many areas, where lawyers are seen as someone who's going to block the deal or be the hurdle.

So as I say, I don't think there's one path. I do think it's a combination of going out and becoming as good a lawyer as you can be, and then be focused on opportunities as they may come up. I will say a good path for a lot of people has been to come to Proskauer. We have more than 70 alumni who are now in the sports industry, including two current Commissioners, most recently Jessica Berman at the NWSL. But everything from commissioners to general counsels at leagues and general counsel of teams to every piece of the business.

But I really think that when leagues hire, they want to think they're getting the best and the brightest, and they're looking for talent on the legal side. And so find a way to make connections and other opportunities, but develop the skillset first of being a very good lawyer. And when you heard me go through that list of how broad sports law is, and it's only getting broader, there are so many entry points to the industry that I think you just have to find the way in. But as I say, developing the legal skills is a critical piece of that.

**Cameron Myler:**

Great. Any last words of advice or anything you want to add to what we've already discussed?

**Bradley Ruskin:**

No, thanks. Total pleasure. And look, if there are people on the screen who have other questions, you can email me and find me at Proskauer, or I'm happy to, as many people have been NYU law, now I'm happy to make time for anybody. And send me a note, and I'm happy to have a conversation if you want to ask more concrete questions about getting in the industry or other pieces. More than happy to do it.

**Cameron Myler:**

Thanks so much, Brad.

**Bradley Ruskin:**

My pleasure. Have a great weekend, Cameron.

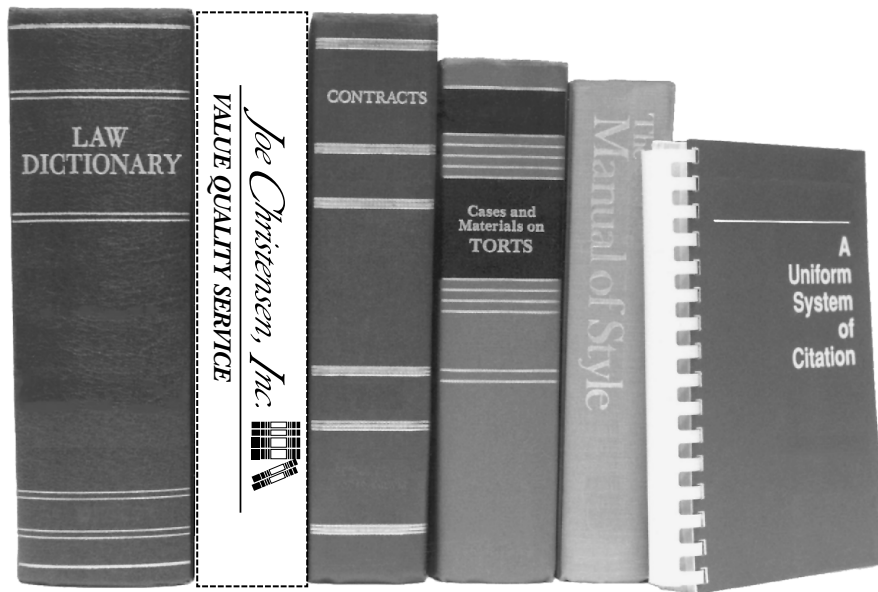
**Cameron Myler:**

You too.

**Nick Sloan:**

Thank you so much, Professor Myler and Brad Ruskin. That was an excellent conclusion to our colloquium. Another huge thank you again to all of our panelists and everyone who helped make this come together. . . . And finally, thank you all for joining us as well. It was a pleasure to put this amazing event together, and we hope to see you again for next year's colloquium.





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