

## Professor Commentary to Professor Anderson's Presentation

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Thank you Professor Anderson, and thank you to *Transactions: The Tennessee Journal of Business Law* and the University of Tennessee College of Law for the opportunity to address this symposium and respond to Professor Anderson today.<sup>1</sup>

Professor Anderson has eloquently and ably stated why social-media-driven (SMD) trading, at least in the form as we have seen in recent trading with respect to the stock of GameStop Corp. and AMC Entertainment Holdings, Inc., is likely not in contravention of U.S. securities laws or regulations issued under and case law opining on Section 10(b) of the Securities Exchange Act.<sup>2</sup> I could not purport to perform a more thorough analysis or enumerate the statutory and regulatory standards with respect to insider trading laws Professor Anderson has already set forth. However, I wish to step back and view the forest for the trees and ask a simple question—what is the purpose of federal securities regulation?

The legislative philosophy underlying the Securities Exchange Act is that “[t]here cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.”<sup>3</sup> In addition to this call for transparency, our federal securities laws rest on older common law concepts, such as an agent's fiduciary duty to a principal as incorporated into the common law of corporations and contractual concepts, such as fraud in the inducement. But SMD trading has led to a broader question: what if market manipulation does not run afoul of either the principle of transparency or common law concepts of fiduciary duty and fraud?

Should market manipulation, and by manipulation in this case we mean trading to induce price fluctuations which have no relation to either the underlying fundamentals of a company's performance or quantitative analysis of a stock's pricing, be unlawful, regardless of such manipulation's relation to the transparency of information regarding an issuer or any actor's common law obligations? I cannot disagree with Professor Anderson's analysis of the lawfulness of SMD trading under existing

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<sup>1</sup> John Anderson, Professor, Miss. Coll. of Law, Presentation at The University of Tennessee College of Law Business Symposium: Connecting the Threads (Sept. 24, 2021).

<sup>2</sup> 15 U.S.C. § 78j (2018).

<sup>3</sup> H.R. Rep. No. 73-1383, at 7705 (1934).

securities laws and regulations, but I would encourage Congress to evaluate the purpose of federal securities law.

If we are to take a libertarian view of securities law and require only that willing buyers and willing sellers be provided with all information necessary for a prudent investor to make an investment decision, then it is difficult to say that current federal securities law is insufficient. If, however, the purpose of federal securities law is more paternalistic and is to create efficient markets that reflect the true underlying value of any particular security, as such value analysis is limited by the frailty of human analysis and the limitations of information relating to the future performance of any particular issuer, then the current federal securities laws demonstrate themselves to fall woefully short, as is demonstrated by recent well-publicized SMD trading. Another issue in implementing this more paternalistic form of securities regulation is if and how such form of securities regulation could be implemented while respecting the First Amendment rights of traders.<sup>4</sup>

While I do not purport to weigh the relative costs and benefits to either the current libertarian approach, an alternative paternalistic approach, or some other approach that splits the difference between these two approaches, it is incumbent on Congress to review from time to time its approach to the regulation of securities markets and exchanges, particularly in the face of current events such as SMD trading. Likewise, I do not purport to offer an alternative solution or rubric for regulating securities markets to ensure that quoted prices of securities match the underlying value of their issuers. Such proposed regulation is for minds far more able than my own. However, if Congress intends to do its duty in regulating interstate securities markets under its enumerated Commerce Clause power, it must periodically ask itself, “[w]hat is the purpose of federal securities law? What ends do we hope to achieve by securities regulation? What form of securities regulation best serves the needs of issuers, buyers, sellers, and the public?”

Until Congress is ready to answer this complex question, there can be no intelligent approach to addressing SMD trading or other forms of non-economic securities manipulation. Thank you for your time and the chance to address this symposium.

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<sup>4</sup> U.S. CONST. amend. I.