Rational Investing or Speculative Fever?: SPACs, Robinhood, and Digital Assets—Securities Markets or Casinos?

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RATIONAL INVESTING OR SPECULATIVE FEVER?: SPACs, ROBINHOOD, AND DIGITAL ASSETS—SECURITIES MARKETS OR CASINOS?

Thomas Lee Hazen

A Few Words About Professor Jerry Markham and His Book:

I have admired Professor Markham’s prolific scholarship for decades—even before he joined me as a colleague at the University of North Carolina School of Law. We have been co-authors on several books and I have been amazed by his work ethic and prodigious productivity.

In his most recent endeavor, Professor Markham has written a very informative book, From the Great Recession to the Covid-19 Pandemic: A Financial History of the United States 2010–2020, which is the most current volume1 of his thorough and informative history of the U.S. financial markets. Professor Markham’s entire multivolume set not only provides a very rich history, it also reveals the cyclical nature of financial crises and frauds which will reappear in his next volume covering the current decade. No doubt, the three investment arenas discussed in my article that follows will play an important role in that upcoming volume.

ABSTRACT

This Article focuses on one of the recurring themes, not only in Professor Markham’s most recent volume but also in the earlier ones as well—speculation in the financial markets. The 2010–2020 decade set the stage for a new round of speculative activity starting in 2021. In the Article that follows, I reflect on a new wave of speculation and three current examples of speculative activity. The Article concludes that regulators should be cautious about over-regulation of special-purpose acquisition companies (“SPACs”) and gamified trading. The article also supports the regulation of digital assets (cryptocurrencies and NFTs) as securities.

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Many years ago, I published an article decrying inadequate regulation and investor irrationality’s impact on the securities markets with respect to derivatives and financial futures.\(^2\) Prior to the implementation of regulation, there was significant scholarly support for regulation of the formerly unregulated, over-the-counter derivatives market.\(^3\) In 2010, with the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress created much needed regulation for the over-the-counter derivatives markets.\(^4\) On a broader basis beyond the derivatives markets,


some commentators have asked for increased regulation of investing when it
too closely approaches gambling.\textsuperscript{5} Three recent investment arenas not
involving derivatives have once again brought increased focus on the
dichotomy between rational investing and speculation as well as the
relationship of speculative investing to gambling.

The first investment arena examined below involves SPACs (special
purpose acquisition companies) that enable blank-check public offerings.\textsuperscript{6} A
blank-check offering is one where investors are asked to participate in an
offering to raise cash for an acquisition to be identified later. This in essence
gives the managers of the company a blank check in looking for a business
to acquire. As discussed below, using a SPAC as a vehicle for taking a
company public raises concerns as to whether making such blind investments
without enhanced disclosure is unjustifiably at odds with the federal
securities laws. This past decade witnessed increased popularity of SPACs.

The second investment arena discussed is the casino-like nature of
investing that raised its head with respect to the wild market swings of
GameStop and other meme stocks\textsuperscript{7} with the growth of the Robinhood
Markets Inc.’s online brokerage activities.\textsuperscript{8} Robinhood and social media
attracted young, unsophisticated investors in part because of the gamification
of Robinhood’s trading app. Gamification is “the process of adding games or
game-like elements to something (such as a task) so as to encourage
participation.”\textsuperscript{9} For example, Robinhood has used gamification as a way of
enticing young and presumably unsophisticated investors.\textsuperscript{10} Perhaps the most

\textsuperscript{5} See, e.g., Theresa A. Gabaldon, John Law, with a Tulip, in the South Seas: Gambling and the
Regulation of Euphoric Market Transactions, 26 J. CORP. L. 225, 284 (2001) (suggesting increased
securities regulation to address gambling and euphoria in the securities markets, including “prohibition of
the most extreme transactions, increasing the controls on the licensing of brokers, restricting the times and
places the most extreme transactions can occur, restricting the clientele, limiting the credit that can be
extended by brokers to finance the most extreme transactions, limiting the ability of investors to borrow
from any source to finance those transactions, increasing the supervision of brokers, regulating
advertising, increasing investor education, constructing market reckoning points, and increasing firm-
taking the approach of gambling laws).

\textsuperscript{6} See infra text accompanying notes 20–49.

\textsuperscript{7} See infra text accompanying notes 50–121.

\textsuperscript{8} See infra text accompanying notes 122–167; cf., Sergio Alberto Gramitto Ricci & Christine M.
Sautter, Corporate Governance Gaming: The Collective Power of Retail Investors, 22 NEV. L.J. 51 (2021)
(discussing retail investors and corporate governance).

\textsuperscript{9} Gamification, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gamification (last visited
Jan. 26, 2024).

\textsuperscript{10} See, e.g., James Fallows Tierney, Investment Games, 72 DUKE L.J. 353, 353 (2022).
extreme example of irrational investing as a result of this gambling environment was the use of Robinhood as a vehicle for public trading of Dogecoin, a cryptocurrency that was originally established as a joke, which unlike many other crypto assets, had no utility.\footnote{See, e.g., JERRY W. MARKHAM, CRYPTOCURRENCY REGULATION: A PRIMER 1–2 (2023) ("Dogecoins, which were created as a joke in 2013 to mock Bitcoin, turned out to be no laughing matter. The market capitalization of Dogecoins soared in value, with $50 billion outstanding in 2021."); see also Justina Lee & Joanna Ossinger, The Dogecoin Joke Is Turning Serious in Latest Crypto Binge, BLOOMBERG L. NEWS (May 5, 2021, 9:49 AM), https://www.bloomberg.com/news/articles/2021-05-05/the-dogecoin-joke-is-turning-serious-in-latest-crypto-binge; Charlie Wells & Katharine Gemmell, Why Dogecoin is the Meme Stock of the Cryptocurrency Universe (2), BLOOMBERG L. NEWS (Apr. 20, 2021, 2:51 PM), https://news.bloomberglaw.com/securities-law/why-dogecoin-is-the-meme-stock-of-the-cryptocurrency-universe (discussing the Dogecoin phenomenon).}

The third investment arena addressed below is cryptocurrency investing and speculation. Cryptocurrencies are created by computer code that supports their use as digital currencies. Bitcoin\footnote{Bitcoin’s original purpose was to create a peer-to-peer version of electronic cash to allow for secure online payments without the need for third-party intermediaries such as banks. See SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 1 (2008), http://www.bitcoin.org/bitcoin.pdf (detailing and explaining the rise of bitcoin). In order to avoid double-spending of the same crypto token, public ledgers provide a basis for authenticating the currency. See id.} became the first widely used decentralized digital currency.\footnote{See id. (describing the rise of bitcoin). For an excellent account of the rise of cryptocurrency, see MARKHAM, supra note 11 (addressing the regulatory framework and asserting that the securities laws and commodities laws are not the best fit for cryptocurrency regulation).} Other virtual currencies followed.\footnote{See Kelsey Bolin, Decentralized Public Ledger Systems and Securities Law: New Applications of Blockchain Technology and the Revitalization of Sections 11 and 12(A)(2) of the Securities Act of 1933, 95 WASH. U. L. REV. 955, 957 (2018).} Notwithstanding the designation as a currency, crypto assets are not currencies in the traditional sense since a true currency is backed by a sovereign state.\footnote{See, e.g., 31 C.F.R. § 1010.100(m) (2024) (FinCEN’s definition of “currency”); Tim Vipond, Fiat Money, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/economics/fiat-money-currency/ (last visited Sept. 9, 2023) (explaining the difference between commodity backed currency and fiat currencies backed by a government entity).} There are a number of other potential regulators for the cryptocurrency markets.\footnote{See, e.g., Scott D. Hughes, Cryptocurrency Regulations and Enforcement in the U.S., 45 W. ST. L. REV. 1, 11 (2017) (discussing regulatory alternatives); Lawrence J. Trautman & Alvin C. Harrell, Bitcoin Versus Regulated Payment Systems: What Gives?, 38 CARDOZO L. REV. 1041, 1077 (2017) (discussing potential regulation for cryptocurrency).} For example, the Commodities Futures Trading Commission (CFTC) regulates virtual currency transactions as commodities.\footnote{See, e.g., Press Release No. 8774-23, CFTC Issues Orders Against Operators of Three DeFi Protocols for Offering Illegal Digital Asset Derivatives Trading (Sept. 7, 2023), https://www.cftc.gov/PressRoom/PressReleases/8774-23; In re CoinFlip, Inc., CFTC No. 15-29, 2015 WL 5535756, at *2 (Sept. 17, 2015) ("Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities."). See generally David E. Aron & Matthew Jones, The CFTC’s Characterization of Virtual Currencies as Commodities: Implications Under the Commodity Exchange
Enforcement Network (FinCEN) also comes into play, as may the banking regulators.\(^{18}\) Many states have their own cryptocurrency regulations.\(^{19}\) This Article focuses solely on SEC regulation of cryptocurrency.

The discussion that follows focuses on each of the three speculative investments mentioned above—SPACs, Robinhood and online “no fee” securities trading, and cryptocurrency. This is followed by a brief discussion of financial bubbles. Next, the Article explores speculation in the securities markets, the similarities between speculation and gambling, and the relaxation of state gambling laws. The Article then concludes that regulators have been correct in taking a cautious and measured approach to regulation of SPACs, Robinhood and online “no fee” securities trading, and cryptocurrency.

II. SPACs\(^{20}\)

As noted above, a SPAC is essentially a blank check company wherein investors are asked to invest in a company with no business or assets with the understanding that the SPAC managers will then find a private company to acquire.\(^{21}\) Once the private company is acquired, that private company has been turned into a publicly held company without the traditional registration statement under the Securities Act of 1933 that accompanies an initial public offering (IPO).\(^{22}\) The purpose of the 1933 Act registration is to provide

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\(^{20}\) Portions of this section are adapted from HAZEN, supra note 4, § 3:58.


investors with full information about the company before making an investment decision.\textsuperscript{23} With a SPAC, the company goes public without any disclosures concerning the business that will be carried on since no such business is selected and identified at the time of the SPAC’s public offering. Thus, when purchasing shares in a SPAC, the investor is gambling on the success of the SPAC management in finding a good acquisition.\textsuperscript{24}

In a typical SPAC offering, the IPO shares are usually priced at $10 per share and are packaged with five-year warrants with an $11.50 exercise price.\textsuperscript{25} At least 98% of the IPO proceeds are put into a trust account for the acquisition.\textsuperscript{26} SPACs usually have an eighteen- to twenty-four-month period to find an acquisition target and completion of the SPAC business combination. Interest from the trust account can be used to defray expenses. The SPAC’s sponsors typically take a 20% interest, but they do not have access to the proceeds held in trust for the hoped-for acquisition.\textsuperscript{27} SPAC sponsors get paid only upon completion of the de-SPAC transaction, which is the merger or reverse merger with the target private company.\textsuperscript{28} In other words, once the SPAC and the private company are merged, the former SPAC no longer exists as a SPAC as a result of this de-SPAC transaction. Underwriting commissions typically are 5.5% of the proceeds, with 2% paid at the outset and the remainder being paid upon completion of the de-SPAC business combination. If a de-SPAC business combination is approved, SPACs provide that the SPAC shareholders have a right to have their shares redeemed.\textsuperscript{29} If there is no de-SPAC business combination before the time

\begin{itemize}
  \item \textsuperscript{23} HAZEN, supra note 4, § 2 (describing the 1933 Act registration process).
  \item \textsuperscript{25} Typically, the warrants are not exercisable until after the de-SPAC business combination. See, e.g., HAZEN, supra note 4, § 3:58.
  \item \textsuperscript{26} The Securities Act of 1933 Rule 419, adopted in 1992, requires that blank check companies deposit proceeds from an IPO into a trust account. 17 C.F.R. § 230.419(b); Adoption of Blank Check Offering Rules, SEC News Dig. No. 92-71-02, 1992 WL 71073 (Apr. 13, 1992).
  \item \textsuperscript{27} Sponsors typically participate in a private placement of warrants for $1.50 each. The proceeds from the private placement are used to defray the up-front underwriting fees and other expenses.
  \item \textsuperscript{28} Since the sponsors’ gains and more than half of the underwriting commissions are contingent on completion of a de-SPAC merger, there is a strong incentive to negotiate and complete an acquisition prior to the expiration of the SPAC’s time limit. HAZEN, supra note 4, § 3:58. There is a similar bias for non-sponsor shareholders as “a sponsor that is unable to come up with a good merger has an incentive to propose a bad merger.” Minmo Gahng et al., SPACs, 36 REV. FIN. STUD. 3463, 3472 (2023).
\end{itemize}
limit expires, the initial $10 per share initial investment is returned to the unit holders other than the sponsors.

Between 2010 and 2014, cash raised by SPACs was a single-digit percentage of all cash raised in public offerings.\(^{30}\) In 2015 SPACs raised more than 10% of all cash raised in public offerings, and continued to rise in the years that followed.\(^{31}\) In 2019 and 2020, there was a SPAC boom.\(^{32}\) But within two years, the number of SPAC offerings began to sharply decrease.\(^{33}\) In 2021, there were 612 SPAC initial public offerings.\(^{34}\) There was a sharp decline in the first half of 2022, which saw only sixty-eight SPAC IPOs in the U.S.\(^{35}\) There were similar declines in SPAC acquisitions (de-SPAC transactions). In the first half of 2021, there were 128 de-SPAC transactions as compared to only 49 de-SPAC transactions in the first half of 2022.\(^{36}\) In 2023, SPAC investors suffered huge losses.\(^{37}\) The current disclosure regime has not resulted in adequate disclosures for SPAC investors.\(^{38}\)

Once a SPAC is funded through an IPO, the company’s managers will search for a business to be acquired through a business combination such as a merger. The business combination is often referred to as a de-SPAC transaction. Ordinarily, a SPAC’s management is comprised of individuals


\(^{31}\) Id.


\(^{33}\) This decline was predictable. See, e.g., Ivana Naumovska, The SPAC Bubble is About to Burst, HARV. BUS. REV. (Feb. 18, 2021), https://hbr.org/2021/02/the-spac-bubble-is-about-to-burst.

\(^{34}\) WHITE & CASE LLP, US DE-SPAC & SPAC DATA & STATISTICS ROUNDDUP (2023).

\(^{35}\) Id.

\(^{36}\) See id.; see also Nicole Lynch, Entire Fairness or Bust: The Burst of the 2020-2021 SPAC Bubble, 17 BROOK. J. CORP. FIN. & COM. L. 179, 181 (2023).


\(^{38}\) See, e.g., Andrew F. Tuch, Fairness Opinions and SPAC Reform, 100 WASH. U. L. REV. 1793, 1796 (2023) (discussing the inadequacy of disclosures in SPACs).
with experience in identifying good candidates for acquisition. SPACs have proven to be controversial in large part due to the investment risks and the relatively limited disclosures required by existing SEC regulations.

Regulators in other countries have engaged in more SPAC rulemaking than the SEC. One possible approach to SPAC regulation is the United Kingdom approach wherein the Financial Conduct Authority’s (FCA) Listing Rules provide a rebuttable presumption that a SPAC listing will be suspended when the SPAC announces its target acquisition. The presumption is based on the justifiable assumption that there will generally be insufficient publicly available information about the proposed transaction, and the SPAC will be unable to assess accurately its financial position and inform the market accordingly. The United Kingdom FCA amended its SPAC listing requirements. Among other things, the new FCA rules specify required disclosures for both the public offering and the SPAC acquisition. Although the SEC has not yet formally acted, SEC officials have signaled the potential need for heightened regulation of SPAC transactions. For example, one official noted:

Are current liability protections for investors voting on or buying shares at the time of a de-SPAC sufficient if some SPAC sponsors or advisors are touting SPACs with vague assurances of lessened liability for disclosures? Do current

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42 See FIN. CONDUCT AUTH., INVESTOR PROTECTION MEASURES FOR SPECIAL PURPOSE ACQUISITION COMPANIES: CHANGES TO THE LISTING RULES (2021).

43 See id.
liability provisions give those involved—such as sponsors, private investors, and target managers—sufficient incentives to do appropriate due diligence on the target and its disclosures to public investors, especially since SPACs are designed not to include a conventional underwriter at the de-SPAC stage? Moreover, is it appropriate that the choice of how to go public may determine or be determined by liability rules? Even without formal rulemaking, the SEC took steps for increased investor education about SPACs. For example, the SEC provides a broad overview of SPACs on its Investor Bulletin page. Among other things, the Bulletin advises investors to carefully understand a potential investment’s disclosures and prospectus before investment. The Bulletin also advises investors to focus on background information about each stage of a SPAC’s lifecycle, including the shell company stage and initial business combination whereby the SPAC acquires the private company that will comprise its business.

In 2024 a divided SEC adopted new rules to provide increased disclosures and eliminate the protection of the safe harbor rule for forward looking statements with respect to SPAC transactions. The enhanced disclosures include those with respect to the SPAC sponsors and their compensation, dilution, factors considered by the SPAC board of directors in evaluating the business combination constituting the de-SPAC transaction, and disclosures of any third-party opinions (such as fairness opinions) with respect to the de-SPAC transaction.


46 Id.

47 Id.

48 The safe harbor rules are designed to encourage projections and other forward-looking information by companies other than SPACs that reduce liability exposure. See, e.g., HAZEN, supra note 4, §§ 3:49, 12:71.

The SPAC boom that started in 2020 is relatively recent and litigation is just starting to blossom. It likely will take years for the caselaw to develop. Also, it remains to be seen whether the SEC will continue to use its existing regulatory structure to scrutinize SPACs rather than SPAC-specific rulemaking.

SPACs embody one variety of speculation namely, investing with a blindfold on. At the same time that SPACs were in their heyday, another variety of speculation developed with the rise of so-called “no fee” online trading accounts. That phenomenon is discussed directly below.

III. ROBINHOOD AND GAMIFICATION

Robinhood Markets, Inc. (“Robinhood”), a financial services company founded in April 2013 was initially launched as an online financial news platform that allowed users to predict the performance of individual stocks. Robinhood’s subsidiary—Robinhood Financial, LLC—registered as a broker-dealer with the SEC in October 2013, and its mobile securities trading app was launched in December 2014. The Robinhood app

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52 Sheelah Kolhatkar, Robinhood's Big Gamble, NEW YORKER (May 10, 2021), https://www.newyorker.com/magazine/2021/05/17/robinhoods-big-gamble. Tenev and Bhatt met as undergraduate students at Stanford University. Id.

53 Id.

offers commission-free trading of stocks, exchange-traded funds, options, and cryptocurrencies. This trading platform provided fertile ground for the growth of so-called meme stocks. A meme stock is the term used for stocks that have been hyped by various users of social media. An investment research firm on Nasdaq’s website defines meme stocks as follows:

By creating investor interest on platforms like Facebook (FB), Reddit, and Robinhood, certain businesses have seen massive surges in share prices and volumes. These surges are speculative, but they have created what we now know as Reddit stocks or “meme” stocks.

As Nasdaq explains, these “stocks are triggered by small traders who cause a short squeeze on the stock. A short squeeze is a term used by market participants to refer to a phenomenon where short sellers who have placed their bets on a stock’s fall, rush to hedge their positions or buy the stock in the event of an adverse price movement, in order to cover their losses. This leads to a sharp rise in demand for shares and a huge rally in share prices.”

From these stocks has come the rise in meme investing. Although it is a newer concept, it is very popular with younger retail investors. But, meme investing can be very risky. The initial surge in price and volume is due to viral interest online; there is a good chance that the stock will also lose its value once the press settles. So, while you can make a lot of money in a short time, there is also risk for greater loss.

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55 As discussed infra in the text accompanying notes 111–112 the ability to offer commission-free trading is supported by payment for order flow whereby Robinhood receives payments for directing their customers’ orders to specific market-makers. See, e.g., Kolhatkar, supra note 52.


57 Nasdaq, subject to SEC oversight, operates and regulates the Nasdaq stock market and automated quotation system. See HAZEN, supra note 4, §§ 14:8–14:11 (discussing securities market regulation).

r/Wallstreetbets (WSB) is one of the many forums ("subreddits") that make up the social news aggregation and discussion website Reddit. WSB participants discuss stock and options trading using crude slang, memes, and other jokes; the trading strategies promoted are often aggressive, leveraged, and speculative. While WSB had 900,000 subscribers at the start of the COVID-19 pandemic in March 2020 and 1.7 million subscribers on January 1, 2021, the subreddit grew even more rapidly during the GameStop/Robinhood fiasco, from 2.06 million subscribers on January 23, 2021, to 8.46 million subscribers on February 2, 2021. As of May 2021, WSB has over 10 million subscribers and is the largest subreddit dedicated to investing or finance.

Many of the most popular posts in Wallstreetbets’ history were made by Keith Gill. In the summer of 2019, Gill began posting videos to YouTube (using another username, “Roaring Kitty”) in which he described his personal GameStop holdings and his view that the stock was undervalued. Gill also made regular “GME YOLO update” posts to WSB—referring to GameStop’s ticker symbol and the “you only live once” mantra popular on subreddit—through 2020 and into 2021, and many of these posts are among the top all-time posts on Wallstreetbets. Wallstreetbets participants also frequently advised others to “hold strong” in order to “rally to the moon,”

59 r/wallstreetbets, REDDIT, https://www.reddit.com/r/wallstreetbets/?r=48616 (last visited Feb. 16, 2024). WSB describes itself with the tagline, “Like 4chan found a Bloomberg Terminal,” a reference to the somewhat controversial discussion board and meme website 4chan. Id.


61 Metrics for Reddit: Top Subreddits, FRONT PAGE METRICS, https://frontpagemetrics.com/top (last visited Feb. 16, 2024). Smaller subreddits devoted to investing discussion include r/investing (1.8 million subscribers), r/stockmarket (1.4 million subscribers), and r/SecurityAnalysis (164,000 subscribers). These subreddits are generally focused on less speculative trading strategy than WSB.


i.e., to refrain from selling GameStop stock at a profit to encourage the stock price’s continued rise.

Throughout 2020, short sellers increasingly bet against GameStop as the company’s sales declined, its stock price languished around $4 per share, and the company cycled through five CEOs in twelve months. In December 2020 and early January 2021, however, GameStop’s stock value began rising after shareholders appointed several new board members with e-commerce backgrounds, including Chewy.com founder and CEO Ryan Cohen. Many WSB posts speculated that Cohen was preparing to lead a hostile takeover of GameStop and that a change in corporate leadership would usher in increased earnings, and encouraged fellow WSB participants to purchase GameStop stock. The following timeline summarizes the key events and the wild market for GameStop that followed:

January 19, 2021:

Citron Research, a hedge fund and one of the largest short sellers of GameStop, published a tweet calling retail investors buying GameStop stock amid this rally “the suckers at this poker game,” predicting the stock would fall “back to $20 fast,” and claiming “[w]e understand short interest better than you and will explain [in an upcoming Twitter livestream].”

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66 Id. (“A four-day surge in GameStop Corp. on the back of retail-investor demand has added $1.2 billion in market value to the video-game seller since activist investor and Chewy Inc. co-founder Ryan Cohen joined its board on Monday.”).


68 Citron Research (@CitronResearch), X (Jan. 19, 2021, 6:58 AM), https://twitter.com/CitronResearch/status/1351544479547760642 (“Tomorrow am at 11:30 EST Citron will livestream the 5 reasons GameStop $GME buyers at these levels are the suckers at this poker game.
attacking Citron with derogatory posts and memes.\textsuperscript{69} Citron subsequently cancelled its livestream after alleging individuals had attempted to hack the fund’s Twitter account,\textsuperscript{70} and eventually announced it would no longer be publishing short seller reports altogether after CEO Andrew Left said traders had shared his personal information and harassed members of his family.\textsuperscript{71}

\textit{Friday, January 22, 2021:}
GameStop stock recorded its highest trading volume since the company’s 2002 IPO, with more than 193 million shares traded.\textsuperscript{72} The stock closed the week at $65.01 per share.

\textit{Monday, January 25, 2021:}
Melvin Capital Management LP, a hedge fund founded by Gabe Plotkin, received a $2.75 billion cash injection from two other hedge funds—$2 billion from Citadel LLC and $750 million from Point72 Asset Management.\textsuperscript{73} Citadel, formerly a Chicago-based hedge fund, is run by Ken Griffith; Point72 is led by billionaire investor Steve Cohen, for whom Plotkin previously worked under at Cohen’s now-defunct hedge fund SAC Capital Advisors.\textsuperscript{74} Melvin had

\textsuperscript{69} See, e.g., u/rohannx, Citron Research in a Nutshell. SGME Holders Read, REDDIT (Jan. 20, 2021), https://www.reddit.com/r/wallstreetbets/comments/l17618/citron_research_in_a_nutshell_gme_holders_read/ (describing Citron Research as “a shady as f*** stock commentary website operated by Mr. Andrew Left”).


\textsuperscript{73} Ortenca Aliaj, Steve Cohen Provides Funds for Hedge Fund Protégé Gabe Plotkin, FIN. TIMES (Jan. 25, 2021), https://www.ft.com/content/1791269f-fe8c-47e3-b933-62125ee83242.

\textsuperscript{74} Id.
acquired significant short positions in GameStop throughout 2020 and was another target of r/Wallstreetbets posts and memes. For example, a WSB post made by Redditor “Stonksflyingup” on October 27, 2020, titled “GME Squeeze and the Demise of Melvin Capital” predicted that Melvin’s GameStop short positions would cause the fund to suffer billions of dollars in losses and collapse, using edited footage from the HBO miniseries “Chernobyl.”

Tuesday, January 26, 2021:
Tesla CEO Elon Musk tweeted “Gamestonk‼” with a link to r/Wallstreetbets. Billionaire investor Chamath Palihapitiya tweeted that he had purchased $125,000 worth of GameStop call options. GameStop’s stock price surge continued.

Wednesday, January 27, 2021:
Melvin Capital Management and Citron Research both closed out of their GameStop short positions. Melvin sustained a 53% overall loss in January 2021—a $4.5 billion fall in its net asset value since the end of 2020, from $12.5 billion to $8 billion (including the $2.75 billion received from Citadel and Point72). Citron closed its GameStop short positions “at a 100% loss,” according to CEO Andrew Kumar.

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75 Kumar, supra note 72.
76 u/Stonksflyingup, GME Squeeze and the Demise of Melvin Capital, REDDIT (Oct. 27, 2020), https://www.reddit.com/r/wallstreetbets/comments/jjctxg/gme_squeeze_and_the_demise_of_melvin_capital/. In a top comment to the post, another WSB user said “[t]his is going to be prophetic and you will go down in history as one of the greatest meme lords of WSB. May your portfolio be as profitable as this meme is prophetic.”
80 Kumar, supra note 72.
Left.\textsuperscript{82} GameStop stock hit an all-time closing high of $347.51.\textsuperscript{83} AMC Theaters stock opened at $20.34 after closing at $4.96 on January 26.\textsuperscript{84} Over 1.2 billion AMC shares were traded on January 27, and the stock closed at $19.90. This surge was driven in large part by posts on r/Wallstreetbets encouraging the trading activity, and the hashtag #SaveAMC trended on social media sites such as Twitter.\textsuperscript{85} Discord, the company that operates the internet server that services r/Wallstreetbets, instituted a temporary ban on the subreddit, stating that the subreddit had continued to allow “hateful and discriminatory content after repeated warnings.”\textsuperscript{86} The ban was lifted the next day.\textsuperscript{87} Over 24 billion total shares were traded on January 27 across the markets—more than the previous high reached in October 2008.\textsuperscript{88} A record 57 million options contracts were also traded.\textsuperscript{89} According to data from the Options Clearing Corporation (“OCC”), the four most traded equity options were Nokia, GameStop, Palantir, and Blackberry; these options were all frequently discussed on r/Wallstreetbets.\textsuperscript{90} The SEC released a brief “Joint Statement Regarding

\begin{itemize}
  \item Kumar, supra note 72.
  \item TIMELINE-The GameStop Battle: How It Unfolded for the Key Players Testifying, REUTERS (Feb. 18, 2021, 1:00 AM), https://www.nasdaq.com/articles/timeline-the-gamestop-battle%3A-how-it-unfolded-for-the-key-players-testifying-2021-02-18.
  \item Id.
  \item Id.
\end{itemize}
Thursday, January 28, 2021:

In the early morning of January 28, the Depository Trust & Clearing Corporation (“DTCC”) demanded that Robinhood deposit an additional $3 billion of collateral into its account. In order to meet this margin call, Robinhood quickly raised more than $1 billion from existing investors and several hundreds of millions more from a credit facility with its existing bank lenders. This margin call also prompted Robinhood to restrict new purchases of GameStop, AMC, Blackberry, Nokia, and other volatile securities; customers could only sell their existing positions of the restricted securities. Although subsequently challenged, the courts to date have not held Robinhood accountable for refusing customer orders. Other brokerages including TD Ameritrade instituted similar

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91 Press Release, SEC Staff, Joint Statement Regarding Ongoing Market Volatility (Jan. 27, 2021), https://www.sec.gov/news/public-statement/joint-statement-ongoing-market-volatility-2021-01-27 (“We are aware of and actively monitoring the on-going market volatility in the options and equities markets and, consistent with our mission to protect investors and maintain fair, orderly, and efficient markets, we are working with our fellow regulators to assess the situation and review the activities of regulated entities, financial intermediaries, and other market participants.”).


94 See Juncadella v. Robinhood Fin. LLC, 76 F.4th 1335, 1355 (11th Cir. 2023), aff ’g In re January 2021 Short Squeeze Trading Litig., 584 F. Supp. 3d 1161 (S.D. Fla. 2022) (upholding Robinhood’s decision to limit customer orders during period of high volatility); Newman, supra note 51, at 414.
trading restrictions. These restrictions contributed to GameStop stock hitting an all-time high of $483 per share (GameStop notched its record low of $2.57 only nine months earlier in April 2020).

Sheelah Kolhatkar of the New Yorker described the DTCC’s margin call on Robinhood as follows:

It was a stunning amount of cash for any company to produce on short notice—thirty times Robinhood’s collateral requirement just three days prior. The extreme volatility in GameStop and a few other stocks had led the [DTCC] to demand that more cash be made available to guarantee the value of customer trades between the time they were made and their settlement, two days later. If Robinhood failed to meet its demands, the [DTCC], in theory, could liquidate all the holdings in Robinhood’s accounts. After Robinhood said that it was restricting purchases of GameStop and a few other meme stocks, including AMC and BlackBerry, the additional-collateral demand was lowered to seven hundred million dollars.

Backlash against Robinhood’s trading restrictions on r/Wallstreetbets was severe. Posts and memes disparaging Robinhood received hundreds of thousands of upvotes. Many WSB users accused Robinhood of market manipulation or of capitulating to pressure from short squeezed hedge funds, and discussed filing class action lawsuits. Both Democratic and Republican politicians including Representative Alexandria Ocasio Cortez, Senator Ted Cruz, and Senator Elizabeth Warren released statements

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96 Kolhatkar, supra note 52.
critical of Robinhood and trading restrictions. Bloomberg reported that industry insiders questioned Robinhood’s explanation for its collateral crunch issues.

Friday, January 29, 2021:
Robinhood loosened some of its trading restrictions but buying limits on many stocks remained in place until February 4. The SEC released another statement on the market volatility.

February 1, 2021:
Robinhood raised another $2.4 billion from its shareholders (in addition to the $1 billion previously raised) to help with its collateral issues.

February 4, 2021:
GameStop’s stock price dropped to $63.77, an 80% drop in five days, wiping $18 billion from GameStop’s market value.


February 18, 2021:
The U.S. House of Representative’s Financial Services Committee held a hearing titled “Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide?”

GameStop is but one example of the volatile trading of so-called meme stocks on the Robinhood trading platform.

In many ways it appears that Robinhood made a concerted effort to attract gullible investors by making the Robinhood app appear game-like. Although there have been suggestions to the contrary, it seems inappropriate to regulate app designs simply because the app may be habit forming and thus inducing additional trading activity. However, in 2024 Robinhood settled charges by the Massachusetts Securities Division claiming that the gamification of the Robinhood app violated Massachusetts’ securities laws.

The SEC Chair asked the SEC staff to seek public comments on the “gamification” of investing and whether regulation may be warranted. Also, the SEC has proposed rulemaking to address broker-dealers’ use of artificial intelligence for predictive data analytics relating to customers. In proposing those rules, the SEC observed that a broker’s conflict of interest “may arise not only when a firm is providing investment advice or recommendations, but also in the firm’s sales practices and investor interactions more generally, such as design elements, features, or communications that nudge or prompt more immediate and less informed

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108 Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 Fed. Reg. 53960 (proposed Aug. 9, 2023) (to be codified at 17 C.F.R. pts. 240, 275); see, e.g., Cherdack, supra note 85, at 345 (discussing gamification and the need for regulation and suggesting that “[n]ew regulation proposed by the SEC to address predictive analytics designed to influence investor behavior is predicated on long existing principles of fairness”).
action by the investor.” The SEC further noted that AI “advances have increased the ability of each of these investor interactions to contain conflicted conduct, given the more widespread availability of data about investors, advances in user interface design and gamification, and business practices that could place the firm’s or an associated person’s interest ahead of investors’ interests.”

Even aside from the gamification issue, Robinhood engaged in deceptive conduct in marketing its services. Robinhood offers its brokerage accounts as commission-free trading. Characterizing the accounts as commission free indicates that there is no cost to the customer, but this impression is deceptive since Robinhood makes a revenue stream from selling its order flow and it is this revenue stream that enables Robinhood not to charge transaction commissions. Payment for order flow is a controversial practice whereby a market maker pays a fee to a retail brokerage firm in exchange for the brokerage firm receiving a payment. The market maker making such payments likely will recoup its cost when pricing the securities that are bought and sold.

The erratic trading in 2021 involving Robinhood and GameStop resulted in increased regulatory scrutiny and possible regulatory changes. Meme stock trading relying on payment for order flow have led to litigation charging securities fraud and/or claims of manipulation and the possibility of increased regulation. The SEC obtained a settlement of an enforcement action by the investor.”

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109 Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 Fed. Reg. at 53962.

110 Id. at 53998.


113 In re January 2021 Short Squeeze Trading Litigation, 620 F. Supp. 3d 1231, 1247 (S.D. Fla. 2022) (some claims were sufficiently pleaded; others were not).

action claiming Robinhood failed to disclose that revenue source to customers.\footnote{115} The potential for increased regulation beyond traditional disclosure requirements creates a tension between investor protection and being too paternalistic.\footnote{116} As explained by one commentator:

The retail brokerage industry appears to be at an inflection point. Robinhood’s practice of no-fee commissions has initiated a shift not only in who participates in the public equity markets but also how they engage in such participation. Younger, less experienced investors, coupled with easier, low-cost access to the markets, and the connectivity of technology and social media, have resulted in market participants who have engaged in novel ways of retail investing with no precedent in scale. In the GameStop short squeeze aftermath, lawmakers wrestle with questions of what, if anything, should be done with this changing investor demographic and the corresponding changes in which they are participating.

The competing tensions are clear—investor protection through limits and relevant guardrails. But protection comes with a price-limiting risk, limits rewards. Limiting access to options trading or margin lending, for example, to novice investors. No doubt some would take issue with that. But by the same token, turning around and taking umbrage when things go south due to that investor’s inexperience and lack of knowledge is the other side of that coin. Investors cannot have no risk and all reward. Tradeoffs will come with whatever policy course is decided here, and investors will have to respond appropriately. If the decision is to fly high and close to the sun, investors will have to accept that some will get burned. If the prevailing policy is bent for more investor protection, then investors will have to appreciate


\footnote{116} See, e.g., Newman, supra note 51, at 412 (discussing the pros and cons of increased regulation of gamified securities trading); Jonathan R. Macey, Securities Regulation and Class Warfare, 2021 COLUM. BUS. L. REV. 796, 797, 799 (2021) (arguing against regulation of gamification).
that certain investment vehicles will be off-limits to them until they shed their investor training wheels and have more knowledge and experience with what they are doing. Investing is speculative with no guarantees. That’s the game and those are the rules. All parties, regardless of their leanings, will need to keep that in mind.\textsuperscript{117}

Developments during the current decade will reveal how much, if any, additional regulation will follow.\textsuperscript{118}

Social media—primarily Reddit—has been used to help move meme stocks such as GameStop. This social media input is motivated both by the profit motive and also to make a point of democratizing the securities markets and, in particular, taking down institutional short investors.\textsuperscript{119} In part because social media may entice unsophisticated investors, it has been suggested that targeted regulation may be warranted.\textsuperscript{120} This raises the same tension between appropriate investor protection and excessive paternalism.\textsuperscript{121} Existing securities laws’ prohibitions against fraud and manipulation are sufficient protection against social media abuses.\textsuperscript{122}

Technology permitting rapid online trading and support of social media paved the way for the Robinhood phenomenon discussed above. Another technological development led to the third type of speculative activity during

\begin{footnotes}
\footnote{117}{Newman, supra note 51, at 437–38 (footnotes and citations omitted).}
\footnote{118}{See, e.g., Rayaan Hossain, \textit{Regulating Best Interest: SEC Confronts the Brave New Markets}, 31 U. MIA. BUS. L. REV. 92, 98 (2023) (discussing investor protection, regulation, and consumer access to the marketplace).}
\footnote{119}{See John P. Anderson et al., \textit{Social Media, Securities Markets, and the Phenomenon of Expressive Trading}, 25 LEWIS & CLARK L. REV. 1223, 1233 (2022).}
\footnote{120}{See, e.g., Stefanou, supra note 85, at 961 (recommending regulation of investment advice on social media); see also, e.g., Anastasi, supra note 114, at 1–2.}
\end{footnotes}
the same era. In particular, the development and widespread interest in cryptocurrency led to speculative trading in the cryptocurrency markets.

IV. CRYPTOocurrency AND NFTs\textsuperscript{123}

Much has been written on cryptocurrencies and the extent to which they should be regulated.\textsuperscript{124} The literature confirms the great degree of speculative activity that pervades cryptocurrency trading. Cryptocurrency is properly viewed as a form of gambling.\textsuperscript{125} Treating crypto coin offerings and public trading of crypto as securities provides the right degree of regulation for those markets. As explained below, cryptocurrency offerings and public trading will generally qualify as securities.\textsuperscript{126} Not all cryptocurrency will be securities. A utility token is one that can be used for a defined amount of

\textsuperscript{123} Some of the discussion in this section is adapted from HAZEN, supra note 4, § 1:80, and Thomas Lee Hazen, Little Ripples or Big Waves? Two Recent Cases on Crypto Currency as a Security, 27 WALL. ST. LAW. 1 (2023).


\textsuperscript{125} See, e.g., W.C. Bunting, A Better Legal Definition of Gambling: With Applications to Synthetic Financial Instruments and Cryptocurrency, 86 ALB. L. REV. 257, 324 (2023) (“[T]he market for cryptocurrency resembles the market for synthetic CDOs in the early part of the twenty-first century when synthetics were the dominant form of CDOs in the United States. Like synthetic financial instruments, trading in cryptocurrency can be viewed as a form of unregulated gambling that magnifies systemic risk in the financial sector in a socially undesirable manner. To avoid repeating the mistakes of the past, financial regulators must take steps to ensure that a potential collapse of cryptocurrency markets does cause broader harm to the financial system and result, as in 2008, in a severe and protracted economic downturn. To date, the regulatory safeguards related to risky assets, implemented in the aftermath of the financial crisis of 2008, have worked to successfully shield the financial sector from potential contagion effects triggered by a significant decline in the market price of cryptocurrencies or other crypto-related assets.” (footnotes omitted)). The author also cautions, however, that in his view, “[t]he contention that trading in cryptocurrency constitutes unregulated gambling is purely theoretical, of course, and relies upon a highly stylized model of cryptocurrency markets. In truth, the proper categorization of cryptocurrency remains an open empirical question.” Id. at 322; see also, e.g., Richard E. Brodsky, Neither a Security Nor a Commodity Be, 51 SEC. REG. L.J. 127, 131 (2023) (concluding that cryptocurrency investing is gambling).

\textsuperscript{126} But see Brodsky, supra note 125, at 131–35 (concluding that cryptocurrency is not a security).
goods or services,⁵²⁷ and thus does not have an investment value beyond the value of the goods or services that the token can be exchanged for. The SEC recognizes that offerings of true utility tokens do not implicate the securities laws.⁵²⁸ A stablecoin is a digital asset whose value is tied to a fixed commodity or currency such as the U.S. dollar.⁵²⁹ Although a stablecoin, like a utility token, will not be a security, the result is otherwise if the stablecoin is promoted in such a way as to generate an expectation of profit from the efforts of others.⁵³⁰

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¹⁵ See, e.g., Bandypadhyay v. Defendant 1, No. 22-cv-22907, 2023 WL 2263552, at *6 (S.D. Fla. Feb. 28, 2023) (“Stablecoins are a category of cryptocurrencies with mechanisms that are aimed at maintaining a stable value, such as by pegging the value of the coin to a specific currency, asset, or pool of assets or by algorithmically controlling supply in response to changes in demand in order to stabilize value.”); In re Cred Inc., 650 B.R. 803, 817 (Bankr. D. Del. 2023) (defining “stable’ cryptocurrency” as “cryptocurrency whose value is pegged to a stable asset such as the U.S. Dollar or gold”); Albright v. Terraform Labs, Pte. Ltd., 641 F. Supp. 3d 48, 52 (S.D.N.Y. 2022) (describing a stablecoin as one “in which the price of the coin is pegged to another asset, most commonly fiat currency, exchange-traded commodities, or other cryptocurrencies’’); In re Tether & Bitfinex Crypto Asset Litig., 576 F. Supp. 3d 55, 74 (S.D.N.Y. 2021) (“Stablecoins are designed to maintain a consistent value relative to non-digital assets like gold or fiat currency, and for this reason they are neither decentralized nor mined.’’); James v. iFinex Inc., 127 N.Y.S.3d 456, 459 (N.Y. App. Div. 2020) (“Stablecoin is a type of virtual currency that is designed to minimize price volatility by being pegged to a stable asset or currency.’’). For a more complete definition, see OCC Interpretive Letter No. 1172, 2020 WL 6490939, at *2 (Sept. 21, 2020) (“Cryptocurrencies referred to as ‘stablecoins’ may be backed by a fiat currency, a commodity, or another cryptocurrency. Fiat-backed stablecoins are typically redeemable for the underlying fiat currency, where one unit of the stablecoin can be exchanged for one unit of the underlying fiat currency. Other types of cryptocurrencies described as ‘stablecoins’ may be more complex, backed by commodities, cryptocurrencies, or other assets but with values that are pegged to a fiat currency or managed by algorithm.’’); see also, e.g., PRESIDENT’S WORKING GRP. ON FIN. MKTS. ET AL., REPORT ON STABLECOINS 16 (2021), https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf (recommending stablecoins be regulated by banks); Gary B. Gorton & Jeffrey Y. Zhang, Taming Wildcat Stablecoins, 90 U. CHI. L. REV. 909 (2023) (discussing stablecoins and what regulation would be appropriate); Eric D. Chason, Regulating Crypto, On and Off the Chain, 64 WM. & MARY L. REV. 1011, 1017, 1019 (2023) (arguing against over-regulation of stablecoins); Mary E. Burke, Note, From Tether to Terra: The Current Stablecoin Ecosystem and the Failure of Regulators, 28 FORDHAM J. CORP. & FIN. L. 99, 107 (2023) (discussing the appropriate regulation for stablecoins); Kara Bruce et al., The Private Law of Stablecoins, 54 ARIZ. ST. L.J. 1073, 1077–78 (2022) (discussing stablecoins and many of the stablecoin failures); Marco Dell’Erba, Stablecoins in Cryptoeconomics: From Initial Coin Offerings to Central Bank Digital Currencies, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (2019) (discussing stablecoins, stablecoin failures, and the appropriate level of regulation).

¹³⁰ See, for example, SEC v. Terraform Labs Pte. Ltd., No. 23-cv-1346, 2023 WL 4858299, at *1, *15 (S.D.N.Y. July 31, 2023), wherein the UST tokens in that case were tied to the value of the U.S. dollar and as such would not be a security, but the defendants offered investors the opportunity to deposit their stablecoins into a program that would yield a variable return. Accord In re Plutus Fin., Inc., No. S-21-3171-23-SC01, 2023 WL 4172686, at *5 (Wash. Sec. Div. June 15, 2023) (“The offer and/or sale of the
The Supreme Court’s seminal and vintage decision in *SEC v. Howey*, as by the Court in *Howey*: “An investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.”

Courts and the SEC have held that when marketed as an investment, cryptocurrency is a security. The SEC was having great success in its enforcement actions but suffered its first defeat in *SEC v. Ripple Labs, Inc*. Although some observers believe that the *Ripple Labs* decision will have a major impact in curtailing the SEC, the better view is that the *Ripple Labs* opinion was wrongly decided and at most is a slight ripple.

Just a few weeks after the decision in *Ripple Labs*, another case in the same federal district took a different and better approach. As discussed more...
fully below, in *SEC v. Terraform Labs Pte. Ltd.*, the court recognized that the essence of the *Howey* case is focusing on what is being offered and how it is being offered. The *Terraform Labs* decision accurately reflects both the *Howey* test and the role of the federal securities laws in the crypto arena. The district court in *Terraform Labs* subsequently granted the SEC’s motion for summary judgment, finding that the crypto offerings were unregistered securities and thus violated section 5 of the Securities Act of 1933. After trial, a jury found Terraform guilty of fraud.

In *Ripple Labs*, a federal district court in the Southern District of New York ruled that sales of digital tokens to “sophisticated individuals and entities” violated the registration provisions found in section 5 of the Securities Act of 1933. *Ripple Labs* promoted the value of the digital tokens so issued as tied to the issuing company’s success. The *Ripple Labs* decision noted that the sophisticated purchasers reasonably understood that the issuer would use the proceeds of the sales to enhance the issuer’s operations and thus enhance the value of the digital tokens so issued. There were other investors that were described as “programmatic” purchasers who used algorithms rather than deliberative investment decisions to make the purchases in question.

In a highly questionable aspect of the *Ripple Labs* court’s ruling, Judge Analisa Torres indicated that the *Howey* test would not be satisfied if the programmatic purchasers relied solely on the algorithm without any expectation of profit from the issuer’s efforts. The error in the court’s approach is that under existing case law, the existence of a security depends on what is offered for sale and how it is marketed, not solely on the supposed expectations of the purchasers.

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138 SEC v. Terraform Labs Pte. Ltd., No. 23-cv-1346, 2023 WL 8944860, at *24 (S.D.N.Y. Dec. 28, 2023). The court remanded the fraud claims for trial and also granted the defendants’ motions for summary judgment that some transactions were security-based swap transactions. *Id.* at *24–25.


141 *Id.* at *9.

142 *Id.* at *3.
As noted above, the Ripple Labs decision was hailed by many in the crypto industry as a major industry win. These claims of victory seem premature. More accurately, the decision is at most a temporary win for the industry. The Ripple Labs finding that there was no security with respect to certain purchasers is questionable, and the SEC petitioned for interlocutory appeal but the trial judge denied the application for the expedited appeal.

On its face, the Ripple Labs decision is not as broad as the industry would hope. The denial of summary judgment is not a final ruling but merely a determination that there were factual issues to be resolved at trial. In the Ripple Labs court’s own words, the holding merely established that the digital tokens in question were not “necessarily” or “inherently” securities. This is consistent with the existing SEC position that offerings of true utility tokens do not implicate the securities laws.

In Terraform Labs, Judge Rakoff aptly noted:

Howey makes no such distinction between purchasers. And it makes good sense that it did not. That a purchaser bought the coins directly from the defendants or, instead, in a secondary resale transaction has no impact on whether a reasonable individual would objectively view the defendants’ actions and statements as evincing a promise of


144 See, e.g., Baker, supra note 137.


147 Ripple Labs, 2023 WL 4507900, at *7.

148 Id.

profits based on their efforts. Indeed, if the Amended Complaint’s allegations are taken as true—as, again, they must be at this stage—the defendants’ [sic] embarked on a public campaign to encourage both retail and institutional investors to buy their crypto-assets by touting the profitability of the crypto-assets and the managerial and technical skills that would allow the defendants to maximize returns on the investors’ coins.150

The distinction made in Ripple Labs ironically gave more protection to private investors than to the secondary general public. The irony here lies in the fact that the primary focus of the 1933 Act is public offerings, and yet the Ripple Labs decision gave less protection to the general public than it did to the more sophisticated private investors.151 This juxtaposition clearly turns on its head the Supreme Court’s emphasis in SEC v. Ralston Purina152 that the securities laws were enacted to protect members of the general public.

Both the Ripple Labs and Terraform Labs decisions recognized that digital assets are not always securities but will be considered securities when promoted in such a way as to create an expectation of a profit.153 In addition to the expectation of profits, the MIR tokens in Terraform Labs clearly involved the investment of money. Judge Rakoff found the existence of a common enterprise since, among other things, the defendants promised that

151 As Judge Rakoff’s opinion explained:

[T]he Court declines to draw a distinction between these coins based on their manner of sale, such that coins sold directly to institutional investors are considered securities and those sold through secondary market transactions to retail investors are not. In doing so, the Court rejects the approach recently adopted by another judge of this District in a similar case, SEC v. Ripple Labs Inc., — F.Supp.3d —–, 2023 WL 4507900 (S.D.N.Y. July 13, 2023). There, that court found that, “[w]hereas . . . [i]nstitutional [b]uyers reasonably expected that [the defendant crypto-asset company] would use the capital it received from its sales to improve the [crypto-asset] ecosystem and thereby increase the price of [the crypto-asset],” those who purchased their coins through secondary transactions had no reasonable basis to expect the same. Id. at —– – —–, 2023 WL 4507900 at *11. According to that court, this was because the re-sale purchasers could not have known if their payments went to the defendant, as opposed to the third-party entity who sold them the coin. Whatever expectation of profit they had could not, according to that court, be ascribed to defendants’ efforts. Id.

funds would be pooled together to enhance the value of the tokens. He further found that since the defendants’ managerial efforts were key to achieving profits, the “efforts of [others]” prong of the Howey test was satisfied.

The split between the two district court decisions discussed above will eventually be resolved by the Second Circuit. It is to be hoped that the Second Circuit will recognize the merits of the broader approach that was taken in the Terraform Labs decision.

Requiring registration of public offerings is not the only consequence of classifying cryptocurrency as a security. Exchanges and other platforms where cryptocurrencies are publicly traded likely would have to register under the Securities Exchange Act of 1934 as a national securities exchange. In addition, anyone in the business of selling or promoting virtual or cryptocurrency transactions could be classified as a broker-dealer and thus subject to the 1934 Act’s broker-dealer registration requirements. Both the SEC and FINRA have challenged virtual or cryptocurrency sales by an unregistered broker-dealer.

Another form of digital asset appeared with NFTs (non-fungible tokens). An NFT is a unique digital token depicting an image or containing music:

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155 Id. at *13–*14.
An NFT is a digital asset that can come in the form of art, music, in-game items, videos, and more. They are bought and sold online, frequently with cryptocurrency, and they are generally encoded with the same underlying software as many cryptos.

Although they’ve been around since 2014, NFTs are gaining notoriety now because they are becoming an increasingly popular way to buy and sell digital artwork. The market for NFTs was worth a staggering $41 billion in 2021 alone, an amount that is approaching the total value of the entire global fine art market.

NFTs are also generally one of a kind, or at least one of a very limited run, and have unique identifying codes. “Essentially, NFTs create digital scarcity,” says Arry Yu, chair of the Washington Technology Industry Association Cascadia Blockchain Council and managing director of Yellow Umbrella Ventures.

This stands in stark contrast to most digital creations, which are almost always infinite in supply. Hypothetically, cutting off the supply should raise the value of a given asset, assuming it’s in demand.159

There is no indication to date that they will be treated any differently than cryptocurrency in determining the extent to which they implicate the securities laws.160

In 2023, the SEC brought and reached a settlement in its first enforcement action challenging NFTs as securities alleging an unregistered

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160 See Friel v. Dapper Labs, Inc., 657 F. Supp. 3d 422, 425–26 (S.D.N.Y. 2023) (upholding complaint alleging NFT sales involved securities). See generally Brian Elzweig & Lawrence J. Trautman, When Does a Non-Fungible Token (NFT) Become a Security?, 39 GA. ST. U. L. REV. 295 (2023) (discussing the securities laws’ applicability to NFTs); Jonah N. Echols, Ceci N’est Pas Une Security: When and Why Attorneys Should Advise F-NFT Clients to File with the SEC, 24 TRANSACTIONS 177 (2023) (explaining how NFTs fit under the Howey test for finding a security); Haley Nieh, Placing a Bid: A Comparison of the Traditional Marketplace (Stocks) and Non-Traditional Markets (NFTs), 39 SANTA CLARA HIGH TECH. L.J. 231 (2023) (discussing whether NFTs are more, or less, like stocks); Carol R. Goforth, How Nifty! But Are NFTs Securities, Commodities, or Something Else?, 90 UMKC L. REV. 775 (2022) (discussing the regulatory landscape for NFTs); Lauren Au, Fractionalization to Securitization: How the SEC May Regulate the Emerging Asset of NFTs, 96 S. CAL. L. REV. 253 (2022) (discussing NFTs and SEC regulation).
public offering\textsuperscript{161} and more NFT enforcement activity followed.\textsuperscript{162} In finding the NFTs in question to be securities, the SEC consent order focused on their being mass marketed as investments and creating the expectation that profits would be derived from the success of the program funded by the NFTs.\textsuperscript{163} Just as a cryptocurrency can be a security, so can an NFT. It should be noted, however, that just as true utility tokens and stablecoins are not


\textsuperscript{163} Id.

“According to the SEC order, on July 27, 2021, SC2 offered and sold to investors more than 10,000 NFTs for approximately $800 each, selling out in 35 minutes. The order finds that both before and after Stoner Cats NFTs were sold to the public, SC2’s marketing campaign highlighted specific benefits of owning them, including the option for owners to resell their NFTs on the secondary market. In addition, the order finds that, as part of the marketing campaign, the SC2 team emphasized its expertise as Hollywood producers, its knowledge of crypto projects, and the well-known actors involved in the web series, leading investors to expect profits because a successful web series could cause the resale value of the Stoner Cats NFTs in the secondary market to rise. Further, the order finds that SC2 configured the Stoner Cats NFTs to provide SC2 a 2.5 percent royalty for each secondary market transaction in the NFTs and it encouraged individuals to buy and sell the NFTs, leading purchasers to spend more than $20 million in at least 10,000 transactions. According to the SEC’s order, SC2 violated the Securities Act of 1933 by offering and selling these crypto asset securities to the public in an unregistered offering that was not exempt from registration.

‘Regardless of whether your offering involves beavers, chinchillas or animal-based NFTs, under the federal securities laws, it’s the economic reality of the offering—not the labels you put on it or the underlying objects—that guides the determination of what’s an investment contract and therefore a security,’ said Gurbir S. Grewal, Director of the SEC’s Division of Enforcement. ‘Here, the SEC’s order finds that Stoner Cats marketed its knowledge of crypto projects, touted that the price of their NFTs could increase and took other steps that led investors to believe they would profit from selling the NFTs in the secondary market. It’s therefore hardly surprising, as the order finds, that Stoner Cats sold its entire supply of NFTs in just 35 minutes, generating proceeds of over $8 million, most of which were then resold—not held as collectibles—in the secondary market within months.”.

\textsuperscript{Id.}
securities, NFTs sold as collectibles or virtual art are not securities. However, when the promoter of the NFT promises or strongly implies a promise of a profit, the NFT is at risk of satisfying the Howey test so as to be classified as a security.

It is likely that the SEC will continue vigorous enforcement in both digital cryptocurrency and NFT arenas. It has been suggested that the SEC is the best regulator for the fluctuating cryptocurrency markets. As discussed below, collectible NFTs represented the current version of the fifteenth century tulip bubble. The wild swings in the NFT collectible markets makes it even more imperative that when marketed in such a way as to implicate the Howey test, NFTs will be regulated as securities, which they should be.

The three areas discussed above—SPACs, Robinhood, and cryptocurrency as well as NFTs—have at least one thing in common. They all involved speculative investing activities that represented a type of gambling. The discussion that follows addresses speculation in the securities markets and its similarity to gambling. It also analyzes the appropriate level of regulation.

V. SPECULATION IN THE SECURITIES MARKETS

An efficient market will identify a commodity’s or security’s price. This is known as “price discovery.” It has long been suggested that speculators

164 See supra notes 128–129 and accompanying text.
166 See Lawrence J. Trautman, Virtual Art and Non-Fungible Tokens, 50 HOFSTRA L. REV. 361, 363–64 (2022) (discussing NFTs as digital art); Megan E. Noh et al., GM! Time to Wake Up and Address Copyright and Other Legal Issues Impacting Visual Art NFTs, 45 COLUM. J.L. & ARTS 315, 316–17 (2022) (discussing NFTs as digital art).
167 See WILLIAM M. PRIFTI ET AL., SECURITIES: PUBLIC AND PRIVATE OFFERINGS § 1A.11 (2d ed. 2023) (“The non-fungible nature of many NFTs and association with assets not commonly understood to be securities like art or digital collectibles often may clearly distinguish NFTs from securities, but depending on the specific design of the NFTs and associated bundle of rights, as well as how it sold and promoted and other factors, there is the potential for it to be deemed a security.”).
169 See infra notes 175–177 and accompanying text.
also provide a type of insurance against extreme price fluctuations as a result of their influence on market pricing. Speculation also adds to market liquidity, but excessive speculation can interfere with efficient price discovery. However, in the recent r/WallStreetBets GameStop frenzy, it was the speculation that caused the market volatility and extreme fluctuations.

Gambling can be seen as an outgrowth of the conquering of the American frontier—a type of thrill-seeking. The same can be said of speculation. This thrill-seeking clearly seems to have been a factor in the GameStop trading frenzy and the challenge to take down the big shorts.

The increased impact of gambling and speculation in the securities markets may well lead to high volatility and a market crash that typically follow financial bubbles. This is the market’s way of correcting itself. It is painful but it may be more effective than targeted regulation.

VI. FINANCIAL BUBBLES

Speculative and irrational investing has plagued markets for centuries. The outcome of speculative frenzy is generally a financial bubble that eventually bursts. For example, in the seventeenth century, speculation resulted in the infamous tulip bubble. The tulip bubble has been summarized as follows:

172 See Bunting, supra note 125, at 306; Hazen, Disparate Regulatory Schemes, supra note 2, at 429.
173 See, e.g., Ploss v. Kraft Foods Grp., Inc., 197 F. Supp. 3d 1037, 1046 n.4 (N.D. Ill. 2016) (“‘Speculators buy and sell futures contracts with the objective of profiting from predicting the bursting of the NFT bubble commodity price fluctuations,’ rather than to hedge against risk. . . . Specification is legal, but the CFTC imposes position limits on speculators in order ‘[t]o protect futures markets from excessive speculation that can cause unreasonable or unwarranted price fluctuations.’ See http://www.cftc.gov/industryoversight/marketsurveillance/speculativelimits/index.htm.”).
174 See JOHN M. FINDLAY, PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS (1986).
177 See, e.g., Charles Mackay, Memoirs of Extraordinary Popular Delusions and the Madness of Crowds (1852) (discussing the tulip bubble).
One of the largest speculative bubbles began in 1593 when tulips were brought to Holland, and over time, the tulips began to contract viruses that made flame-like colors appear on the bulbs. Tulips with flame-like color patterns were trading at much higher values than the unaffected bulbs, and by the 1630s, everyone in Holland began trading the bulbs; tulip-mania was born. Actual price data from the 1630s is scarce, but the Rijksmuseum (the Museum of the Netherlands) claims that traders were putting up their houses as collateral to secure tulip bulbs. The price of the tulips during this period was not an accurate representation of what the bulbs were actually worth, and once some investors decided to sell, the price of bulbs began to fall. When this happened, other investors sold their tulips to avoid even bigger losses, and the bubble burst.178

In an earlier article, I pointed out the likelihood that the absence of regulation will result in a harmful bubble in cryptocurrency investments.179 As compared to cryptocurrencies, tulips at least have some intrinsic value.180

In light of the massive investor losses that have occurred and are likely to continue to result from virtual or cryptocurrencies, appropriate regulation is necessary.181


179 Hazen, supra note 124, at 510–11; see also, e.g. HAZEN, supra note 4, § 1:80 (discussing cryptocurrencies as securities); Hilsenrath, supra note 175 (discussing crypto and internet investments as the next bubble).

180 Alex Hern, Bitcoin Hype Worse Than 'Tulip Mania', Says Dutch Central Banker, GUARDIAN (Dec. 4, 2013, 12:22 PM), https://www.theguardian.com/technology/2013/dec/04/bitcoin-bubble-tulip-dutch-banker (quoting former Dutch Central Bank president: “This is worse than the tulip mania,” he continued. “At least then you got a tulip [at the end], now you get nothing.”).

As noted above, a contemporary example of the events leading to the tulip bubble can be found with respect to NFTs. The second quarter of 2021 witnessed a wild rise in NFT collectible prices. By mid-2021, it became apparent that the bubble was about to burst. For example, according to a recent report, after initial huge success, ninety-five percent of the NFT market has become worthless.

So far, this article has focused primarily on speculation in the securities markets and the regulatory issues surrounding that. The similarity to gambling warrants the following brief explanation of regulatory developments emanating from laws regulating gambling activities.

VII. SPECULATION AS GAMBLING

Speculation in the investment markets bears much resemblance to gambling. In fact, it is a type of gambling and is likely to prove not to be a

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183 See, e.g., The NFT Market Bubble Has Popped and We’ve Got the Charts to Prove it, PROTOS (June 2, 2021, 3:39 PM), https://protos.com/nft-market-bubble-popped-crypto-collectibles-are-over/ (chronicling the NFT markets rise and precipitous fall); see also Chris Morris, The NFT Bubble is Showing Clear Signs of Bursting, FORTUNE (Mar. 4, 2022, 11:15 AM), https://fortune.com/2022/03/04/nft-bubble-market-crash-price-value/ (describing the NFT bubble).


Non-fungible tokens, or NFTs, are all the rage. But their popularity may have already peaked. Prices of NFTs, the digital certificates that have taken the art and collectibles world by storm this year, have plunged about 70% from their high point in February. The average price for an NFT on April 5 was about $1,256—down from more than $4,000 in late February, according to market research site NonFungible.com. Data from The Block, another crypto research firm, shows a similarly large decline for both prices and NFT sales as well. NFTs have been an investing and pop culture mania for the past few weeks, leading some to wonder if the frenzy is a market bubble fueled by the wealthy and younger traders flush with stimulus money.

Id.


successful investment strategy. Comparisons of investment speculation to gambling is not new. For example, in a letter to George Washington, Thomas Jefferson wrote: “[t]he wealth acquired by speculation and plunder is fugacious in its nature and fills society with the spirit of gambling.” According to Jefferson, however, this did not mean that regulation was the answer:

If we consider games of chance immoral, then every pursuit of human industry is immoral; for there is not a single one that is not subject to chance, not one wherein you do not risk a loss for the chance of some gain . . . . In all these pursuits, you take some one thing against another which you hope to win . . . . These, then, are the games of chance. Yet so far from being immoral, they are indispensable to the existence of man, and everyone has a natural right to choose for his pursuit such one of them as he thinks most likely to furnish him substance.

Theodore Roosevelt had a more negative take on the comparison:

There is no moral difference between gambling at cards or in lotteries or on the race track and gambling in the stock market. One method is just as pernicious to the body politic as the other in kind, and in degree the evil worked is far greater. But it is a far more difficult subject with which to deal. The great bulk of the business transacted on the exchanges is not only legitimate but is necessary to the working of our modern industrial system, and extreme care would have to be taken not to interfere with this business in doing away with the “bucket shop” type of operation. We should study both the successes and the failures of foreign legislators who, notably in Germany, have worked along this line, so as not to do anything harmful. Moreover, there is a special difficulty in dealing with this matter by the Federal Government in a Federal Republic like ours. But if it is possible to devise a way to deal with it the effort should be

\[ \text{187 See, e.g., Alan Farley, The Casino Mentality in Trading, \textsc{Investopedia}, https://www.investopedia.com/articles/investing/070815/casino-mentality-trading.asp (Nov. 2, 2023) ("[P]lacing binary bets on market outcomes, believing it’s a casino that pays off in a random manner, ignores market structure and reality, providing a direct path to failure and washout.").} \]

\[ \text{188 Thomas Jefferson on Politics & Government, \textsc{FAM. GUARDIAN FELLOWSHIP}, § 35.4, https://famguardian.org/Subjects/Politics/ThomasJefferson/jeff1320.htm (last visited Feb. 2, 2024).} \]

\[ \text{189 Id. § 35.11.} \]
made, even if only in a cautious and tentative way. It would seem that the Federal Government could at least act by forbidding the use of the mails, telegraph and telephone wires for mere gambling in stocks and futures, just as it does in lottery transactions.190

The debate over regulating speculation, thus is not new. Also, not all aspects of speculation are necessarily bad for the market.

It has been observed that speculation, like gambling, can offer a way out for less fortunate members of society.191 For example, as stated in an earlier article, “[o]ne of the factors that has motivated people to become gamblers and speculators is that ‘hitting it big’ offers them the opportunity to cross economic barriers that could not otherwise be transcended by rational investment strategies.”192 Gambling is seen as consistent with a capitalistic system because of the contradiction between equal opportunity and inequality.193 On the other hand, as noted before, “‘[f]renzied speculation’ in search of the big win as an investment strategy has been decried as the rankest form of gambling.”194

As noted previously in this article, undue speculation in investment markets often leads to financial bubbles that eventually burst. The discussion that follows briefly describes financial bubbles.


191 See, e.g., Hazen, Rational Investments, supra note 2, at 1002–05.

192 Id. at 1002; see, e.g., VICKI ABT ET AL., THE BUSINESS OF RISK: COMMERCIAL GAMBLING IN MAINSTREAM AMERICA (1985). This is not a new sentiment. See, e.g., ANN FABIAN, CARD SHARPS AND BUCKET SHOPS: GAMBLING IN 19TH CENTURY AMERICA 153–203 (2d ed. 2013) (reference Ch. 4); CHARLES W. SMITH, COMMERCIAL GAMBLING: THE PRINCIPAL CAUSES OF DEPRESSION IN AGRICULTURE AND TRADE (Leopold Classic Library ed. 1893).

193 “Gambling not only provides an escape from the drudgery of work, it also serves as a ‘safety valve for . . . unfulfilled hopes.’” Hazen, Rational Investments, supra note 2, at 1002. See ABT ET AL., supra note 192, at 23 (citing Edward C. Devereux, Jr., Gambling and the Social Structure: A Sociological Study of Lotteries and Horseracing in Contemporary America (1949) (Ph.D. dissertation, Harvard University)).

VIII. RELAXATION OF STATE GAMBLING PROHIBITIONS

For many years, gambling was prohibited in most states, except for some Indian reservations, and highly regulated in the few states allowing it. That changed in 2018 when the United States Supreme Court invalidated a federal statute prohibiting states from legalizing gambling in *Murphy v. NCAA*. Since then, at least eighteen states have either relaxed or created new gambling laws. By 2024, the total rose to at least twenty-five states.

The relaxation of state gambling laws was an elimination of a strict prohibition but was not deregulation. The statutes permitting gambling are not completely laissez-faire as they are designed to maintain the integrity of gambling operations, much as the securities laws focus on the integrity of the securities markets. States permitting gambling typically have regulatory authorities designed to assure fairness and legitimate operation of the gambling venues. The states vary in their restrictions. For example, following the *Murphy* decision, New Jersey passed the Sports Wagering Act in 2018, which legalized the practice of wagering on sporting events considering the Supreme Court’s *Murphy* decision. New Jersey significantly expanded permissible gambling, permitting the operation of both in-person and online sports pools. New Jersey is one of the only states that permits sports wagers from bettors who are not physically located within the boundaries of the state, provided that the wager does not violate laws of the jurisdiction in which the bettor is located. Sports betting in New Jersey, however, is not unlimited. “Prohibited sporting events”—events that cannot be legally wagered on—include any college-level athletic contest that takes place in New Jersey and any college-level athletic contest that involves a New Jersey

195 The sovereignty of Indian reservations put the casinos beyond the federal and state law’s reach. The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (1988). Similarly, offshore gambling in international waters cannot be prohibited by federal or state authorities.


200 *Id.*

201 *Id.* § 5:12A-11.

202 *Id.* § 5:12A-19.
educational institution. Additionally, high school sporting events, electronic sports (competitive videogaming), and events that involve participants under the age of eighteen cannot be wagered upon. By early 2023, the number of states with legalized gambling rose to thirty-eight. Clearly, the trend of legalizing gambling continues to grow.

Most states have more restrictive laws than New Jersey. For example, Illinois exacted legislation permitting sports gambling. The Illinois statute contains a number of notable restrictions on sports gambling, namely that licensed bookies cannot take wagers on (1) minor league sporting events, or (2) college athletic teams located within Illinois. Both in-person and online sports wagering are permitted in Illinois. Additionally, to place a sports bet with a licensed bookie in Illinois, the bettor must be physically located within the boundaries of the state. Michigan made it legal for licensed operators to run casino-style online games in the state. Parties placing bets must be located within the state of Michigan; however, the statute does allow for the possibility of betting parties in other states getting permission to place bets online with Michigan based operators if there is a “multijurisdictional agreement” in place. Another was taken in the District of Columbia which, in addition to sports gambling, legalized “game of skill machines” for use in the district starting in 2020. These are defined, broadly, as games that involve some degree of skill as opposed to chance or luck, the object of which is to win a prize of monetary value.

The rapid growth of legalized gambling does not eliminate state regulation. Gambling remains a regulated industry in those states that allow it. There are similarities between gambling and investment speculation; although there is not a causal relationship, the increased legalization of gambling witnessed the parallel growth of speculative investing, some examples of which are discussed above. Continuing the parallel nature of gambling and speculation, the SEC (and the CFTC where applicable) must continue to monitor and impose responsible, but not overprotective,

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204 Id.
207 Id.
208 Id. 45/25-45.
209 Id. 45/25-25(e).
211 Id. § 432.311.
212 D.C. CODE § 36-641.02 (2021).
213 Id. § 36-641.01(6).
regulation on speculative activity, focusing primarily on disclosure requirements.

**IX. COMPARING THE REGULATION OF ONLINE GAMBLING AND SECURITIES TRADING**

Some observers suggested regulating fantasy sports gambling as bucket shops under the commodities laws.\(^{214}\) However, this suggestion bucks the current deregulatory trend with respect to online gambling. It has been suggested that federal securities regulation serves as an ideal model for federal sports betting regulations.\(^{215}\) For example, more than fifteen years ago, Professor Hurt suggested that states liberalize online gambling laws to bring them more in line with the SEC’s approach in not imposing heightened regulation for online as compared to physical securities trading.\(^{216}\) The past several years have witnessed a relaxation by many states of online gambling.\(^{217}\) As noted above, the key difference, however, is that even the more liberal state gambling laws regulate the operation of casinos and other gambling venues.

The relaxation of state gambling prohibitions does not favor a parallel deregulatory approach for online securities trading. Current securities regulation diligently applied is sufficient to regulate online securities trading. Casino-like strategies for online trading do not warrant significantly increased SEC regulation of online trading *per se*.\(^{218}\) However, since many investors expect more rationality in the securities markets, enhanced disclosures in terms of warnings of speculation and its effects are appropriate to assure that retail investors are made aware of the risks of treating securities investing as gambling. This tactic is consistent with the securities laws’ general approach of disclosure rather than substantive regulation.\(^{219}\)

\(^{214}\) Holden & Rodenberg, *supra* note 186.


\(^{216}\) Hurt, *supra* note 3, at 439, 441.

\(^{217}\) Rodenberg, *supra* note 197.


\(^{219}\) It has been suggested that the gambling laws would benefit by using a disclosure approach as a supplement to existing gambling regulation. See Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 MD. L. REV. 217 (2004) (recommending disclosure requirements as a part of gambling regulation).
The basic premise of federal securities regulation is that “sunlight is the best disinfectant.” Casting sunlight on the risks of casino-like retail investing through meaningful risk disclosure would be a significant step forward. The SEC should consider specific disclosure requirements that will increase investor education regarding SPACS, “no fee” online trading, and cryptocurrency investing. Congress and the SEC should eschew more substantive regulation or prohibitions regarding these activities. State securities laws enacted prior to the federal 1933 Act utilized a merit approach, judging the merits of an investment before issuing a license to sell the securities. Congress clearly rejected a substantive review of securities’ merits in favor of a disclosure approach. Substantive regulation of gamification and other speculative investments would belie limiting regulation to a disclosure approach that has led to the success of the federal securities laws over the years. The existing securities law regarding deception and the requirement that material risks be disclosed should be sufficient to prevent wrongdoing in the marketplace. In contrast to the securities laws, gambling regulations in states where gambling is legal focus on the fairness of the gambling.

X. CONCLUSION

This Article has addressed three recent examples of speculation and the securities laws: (1) SPACs, (2) meme stock trading, and (3) digital assets. With respect to the first, the securities laws must be vigorously enforced to assure that SPAC investors are adequately informed of the investment risks
and not otherwise deceived by SPAC-related disclosures. Second, similar vigorous enforcement of existing securities laws should be sufficient to help curb the excesses of speculation in meme stocks and the consequences of gamification. With respect to the third arena addressed in this Article, courts should adhere to the broad view taken by the Terraform Labs decision in determining when a cryptocurrency qualifies as a security. Courts should take a similarly broad approach when dealing with NFTs marketed as investments and not sold primarily as collectibles or digital art.