# Do Investors Pay Attention to Social Media? A Response to Christine Hurt, *Socially Acceptable Securities Fraud*

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## I. THE RISE OF SOCIAL MEDIA IN SECURITIES CLASS ACTIONS

In her paper, *Socially Acceptable Securities Fraud*, Professor Christine Hurt poses a critical question: should the securities laws distinguish between a company's formal corporate statements and those it makes on social media? Professor Hurt offers an important and thorough analysis of social media in recent securities class actions brought under Rule 10b-5 of the Securities Exchange Act of 1934. As she explains, Rule 10b-5 imposes liability for false or misleading statements regardless of the statement's format, the identity of the speaker, or the platform on which the statement appears.[1] Therefore, "[c]ivil and criminal liability may attach . . . to materially false statements made anywhere, at any time . . . ."[2] But, she queries, should it?

This question—and Professor Hurt's contribution—are necessary and important for a number of reasons.

First, social media today plays a significant role in mediating information that reaches investors. As Professor Hurt points out, the platforms on which information can be disseminated have proliferated hugely. They have grown from being limited to formal items such as specific SEC filings and targeted announcements to including everything from social media, message boards, company websites, conference calls, conferences, and the like.[3] This also means that the communications themselves range from being scripted and vetted by attorneys to being careless and entirely extemporaneous.[4]

In addition, information dissemination today is largely multidirectional, meaning anyone can become an information broker in today's markets. Retail investors in particular obtain information through a multitude of channels—especially from each other and in online communities formed through social media and contemporary trading apps such as Robinhood.[5] On this issue, I have written extensively on the impact of "finfluencers," or financial influencers: those with outsize influence on investment decisions through social media influence.[6] Nor is this social media activity limited to investors. Issuers also use

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1. Christine Hurt, *Socially Acceptable Securities Fraud*, 49 J. CORP. L 786, 828 (2024).
2. *Id.* at 786.
3. *Id.* at 787–88.
4. *Id.* at 788.
5. *Id*. at 802–03 ("This marketplace speech, which takes place outside of traditional SEC filings and press releases, can be interactive, community-based, and produced by anyone, from professional investment advisors to anonymous agents of chaos.").
6. *See* Sue S. Guan, *The Rise of the Finfluencer*, 19 NYU J. L. & BUS. 489 (2023) (describing various kinds of finfluencers and examining their impact on price discovery and information in stock markets); Sue S. Guan, *Finfluencers and the Reasonable Retail Investor*, 172 U. PENN. L. REV. ONLINE 43 (2024) (discussing the impact of finfluencers on the materiality inquiry under Rule 10b-5).

social media to market and promote their products, increase brand awareness, and engage with investors—often in real time.[7] Of course, doing so is not without risk, especially considering the largely unvetted, extemporaneous nature of social media communications: Professor Hurt cites instances of CEOs or other officers being "strategically manipulative, thoughtlessly self-centered, and unintentionally inept."[8]

However, despite the proliferation of social media as a medium for disseminating information in stock markets and the potential associated risks, little systematic study has been done on the interaction between social media and liability for issuers using social media. As Professor Hurt explains, while courts do treat social media statements as potentially actionable, they typically engage in a case-by-case analysis of whether issuer statements on varying platforms are false, material, or made "in connection with" securities under Rule 10b-5, creating substantial uncertainty for market participants and litigants.[9]

Using a hand-collected dataset of 150 complaints filed in federal securities class action suits in 2022, Professor Hurt codes allegations according to defendant identity as well as the platforms on which the allegedly false statements were made (e.g., SEC filing, investor calls, company websites, advertisements, private documents, presentations, interviews, and social media).[10] With respect to social media specifically, Professor Hurt finds that social media channels comprised a relatively small portion of the dataset.[11] For example, nine cases cited YouTube videos, and tweets were cited in fourteen complaints, the highest number of any form of social media.[12]

Professor Hurt ultimately proposes limiting the categories of speech that would give rise to securities fraud liability under Rule 10b-5, arguing that "there may be a level of socially acceptable securities fraud that must be tolerated in an information society."[13] Doing so, she reasons, will provide ex-ante clarity to market participants and reduce the burden on courts.[14] Her proposal would shift the inquiry away from the current one, which excludes statements based on traditional inquiries into requirements such as falsity, materiality, and nexus to the issuer's securities. Instead, she would exclude from liability non-director and non-officer individuals posting on social media about issuers of which they do not hold a substantial position, as well as publicly traded issuers on social media who are otherwise current in their periodic filings.[15] She suggests that her proposal could draw support from the total mix test, where, for example, "[g]iven the explosion of information about publicly held issuers, the social media posts or internet messages of an unrelated individual would not alter the total mix."[16] Similarly a social media post by itself "should not outweigh SEC filings and professional investment analysis" for a reporting

7. Hurt, *supra* note 1, at 807–08.
8. *Id.* at 808.
9. *Id.* at 808.
10. *Id.* at 820–21.
11. *Id.* at 824.
12. Hurt, *supra* note 1, at 824–25.
13. *Id.* at 788.
14. *Id.* at 828–29 ("Creating a rule, however, could save judicial resources and shareholder wealth by insulating the unrelated individual and the publicly held issuer from SEC enforcement or private causes of action that ultimately go nowhere.").
15. *Id.* at 829.
16. *Id.* at 829.

issuer.[17] She explains that these kinds of statements ought to be deemed "socially acceptable."[18] According to Professor Hurt, investors should be trusted to understand the difference between statements made on various platforms.[19]

Professor Hurt's analysis will no doubt accelerate the conversation around liability for social media statements. It is an important dataset on which to ground further study. And in accelerating the conversation, I believe it reanimates two questions that have plagued securities regulation for decades: (1) who is the reasonable investor, and (2) who bears the informational burden in stock markets?

## II. WHO IS THE REASONABLE INVESTOR?

Who is the reasonable investor, and has their identity changed with the advent of social media? In reading Professor Hurt's analysis, I find myself revisiting these questions.

On July 26, 2024, Andrew Left, activist short seller and founder of Citron Research, was charged by the DOJ and the SEC for securities fraud.[20] The SEC alleged that Left, through social media and his Citron Research website, recommended taking certain positions in a number of companies, holding out that the recommendations were consistent with his own positions.[21] According to the complaint, once the stock prices moved in response to Left's recommendations, Left and Citron Capital rapidly reversed their positions.[22] As a result, Left "bought back stock immediately after telling his readers to sell, and he sold stock immediately after telling his readers to buy."[23]

The charges also reference what I would refer to as Left's "finfluencer" status, and his ability to move stock prices as a result. Left cultivated a public persona through social media and appearances on news programs, podcasts, and the like.[24] As a result, according to the charges, Left was able to influence the trading behavior of his followers, allowing him to reliably profit off of their trades. According to the DOJ, Left "routinely included sensationalized headlines and exaggerated language to maximize the reaction it would get from the stock market."[25] Further, Left "knowingly exploited his ability to move stock prices by targeting stocks popular with retail investors and posting recommendations on social media to manipulate the market and make fast, easy money."[26] On average, the stocks targeted by Left moved more than 12%–quite a significant number.[27]

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17. Hurt, supra note 1, at 829.
18. *Id.* at 829.
19. *Id.* at 830.
20. Press Release, *Activist Short Seller Charged for $16M Stock Market Manipulation Scheme*, DOJ (July 26, 2024), https://www.justice.gov/opa/pr/activist-short-seller-charged-16m-stock-market-manipulation-scheme; https://www.sec.gov/newsroom/press-releases/2024-89.
21. Press Release, *SEC Charges Andrew Left and Citron Capital for $20 Million Fraud Scheme*, SEC (July 26, 2024), https://www.sec.gov/newsroom/press-releases/2024-89.
22. *Id.*
23. *Id.*
24. DOJ Press Release, *supra* note 20.
25. *Id.*
26. *Id.*
27. SEC Press Release, *supra* note 21.

In other work, I have explored the specific mechanics by which a finfluencer can move stock prices.[28] Finfluencers can control, influence, or simply predict price movements, because they can predict that their social media activity will lead to trading by their followers.[29] Finfluencers post on social media, their followers respond, and stock prices move—sometimes irrespective of the informational content of the finfluencer's statements.[30] Left is being accused of precisely this behavior: disseminating false or misleading information while knowing that his followers would trade in a predictable manner in response, while taking positions that profited off of his followers' trading.[31]

Left is certainly not the first person—or finfluencer—to be accused of such behavior. The internet is rife with pump and dump schemes perpetrated on social media,[32] and Ryan Cohen, activist investor and chair of GameStop's board, is currently fighting a lawsuit that accuses him of similar behavior.[33]

While Left is not an issuer, the allegations against him raise an interesting question that is more broadly applicable: was it reasonable for investors to have relied on his social media statements when they could have or should have been relying on the research published in his reports? Did the existence of Left's research reports or other publicly available information make investors' reliance on his social media statements less reasonable? That is, does the existence of more formal statements make relying on tweets less reasonable?

For example, Left had a number of tweets concerning Cronos Group, a Canadian cannabis company trading under the ticker CRON.[34] Left published a report on Cronos Group and tweeted: "$CRON tgt price $3.5. Everything that is contaminated about the Cannabis space. ALL HYPE with possible securities fraud."[35] Left then appeared on CNBC's Fast Money, and when asked whether he was "just as short the stock right now as you were at the beginning of the day," Left responded that he "took a small size position off today but I am still extremely short the stock," and reiterated his belief that CRON would fall to $3.50.[36] However, Left had at this point exited more than 75% of his exposure at prices substantially higher than $3.50.[37] While the SEC and the DOJ allege that this was

28. *See* Guan, *Finfluencer*, *supra* note 6, at 522–30 (discussing how price movements can reflect finfluencer—and retail-driven motivations, from cultural preferences to personal values, and exploring the degree to which such movements are shifting the kinds of "information" incorporated into stock prices).

29. *See id.*

30. *See id.*

31. *See* DOJ Press Release, *supra* note 20.

32. *See, e.g.*, Complaint, United States v. Gallagher, No. 21-mag-10220 (S.D.N.Y. filed Oct. 25, 2021) (alleging that Gallagher engaged in a pump and dump scheme by tweeting false and misleading information using his Twitter handle @AlexDelarge6553); Complaint at 2, SEC v. Michael M. Beck, a/k/a @BigMoneyMike6, & Relief Defendant Helen P. Robinson, No. 2:22-cv-00812 (C.D. Cal. filed Feb. 7, 2022) ("Defendant Michael M. Beck . . . used his Twitter platform, where he had as many as 3 million followers, to promote and encourage people to buy eight microcap stocks—all without disclosing that he planned to sell, or in some instances was personally selling, his own holdings of the same stocks.").

33. *See In re* Bed Bath & Beyond Corp. Sec. Litig., No. 1:22-cv-2541, 2023 WL 4824734 (D.D.C. July 27, 2023) (denying Cohen's motion to dismiss and ruling that Cohen's tweet containing a smiley-face moon emoji could be reasonably interpreted as material and misleading).

34. Complaint, SEC v. Left, 24-cv-06311, at ¶ 107–17 (July 27, 2024).

35. *Id.* at ¶ 111.

36. *Id.* at ¶ 113.

37. *Id.* at ¶ 114.

materially misleading to investors, it raises the question: would Left's positions be material to a reasonable investor? Or does the reasonable investor care more about the actual content of Left's research report on Cronos? As one commentator put it: "I am not sure how material this was to investors — surely the contents of the report should matter more than his trading positions?"[38]

This is a thorny question, not least because of the growing role played by social media in reaching investors—especially retail investors. It is also complex because of the sometimes-conflicting standards that a "reasonable investor" under the securities laws has been held to. Under the securities laws, an actionable statement is one with a "material fact" or which omits a "material fact" necessary to make the statements not misleading.[39] Materiality turns on whether there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[40] This determination has been a notoriously complex task for courts, at least in part because the reasonable investor figure has not been clearly defined.[41] However, conceptions of the reasonable investor suggest one who is relatively financially sophisticated (though not to the level of an investment professional), who does their own research and understands financial concepts.[42] Critics say that this standard is aspirational and out of touch with reality.[43]

Social media—with its off-the-cuff nature and engagement styles that resemble community speech that is personal and targeted—only makes this determination murkier. It may be the case that a speaker's reputation or relationship with investors makes their social media statements just as material or even more material than formal public documents. As Professor Hurt acknowledges: "it is challenging to say whether a reasonable investor would rely on various types of statements, which might be anonymous, on various

38. Matt Levine, *Andrew Left Wasn't Short for Long*, BLOOMBERG (July 26, 2024), https://www.bloomberg.com/opinion/articles/2024-07-26/andrew-left-wasn-t-short-for-long.

39. Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5(b) (2023).

40. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

41. *See* Amanda M. Rose, *The 'Reasonable Investor' of Federal Securities Law*, 43 J. CORP. L. 1, 88–90 (2017) ("Notwithstanding the important role the reasonable investor plays in federal securities regulation, 'courts have not spoken with one clear voice on its identity,' leaving the figure 'anonymous, elusive, and the subject of much inquiry.'").

42. *See id.* at 89–90 (gathering sources and explaining that the reasonable investor is commonly conceptualized as a rational actor who "grasps market fundamentals—for example, the time value of money, the peril of trusting assumptions, and the potential for unpredictable difficulties to derail new products"); Hurt, *supra* note 1, at 116 ("just as the reasonable person is not average and is probably more careful than the average person, the reasonable investor is probably not the average retail investor and may be an aspirational model of a rational investor"); Tom C.W. Lin, *Reasonable Investor(s)*, 95 B. U. L. REV. 461, 466–67 (2015) (noting that while courts, regulators, or commentators are not unified on the reasonable investor's characteristics, the "leading paradigm" paints the reasonable investor as "the idealized, perfectly rational actor of neoclassical economics"); Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?*, 15 WM. & MARY J. WOMEN & L. 291, 297 (2009) ("Decisional law and the related literature support the view that the reasonable investor is a rational investor . . . .").

43. *See* Rose, *supra* note 41, at 89–92 (discussing criticism of this idea of the reasonable investor); Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. L. REV. 135, 173 (2002) (discussing the SEC's "awkward myth-story in which . . . the typical retail investor is very much an earnest and rational person, but with bounded capacity"). There is also the perennial problem that most investors do not read dense, lengthy public filings. *See* Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 599–604 (2013).

websites, during webinars, investor calls, or presentations. These new forms of media may grow more reliable over time, as more users visit them, and the sites become more professionalized."[44] On the other hand, "algorithms, bots, and general disinformation in social media" may reduce the reliability of certain types of social media.[45]

I certainly agree with Professor Hurt that "Rule 10b-5 cases should focus on statements that are the most problematic; and problematic because reasonable investors would believe them to be true, authoritative, and reliable."[46] But I wonder whether it is too early to draw the bright line rules that Professor Hurt thoughtfully recommends. That is, I wonder whether it is too early to make platform- or speaker-specific exclusions from liability under the securities laws.

## III. WHO BEARS THE INFORMATIONAL BURDEN?

Professor Hurt's article also implicitly revisits longstanding questions about the goals of stock market regulation. Securities regulation has long wrestled with the appropriate amount of regulation and oversight of the securities markets, especially when it comes to protecting retail investors. On whom should we place the burden of policing good and bad information? On the investors, or on the speakers? The ethos of stock market regulation has long been one of information disclosure – by both regulating the kinds of information disseminated, as well as providing recourse for those who rely on bad information. It has also been one of allowing investors to make their own decisions, so long as they have access to all the relevant information.[47]

Normatively, there is the question of whether the securities laws *should* draw bright line rules that exclude certain statements made on certain platforms from securities liability. Certainly, this choice could be made—that the securities laws will not protect reliance on, for example, statements made by non-director and non-officer individuals posting on social media about issuers of which they do not hold a substantial position, as well as publicly traded issuers' statements on social media who are otherwise current in their periodic filings.[48] The choice could be supported by reference to the total mix test, as Professor Hurt points out, and by the policy determination that such statements simply do not merit protecting against, because, for example, most are simply made by those who are "trading and talking for entertainment, in a socially acceptable way."[49] As Professor Hurt argues, "for a reporting issuer, a social media post, standing alone, should not outweigh SEC filings and professional investment analysis."[50]

However, descriptively, *does* a social media post outweigh SEC filings and professional investment analysis? On this question, as discussed in the previous section, I wonder whether the evidence conclusively demonstrates that statements made on social

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44. Hurt, *supra* note 1, at 830.
45. *Id.* at 830.
46. *Id.* at 830.
47. *See* Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799, 1825 ("Federal securities regulation is premised on the idea, however, that providing investors and the capital markets with full information is a more desirable regulatory approach than having the federal government screen potential investment opportunities for safety or quality.").
48. Hurt, *supra* note 1, at 829.
49. *Id.* at 830.
50. *Id.* at 829.

media receive less weight from investors—especially retail investors. The example of Andrew Left and Citron Research illustrates this complexity. Not only do retail investors obtain significant amounts of their financial information from social media,[51] but corporations and issuers themselves are increasingly using social media to reach investors, with full knowledge that social media statements engage investors and spur them to trade.[52] The three Twitter case studies that Professor Hurt discusses illustrate this as well. In *In re Tesla*, Elon Musk tweeted: "Am considering taking Tesla private at $420. Funding secured" and: "Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote."[53] In another case, the president of a publicly-traded microcap medical technology company posted false and misleading statements on Twitter about its products and its financial statements.[54] Finally, the CEO of Nikola Corporation, a publicly-traded company purporting to develop electric trucks, was convicted of criminal securities fraud on the basis of his false and misleading statements on Twitter and other media outlets.[55]

Another point to consider, and one that Professor Hurt touches on, is the best method of incentivizing better behavior. Is it by strengthening liability? If social media is a clear platform on which liability can rest, will that improve businesses' speech on social media? Or are incentives to produce better information improved by excluding liability for certain categories of speech, because doing so may allow issuers to post more freely on social media—truthfully—without fearing liability?[56] It would seem that Professor Hurt's proposal would need to go hand in hand with the prioritization of financial literacy, especially among retail investors.[57]

As a final matter, I certainly agree with Professor Hurt that "[i]nvestors should be trusted to understand the difference between information channels."[58] My remaining question is simply whether there really is a sufficient difference between such information channels. In other words, whether legal liability should remain tethered to the falsity,

51. *See id.* at 787–88 (gathering sources and citing *2023 Digital Investor Survey: The Age of Information Without Limitation*, BRUNSWICK GRP., https://www.brunswickgroup.com/media/10867/brunswick-digital-investor-survey-2023-summary.pdf ("81% of investors surveyed stated that they have made a recommendation or decision after initially sourcing information on digital or social media" and "88% have investigated a company based on information posted on digital or social media")).

52. *See* Fisch, *supra* note 47, at 1843 (explaining that "specialists are counseling issuers not just to pay attention to retail investors but to develop strategies for doing so, including taking advantage of the company's website and making greater use of social media," and that "corporate executives are using new tools to connect with retail investors and respond to their concerns").

53. *In re* Tesla, Inc. Sec. Litig., No. 18-cv-04865, 2022 WL 1497559, at *5, 6 (N.D. Cal. Apr. 1, 2022).

54. Complaint ¶ 1, USA v. Schena, No. 20-cr-00425 (N.D. Cal. Nov. 12, 2020).

55. Jack Ewing, *Founder of Electric Truck Maker is Convicted of Fraud*, N.Y. TIMES (Oct. 14, 2022), https://www.nytimes.com/2022/10/14/business/trevor-milton-nikola-fraud.html.

56. *See* Hurt, *supra* note 1, at 828 ("Creating bright-line rules would aid all marketplace participants in understanding what types of speech would be scrutinized under the federal securities law lens. Certainty could lead to more participation and even more truthful information.").

57. *See* Guan, *Finfluencer*, *supra* note 6, at 543–45 (emphasizing the importance of financial literacy); Fisch, *supra* note 47, at 1858; Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Educated Retail Investor: A Response to "Regulating Democratized Investing"*, 83 OHIO ST. L. J. ONLINE 205, 211–17 (discussing how financial literacy can be strengthened).

58. Hurt, *supra* note 1, at 830.

materiality, and nexus requirements under Rule 10b-5, or whether certain categories can be excluded because investors would not or should not rely on them.

## CONCLUSION

Professor Hurt has offered a cogent and critical analysis of the interaction between social media and securities fraud liability, raising important questions and offering thoughtful responses. The importance of this Article merits emphasis. Social media will only continue to permeate the stock markets, and the securities laws will do well to pay attention.