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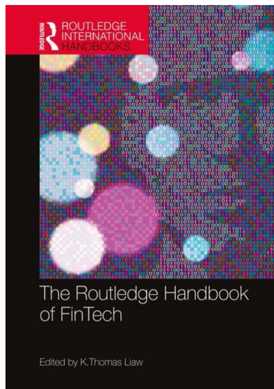

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19

RETHINKING AUTOMATED INVESTMENT ADVISER DISCLOSURE

Nicole G. Iannarone[*]

Introduction

Since their emergence, robo-advisers[1] have been one of the fastest growing segments of financial technology ("FinTech").[2] Though predictions of purely digital investment advisory services' quick and sustained growth may be overstated,[3] robo-advisory platforms continue to thrive with industry experts predicting more consumers seeking out their advice in years to come.[4] Whether robo-advisers will fold, continue to grow, or return to their original promise of premium investment services provided without any visible human adviser and human investor interaction is uncertain. Nevertheless, the robo-advice revolution has caused many to ponder whether robo-advisers' promises can be fulfilled.[5] Chief among those promises is the purported ability to live up to a fiduciary standard, a claim that industry observers similarly question.[6] Still young, robo-advisers have already been the subject of lawsuits for allegedly not meeting their fiduciary responsibilities and providing conflicted advice, perhaps validating the many questions raised about their ability to revolutionize the markets.[7]

This chapter does not focus on whether, in their current structures, robo-advisers are able to meet the fiduciary standard required under the Investment Advisory Act of 1940. Instead, it focuses on how robo-advisers, regulators, and investors can together evaluate a shift in the current regulatory paradigm. Today, investment advisers, including robo-advisers, push dense disclosures to consumer investors who may not be able to fully comprehend their import. Tomorrow, robo-advisers and their innovative technology, if embraced by regulators and consumers, can facilitate and cultivate a trusted collaborative relationship between investor and adviser, where the adviser learns from the investor and provides education tailored to the investor, helping to solve vexing consumer protection issues and lessen the impending retirement crisis.

More and more of us are comfortable making decisions entirely through a digital interface, without any human involvement.[8] Despite consumers' increasing comfort relying upon machines to direct and guide their decisions, most Americans nevertheless lack basic foundational knowledge in finance and investing.[9] Even those Americans who are able to save for retirement sometimes lack the financial literacy necessary to understand the complex products in which they invest.[10] Robo advice may not, however, be the solution for product complexity or financial competency concerns because robo-advisers present a black

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box problem: the digital investment advisers may not be capable of explanation beyond the information input and advice output.[11] In such a world, it is not only the new technology that should be questioned. The existing standards through which the new technology is regulated should similarly be explored. An understanding of potential benefits and potential harms may provide lessons that better allow us to protect consumer investors and better prepare for the so-called retirement crisis.

This essay explores the parameters of the pre-existing regulatory regime as applied to a new landscape of investing with a focus on the key regulatory tool of disclosure, examining the challenges of delivering appropriate disclosures when advice is provided in a new format. It further suggests a reconceptualization of the aim of disclosure to capitalize on robo-advisers' ability to truly know their clients and shift the burden of investor education from the customer to a fiduciary level adviser with the ability to tailor advice and education to each investor at an individualized level of understanding. The chapter concludes with a recommendation: robo-advisers and investor collaboration via an active and iterative disclosure regime that encourages investor comprehension, understanding, and learning.

I New technology meets old standards: regulation of robo-advice

With more than 140 entrants into the field in the past decade,[12] automated investment advice is predicted by some technological optimists to exceed US$2 trillion in assets under management by the end of 2020.[13] Robo-advisers' rapid predicted growth is due to the promise of their technology and lower cost profile that makes them accessible to a wider range of investors, including those who were previously not served due to lower account balances than traditional advisers were equipped to assist.[14] While many experts suggest that individual investors might be best off by investing in low-cost index funds,[15] others suggest that professional advice may be beneficial to those investors with low financial literacy.[16] Moreover, there is a distinct category of investors who prefer to place their trust in an adviser, human or digital, who makes decisions for them and would not invest at all absent access to advice from another.[17]

Robo-advisers seek to fill the gap. Many have voluntarily elected registration as investment advisers, subject to the Investment Advisory Act of 1940 ("1940 Act").[18] Generally speaking, the regulation of financial advice is disjointed, with a confusing and fragmented patchwork of regulation covering a wide range of professionals with similar sounding names but very different obligations to their clients.[19] Consumers can receive investment advice from a wide variety of regulated financial providers, including investment advisers, broker-dealers, and insurance sales persons—each subject to a different regulatory regime.[20] The only similarity that seems to run across the industry is how investors perceive the professional who provides them with advice: investors exhibit trust in their financial professional and often have difficulty understanding if and how they are paying that professional and whether the professional is acting in the investors' best interest.[21]

Though investors appear to believe that their financial professionals act in their best interest, only one category of financial professionals, investment advisers regulated under the 1940 Act, uniformly owe their investor clients a fiduciary duty.[22] Thus, robo-advisers' promise includes the purported ability to provide financial advice at the level many consumer investors already believe they are receiving. While the way they provide financial advice differs from a traditional human adviser, the means through which robo-advisers are regulated does not differ from the regulation of human investment advisers.[23] Whether human

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or computer, investment advisers under the 1940 Act only meet their fiduciary duty if they provide full disclosure, avoid conflicts of interest, and act in the customer's best interests.[24]

Regulators and academics can choose to challenge and test robo-advisers' adherence to any of these aspects of the fiduciary relationship. I focus this chapter on the disclosure device for several reasons. First and foremost, relationships of trust and confidence begin with conversation, an exchange of information, between participants who listen to each other and react to the information exchanged. Until trust develops through that sharing—or disclosure—of information, transactions are unlikely to occur.[25] Second, disclosure is a hallmark of financial regulation across the industry and is a key tool used in the regulation of investment advisers.[26] Third, regulators from the U.S. Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA) jointly highlighted the need for adequate disclosure as the first main point of their initial guidance to investors about automated investment advice.[27] Finally, in times of technological disruption, it often makes sense to focus on fundamental principles and their ability to meet new technological challenges before recommending significant structural change.[28] Accordingly, due to the importance of the disclosure device to the fiduciary relationship investment advisers owe their clients, it is a natural starting point for envisioning how a robo-adviser/investor relationship could operate.

II Disclosure: problems and promise

Disclosure could be aptly described as a regulatory darling and is often relied upon to regulate the financial services industry.[29] Disclosure attempts to provide equal access to information for decision making.[30] Whether used to regulate initial public offerings or individual relationships between financial advisers and their clients, critiques of disclosure appear across different financial services regulatory regimes. Though arising in different regulatory frameworks, the critiques of disclosure in situations where the end user is a consumer investor provide insight for evaluating robo-adviser disclosure.

Among the greatest challenges with disclosure as a regulatory tool for securities and investment advice is that the same material is intended for and used by multiple audiences, with a presumption that the single disclosure is appropriate for all. Scholars have challenged this norm, suggesting that the multiple consumers of disclosure should receive disclosure crafted to their individual levels and needs.[31] Similarly, disclosure has been criticized due to the complexity of transactions sought to be disclosed, including some that might not be capable of disclosure even to its most sophisticated consumers.[32] In many instances, disclosure's intended beneficiaries do not react to disclosed information properly.[33] Consumers are overwhelmed by the sheer amount of information disclosed.[34] In addition, the substantial, and substantially complex, information that is pushed out to consumers via disclosure is not accompanied by any test to assess whether it is understood or appropriately used. Robo-advisers add an additional level of complexity to disclosure as a device. Indeed, disclosure might be impossible because a truly digital investment adviser may not be capable of explaining its decisions.[35] And, even if robo-advisers could explain their decisions and all investors were capable of understanding that information, the reality is that investors appear not to read disclosures provided to them.[36]

Thus, while additional disclosure has been proposed as a means to protect consumer investors working with robo-advisers,[37] as well-intentioned and reasonable as such recommendations sound within a regulatory framework largely driven by disclosure, it may be time to rethink disclosure and what it looks like when advanced technology—rather than

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a human—delivers investment advice.[38] Disclosure today involves pushing out dense and complex information and advising consumers to read it and act accordingly, and robo-advisers are required to adhere to the same requirements as human investment advisers.[39] This, of course, assumes that robo-adviser disclosures and statements are correct and truthful, a threshold that human and robo advisers alike have problems meeting. Indeed, the SEC instituted its first enforcement actions against robo-advisers in December 2018, alleging that two robo-advisers, Wealthfront and Hedgeable, each made incorrect statements about their respective advice to consumers.[40] The SEC's efforts to monitor robo-adviser statements to ensure that they meet current standards, and to institute enforcement actions against both large and small robo-advisers under the existing regulatory regime is important.[41] Enforcement efforts alone, however, will not solve the problem that disclosure alone cannot be effective if it is not understood or used in the manner intended.[42] Robo-adviser technology may provide the avenue to address recommendations to improve disclosure by ensuring it is understood.

Technological advances permit robo-advisers to provide advice at a lower cost while still knowing more about their customer than a traditional human investment adviser is capable of understanding. At the same time, robo-advisers are capable of keeping contemporaneous records of interactions with their investor clients. The technology could also facilitate another goal—ensuring that consumer investors understand the benefits and risks of their investments. Robo-advisers may permit a revisioning of the disclosure device. Could the industry move from a passive one-sized-fits-all device to an active partnership between adviser and client where each learns from the other and disclosure statements are designed for the individual to whom they are deployed with a test for actual understanding?

III Active and iterative disclosure

Exploring the technological capacities of robo-advisers to provide disclosure in a more meaningful way can potentially solve some of the critiques of disclosure.[43] The excitement of new technological fixes to solve problems arises from robo-advisers' potential to act in ways we cannot yet envision. We should be careful, however, not to let the excitement for new possibilities overshadow the core components of the advisory relationship and learn from both pre-technology and technology assisted advice models while considering technological hacks for improving disclosure.

Robo-adviser technology changes how investment advice is provided in a fiduciary relationship. Traditional human-led fiduciary relationships involve the beneficiary of the relationship placing their trust and confidence in an expert with knowledge and experience who will provide advice in the client's best interest while fully disclosing and explaining conflicts of interest. While concerns have been raised as to whether human investment advisers can meet this standard, robo-advisers working under the 1940 Act's fiduciary regime raise even more questions.[44] With the human element missing, how does a robo-adviser answer questions as they come up or provide reassurance in volatile markets?[45] Though hard as it may be to have a conversation with a computer, a computer has the ability to monitor and evaluate an investor's use and understanding of disclosure information in a way a human may not be able to accomplish.

This combination of computers and humans has been used by the most sophisticated classes of investors to maximize opportunities,[46] and the potential should also be used to benefit the consumer investor, especially as it comes to truly understanding their investments. Instead of simply pushing out disclosure information, robo-advisers can work collaboratively

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with investors to help them understand the information that is shared, meeting the goal of a disclosure-based regulatory regime.[47] Robo-advisers have extraordinary access to the financial lives of their clients to provide their advice. To improve disclosure, the same capabilities could be deployed in a partnership between machine and human whereby the robo-adviser learns about the investor's baseline understanding, and provides bespoke disclosure tailored to the investor. The disclosure is active, requiring engagement and interaction from the investor, and iterative, providing more information at subsequent stages of decision making and as the robo-adviser determines the customer understood the prior disclosure material. During the course of the active and iterative disclosure, the robo-adviser records proof of the customer's understanding, or the customer's election to opt out of understanding and instead receive disclosure in the standard format.

Active and iterative disclosure via partnership between robo-adviser and investor is not without potential problems. Requiring consumer understanding before action is taken in their account could neutralize robo-advisers' speed advantages.[48] Regulators would be challenged in evaluating the efficacy of disclosure in exponentially greater volume.[49] The approach may be overly paternalistic, requiring investors to learn and understand when some might instead prefer to rely upon another's advice without learning or understanding. Perhaps most challenging to overcome is a critique that this proposal does not revamp a preexisting disclosure regime but instead replaces it with a new understanding-based regime for which additional regulation is required. These are but a few of the potential problems with active and iterative disclosure.

Study of active and iterative disclosure is required, focusing on its technological and practical feasibility before it can be implemented. This short chapter is not intended to present a complete proposal to be immediately implemented. It is instead intended to outline an idea for which further investigation and design is warranted. At the same time, study and candid evaluation of disclosure as a device in a fiduciary level relationship should continue to be explored.[50] There is much that the securities regulatory world can learn from studying how other fiduciary-level service providers approach disclosure and information exchange. For example, lawyers, whose advice is provided within a fiduciary framework, are required to not only disclose conflicts of interest by pushing information out, but also to ensure that their clients are able to comprehend, understand, and affirmatively consent to a conflict of interest before going forward.[51] This concept of informed consent is not unique to lawyers, and should be explored in similar relationships where a professional acts on behalf of a customer. For example, consumers are most familiar with the concept of informed consent in the medical context, where it is likewise criticized for impermeability, complexity, and lack of consumer understanding before an important action is undertaken.[52] In rethinking disclosure vis-à-vis robo-advisers, these areas should be studied to determine the methods of meaningful disclosure, or where disclosure has fallen short, in circumstances where there are information asymmetries between those required to give disclosure and those who act after receiving it.

Technology has fundamentally changed how financial advice is provided. It is intuitive that regulators should find a way to work with—rather than respond to—new technological changes.[53] Yet, the regulatory framework has largely remained the same,[54] often playing catch up and seeking to bend pre-existing regulatory models to the new technology. It is time to think about regulation in a new way, addressing it differently than has been done in the past, a reality that regulators and scholars alike embrace.[55] Working together, robo-advisers and their investor clients, with the aid of regulators, can maximize retail investors' understanding while helping them become better investors.[56]

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Conclusion

As the robo-advice industry continues to grow and evolve, we should rethink whether the regulatory scheme designed for a different delivery model still fits a modern means for delivering investment advice while examining the untested promise of the new technology to fill gaps. This short piece presents the kernel of an idea using collaboration between machine and human to provide active and iterative disclosure that ensures investors better understand their investments and the risks that different options present. Robo-advisers' potential includes more than providing advice to previously underserved investors. Robo-advisers' full potential, the ability to ensure that investors who wish to understand can truly understand, should be a regulatory priority.[57]

Notes

*This chapter was originally published in the *University of Toledo Law Review*, Volume 50: Issue 3 (2019).

1 The term robo-adviser (or robo-advisor) relates to investment advice provided in a digital format. There are three main modes of delivery of robo-advice: (1) fully automated; (2) hybrid; and (3) adviser-facing. See Nicole G. Iannarone, Computer as Confidant: Digital Investment Advice and the Fiduciary Standard, 93 *Chi-Kent L. Rev.* 141, 149 (2018) (defining robo-advisers).

2 *Id.* at 141.

3 In recent years, several robo-advisory firms have closed. See, e.g., Bernice Napach, Another Robo-Advisor Bites the Dust, *ThinkAdvisor* (July 25, 2019); Bailey McCann, What to do if Your Robo Adviser Shuts Down, *Wall Street Journal* (Oct. 7, 2018) ("What happens when a robo adviser closes? Lots of investors have had to deal with this question lately, and still more are likely to soon."); Samuel Steinberger, $80 Million Robo Hedgeable Shutters Its Portfolio Management, *Wealth Management.com* (July 12, 2018).

4 Some predicted that robo-advisers, as fully digitized entities, would manage over $2.2 trillion of assets by 2020. Kristin Snyder, Moderator, Fintech Forum: The Evolving Financial Marketplace, Statement before the United States Securities & Exchange Commission (Nov. 14, 2016), www.sec.gov/spotlight/fintech/transcript-111416.pdf. Two million consumers currently use robo-advisers, and industry studies suggest that the number of consumers using robo-advisers will increase to 17 million before 2021. Charles Schwab & Co., The Rise of Robo: Americans' Perspectives and Predictions on the use of Digital Advice, (Nov. 2018), https://www.aboutschwab.com/images/uploads/inline/schwab_rise_of_robo_report_2018_findings.pdf.

5 See, e.g., Tom Baker & Benedict Dellaert, Regulating Robo Advice Across the Financial Services Industry, 103 *Iowa L. Rev.* 713 (2018) (recommending capacity building regulators need to answer core questions concerning robo financial advice); Benjamin P. Edwards, The Rise of Automated Investment Advice: Can Robo-Advisers Rescue the Retail Market?, 93 *Chi.-Kent L. Rev.* 97 (2018) (outlining disruptive potential of robo-advisers and surveying concerns for regulating the new technology to harness potential); Nicole G. Iannarone, Computer as Confidant: Digital Investment Advice and the Fiduciary Standard, 93 *Chi-Kent L. Rev.* 141 (2018) (recommending testing to determine whether robo-advisers can meet parameters of investment adviser regulation, evaluation of regulatory tools to determine malleability and feasibility for evaluating robo-advisers, and enhancing disclosure in robo-adviser/client relationships to ensure consumer understanding of recommendations); Avery R. Barber, Comment, Redefining Fiduciary in the Robot Age: How the Department of Labor's New Definition will Encourage Robo-Investment Platforms and Remove the Human Element from Investment Advising, 18 *Wake Forest J. Bus. & Intell. Prop. L.* 316 (2018) (discussing questions concerning fiduciary standard applicable to non-human advisers); Caelainn Carney, Note, Robo-Advisers and the Suitability Requirement: How they Fit in the Regulatory Framework, 2 *Colum. Bus. L. Rev.* 586 (2018) (suggesting regulation through cooperation); Megan Ji, Note, Are Robots Good Fiduciaries? Regulating Robo-Advisors Under the Investment Advisers Act of 1940, 117 *Colum. L. Rev.* 1543, 1545 (2017) (recommending that regulators "focus on policing robo-advisor conflicts of interest" and require enhanced disclosure of conflicts of interest programmed into robo-adviser investment advice algorithms); John Lightbourne, Note, Algorithms & Fiduciaries: Existing and Proposed Regulatory Approaches to

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Artificially Intelligent Financial Planners, 67 *Duke L.J.* 651, 679 (2018) (advocating for adoption of alternative liability regime for robo-advisers); Domonic Litz, Note, Risk, Reward, Robo-Advisers: Are Automated Investment Platforms Acting in Your Best Interest?, 18 *J. High Tech. L.* 367 (2018) (arguing that robo-advisers cannot meet Department of Labor's proposed fiduciary standard); Bret E. Strzelczyk, Note, Rise of the Machines: The Legal Implications for Investor Protection with the Rise of Robo-Advisors, 16 *DePaul Bus. Com. L.J.* 55, 55 (2017) ("roboadvisors can not [sic] act as a fiduciary for several reasons – primarily because these platforms do not provide the type of individualized portfolio analysis that traditional fiduciary agents provide.").

6 See, e.g., Carmen Germaine, Robos Falling Behind on Fiduciary Standards: Report, *Ignites* (Nov. 2, 2018) (reporting on MyPrivateBanking report finding that leading robo-advisers may not be meeting fiduciary standards); Melanie L. Fein, Are Robo-Advisors Fiduciaries? (Sept 12, 2017), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028268.

7 See, e.g., Complaint, Pizarro, et al. v. The Home Depot, et al., No 1:18-cv-01566-LMM (N.D. GA) (filed July 11, 2018) (class action alleging fiduciary breached fiduciary duties within 401(k) plan and engaged in prohibited transactions by engaging a robo-adviser that charged excessive fees, offered cookie-cutter recommendations with no individualized advice, and had overall poor performance); Diana Novak Jones, Morningstar, Prudential Face Class Action Over Robo-Adviser, *Law360* (Aug. 4, 2017) https://www.law360.com/articles/951428/morningstar-prudential-face-class-action-over-robo-adviser (describing putative class action alleging that investment advisers conspired to develop a robo-adviser that directed clients to high fee investments for benefit of advisers).

8 Kara M. Stein, Comm'r, U.S. Sec. & Exch. Comm'n, Speech at Georgia State University College of Law Henry J. Miller Distinguished Lecture Series, From the Data Rush to the Data Wars: A Data Revolution in Financial Markets (Sept 27, 2018), https://www.sec.gov/news/speech/speech-stein-092718 ("Today's investors may only interact with a software program or smartphone app when making investment decisions or executing transactions."); Charles Schwab & Co., Consumer Digital Demands (Oct. 2018) ("Americans are more likely to automate their day-to-day finances than other daily activities, but they still prefer human assistance over automation").

9 Fin. Indus. Reg. Auth. Inv'r Educ. Found., Investors in the United States 2016 at 16 (2016), http://www.usfinancialcapability.org/downloads/NFCS_2015_Inv_Survey_Full_Report.pdf.

10 Jill E. Fisch, Rethinking the Regulation of Securities Intermediaries, 158 *U. Pa. L. Rev.* 1961, 1964 (2010) (describing increasing number of typical Americans purchasing securities in a time when investment complexity continues to increase).

11 Lightbourne, *supra* note 5, at 660 ("neural networks have begun to reach levels of complexity at which it is questionable whether humans can understand how the neural networks process information"); Christopher Bradley, FinTech's Double Edges, 93 *Chi-Kent L. Rev.* 61, 75 (2018) ("Whereas investment advice or credit decisions from a human can be questioned, a 'deep learning algorithm' may not make its decisions in any way that can be usefully conveyed to a user.").

12 BlackRock, Digital Investment Advice: Robo Advisors Come of Age 5 (2016), https://www.blackrock.com/corporate/en-at/literature/whitepaper/viewpoint-digital-investment-advice-september-2016.pdf (describing "nearly 140" entrants into the field in 2006 and the field continues to grow).

13 Snyder, *supra* note 3 (optimistic prediction of $2.2 trillion of assets under management by robo-advisers before 2020).

14 EY, Advice Goes Virtual 1 (2015), http://www.ey.com/Publication/vwLUAssets/Advice_goes_virtual_in_asset_management/$File/ey-digital-investment-services.pdf ("The new models have the potential to make advice for the mass market [US households with less than US$250K in financial assets] feasible at last"); id. ("the changes in economics and scalability enable these players [robo-advisers] to reach client segments that have traditionally been out of reach for wealth managers. The firms have made it possible to bring investment advice to the masses and unlock the large potential of those underserved segments.").

15 Dan Burrows, Warren Buffett: Why Index Funds Trump Hedge Funds, *Kiplinger* (Jan. 8, 2018), https://www.kiplinger.com/article/investing/T030-C008-S001-warren-buffett-why-index-funds-trump-hedge-funds.html.

16 Jill E. Fisch, et al., The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors, 66 *Duke L.J.* 663, 670–671 (2016) ("Access to professional advice may address this knowledge gap and enable low-literacy investors to make better retirement investing

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decisions. Our empirical results are consistent with anecdotal evidence of the value of professional advice. … our study highlights the potential value of professional advice in enabling low-literacy investors, those most disadvantaged by a participant-directed model, to make more appropriate allocation decisions. Continued research is necessary to explore the extent to which the benefits from sound retirement investing outweigh the costs associated with professional advice.").

17 See Donald C. Langevoort, Selling Hope, Selling Risk: Some Lessons for Law and Behavioral Economics about Stockbrokers and Sophisticated Customers, 84 *Cal. L. Rev.* 627, 636 ("[T]there is little doubt that the act of investing is anxiety-producing, given the high degree of informational ambiguity and the potential risk of loss. People generally have to be prodded to take such a step, and their decisions are thus likely to be quite deliberate.").

In this short chapter, I do not discuss whether eliminating paid investment advice would result in better consumer protection outcomes than further examining, and potentially creating more regulation for, providers of investment advice. With an impending retirement crisis where most Americans have insufficient retirement savings, it is important to address challenges in the few methods of preparing for retirement that Americans utilize. See generally Robert Prentice, Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for its Future, 51 *Duke L.J.* 1397, 1510 (2002) ("[I]nvestors, even sophisticated institutional investors, are unlikely to protect themselves adequately through private ordering.").

18 See Iannarone, *supra* note 1, at 158 ("The consensus appears to be that since robo-advisers are availing themselves to the 1940 Act, it is up to robo advice providers to ensure, and prove, that they can comply with it."). See also U.S. Sec. & Exch. Comm'n, Div. of Inv. Mgmt., IM Guidance Update: Robo-Advisors 2 (2017) [hereinafter IM Guidance Update] ("Robo-advisers, like all registered investment advisers, are subject to the substantive and fiduciary obligations of the Advisers Act.").

19 See, e.g., Benjamin P. Edwards & Christine Lazaro, The Fragmented Regulation of Investment Advice: A Call for Harmonization, 4 *Mich. Bus. & Entre. L. Rev.* 47 (2015) (describing, generally, differences in regulation for different financial professionals); Brian Scholl & Angela A. Hung, U.S. Sec. & Exch. Comm'n, The Retail Market for Investment Advice 12 (2018), https://www.sec.gov/files/retail-market-for-investment-advice.pdf ("Research suggests that retail investors do not understand the differing roles and legal obligations required of financial service professionals, including IAs, BDs, and other financial professionals."). The SEC adopted a new standard, Regulation Best Interest, for broker dealers on June 5, 2019. See 17 C.F.R § 240.15l–1 (2019).

20 See, e.g., Arthur B. Laby, Fiduciary Obligations of Broker-Dealers and Investment Advisers, 55 *Vill. L. Rev.* 701 (2010) (describing differences between broker-dealer and investment adviser regulation and application of fiduciary standard to each).

21 Edwards, *supra* note 5, at 103; Langevoort, *supra* note 17, at 654 ("… investors are motivated to trust stockbrokers.").

22 Edwards, *supra* note 5, at 103.

23 IM Guidance Update, *supra* note 18 ("Robo-advisers, like all registered investment advisers, are subject to the substantive and fiduciary obligations of the Advisers Act."); BlackRock, *supra* note 12, at 2 ("Digital advisors are subject to the same framework of regulation and supervision as traditional advisors; however, the applicability and emphasis may differ in some cases.").

24 Steven D. Irwin et al., Wasn't My Broker Always Looking Out for My Best Interests? The Road to Become a Fiduciary, 12 *Duq. Bus. L.J.* 41, 59 (2009).

25 See Langevoort, *supra* note 17, at 631 (describing how clients of stockbrokers—regulated differently than investment advisers—routinely rely upon their advice once trust has been cultivated between broker and investor).

26 See, e.g., Anita K. Krug, Downstream Securities Regulations, 94 *B.U. L. Rev.* 1589, 1605–1606 (2014) ("The Advisers Act and its rules rely primarily on requirements that advisers disclose conflicts of interest and obtain client authorization to engage in certain types of transactions."). But see Susanna Ripken, The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation, 58 *Bay. L. Rev.* 139, 203 (2006) ("Care must be taken to ensure that disclosure-based regulation is not idealized simply because we started with a disclosure-based regime, especially if it results in an abdication of substantive responsibility to protect investors and the integrity of the market.").

27 U.S. Sec. & Exch. Comm'n & Fin. Indus. Reg. Auth., Investor Alert: Automated Investment Tools (May 8, 2015), https://www.sec.gov/oiea/investor-alerts-bulletins/autolistingtoolshtm.

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html (listing, as first of five tips concerning the use of automated investment advice, the need to "[u]nderstand any terms and conditions" and "[r]eview all relevant disclosures … ").

28 See, e.g., Kara M. Stein, Comm'r, U.S. Sec. & Exch. Comm'n, Address at the Council of Institutional Investors 2018 Fall Conference, Improving Information for Investors in the Digital Age (Oct. 23, 2018), https://www.sec.gov/news/speech/speech-stein-102318 ("Much has changed since the Commission was created in 1934. Nonetheless, the fundamental principles adopted by the Commission, transparency and fair presentation, still serve as a Rosetta Stone in today's Digital World. By applying these fundamental principles from the past, I believe we can find thoughtful ways to address the new challenges of the Digital Age.").

29 Tamar Frankel, The Failure of Investor Protection by Disclosure, 81 *Cin. L. Rev.* 421, 426 (2012) ("Disclosure has become the main regulatory mechanism for the securities markets."); Troy A. Paredes, Blinded by the Light: Information Overload and its Consequences for Securities Regulation, 81 *Wash. U. L.Q.* 417, 427 (2003) ("Disclosure is the SEC's chief regulatory tool."); Susanna Ripken, *supra* note 26, at145 ("For the last seventy years, federal securities legislation in general has consistently relied on the philosophy of disclosure as the primary tool for protecting investors and regulating the securities market."). But see Krug, *supra* note 26, at 1648 ("[D]ownstream regulation presently uses both disclosure requirements and tools beyond them, such as consent requirements in the investment adviser context and operational rules in the broker-dealer context.").

30 Joel Seligman, The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation, 93 *Mich. L. Rev.* 649, 649–650 (1995) ("At its core, the primary policy of the federal securities laws involves the remediation of information asymmetries.").

31 See, e.g., Thomas C.W. Lin, Reasonable Investor(s), 95 *B.U. L. Rev.* 461 (2015); Anita K. Krug, *supra* note 26, at 1647–1649 (2014) (arguing for differentiated regulation based on the needs of the protected party).

32 See, e.g., *Steven L. Schwarcz, Rethinking the Disclosure Paradigm in a World of Complexity, 2004 Ill. L. Rev.* 1, 5–6 (2004) (arguing that disclosure of certain structured transactions, including those that led to Enron's downfall, may be too complicated for even sophisticated investors to understand and cannot therefore be adequate); Frankel, *supra* note 29, at 435 ("disclosure documents have become bulky and unreadable to the untutored eye").

33 Robert Prentice, The Inevitability of a Strong SEC, 91 *Cornell L. Rev.* 775, 826 (2006) ("when people know of their advisors' conflicts of interest, they insufficiently discount that information.").

34 See Paredes, *supra* note 29, at 441; Ripken, *supra* note 26, at 146–147 ("[D]isclosure that is too long or complex to be comprehensible to the average person floods the individual with too much nonessential data and overloads the person with information that inhibits optimal decision-making. Securities regulation is motivated by the assumption that more information is better than less, but evidence shows that too much disclosure can ultimately be counterproductive to the decision-making process of the individual investor."). C.f. Stein, *supra* note 28 (SEC Commissioner Stein noting that despite so-called information overload, "during my five years on the Commission, I have not heard this concern expressed by even one investor. Not one.").

35 Regulators and scholars wonder how complex technology can be disclosed in a fashion where consumers will understand it. See, e.g., Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Opening Remarks at the Fintech Forum (2016), https://www.sec.gov/news/statement/white-opening-remarks-fintech-forum.html ("[W]e are looking at how advisers that provide investment advice with limited, if any, human interaction … provide appropriate disclosures so that their clients understand their services … ."); Erik F. Gerding, Disclosure 2.0: Can Technology Solve Overload, Complexity, and Other Information Failures?, 90 *Tul. L. Rev.* 1143, 1167–1180 (2016) (This issue is even more pronounced as it may not be possible for robo-advisers to explain how and why they make the recommendations they make.); Lightbourne, *supra* note 5, at 660.

36 Frankel, *supra* note 30, at 432 ("investors do not read the disclosed information."); Langevoort, *supra* note 17, at 682 ("Yet anecdotal evidence, supported by many people's assumptions about investment practices, indicates that most nonprofessional investors do not read the prospectuses and other legal disclosure documents they are given."); Prentice, *supra* note 17, at 1456 (2002) ("It is well known that investors typically do not read disclosure documents when investing in securities.").

37 See, e.g., Ji, *supra* note 5, at 1581–1582 ("The SEC should implement a rule requiring robo-advisors to disclose to every client a 'shadow commission' that indicates the impact of conflicts programmed into robo-advisor algorithms."); Paredes, *supra* note 29, at 418 (noting "the SEC's chief regulatory tool is to require companies to disclose more").

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38 Paredes, *supra* note 29, at 451–452 (describing the need to refrain from reflexively providing more disclosure simply because the regulatory regime already supports it, without investigating the utility of the additional information).

39 See Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Two Robo-Advisers with False Disclosures (Dec. 21, 2018), https://www.sec.gov/news/press-release/2018-300.

40 Id. (describing two enforcement actions, including alleged false statements concerning tax harvesting strategies offered by robo-adviser Wealthfront and alleged false statements concerning robo-adviser Hedgeable's performance).

41 Id. (explaining that the two entities against whom the SEC instituted their enforcement actions had assets under management of $11 billion).

42 Paredes, *supra* note 29, at 418 ("[U]sers of information … need to use the disclosed information effectively" for disclosure to work.).

43 See, e.g., Gerding, *supra* note 35, at 1167–1180 (2016) (discussing technology's potential role and challenges in addressing informational overload and complexity issues investors may face in assessing securities and arguing for development of evidence to inform disclosure initiatives). See also Kara M. Stein, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at the "SEC Speaks" Conference (Feb. 20, 2015), https://www.sec.gov/news/speech/022015-spchckms.html ("Digital disruption also has led to increased innovation. That innovation is at times leading to increasing complexity, which is requiring us to rethink our approach to traditional financial products.").

44 See Iannarone, *supra* note 1, at 156–158 (describing questions posed as to robo-advisers' ability to meet fiduciary standard).

45 Kara M. Stein, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at Harvard Law School Fidelity Guest Lecture Series, Surfing the Wave: Technology, Innovation, and Competition (Nov. 9, 2015), https://www.sec.gov/news/speech/surfing-wave-technology-innovation-and-competition-remarks-harvard-law-schools-fidelity ("Do investors using robo advisors appreciate that, for all their benefits, robo advisors will not be on the phone providing counsel if there is a market crash?").

46 Thomas C.W. Lin, The New Investor, 60 *U.C.L.A. L. Rev.* 678, 687, 733 (2013) ("Modern finance is cyborg finance, an industry in which the key players are part human and part machine." … "[F]inance needs both machines and humans.").

47 Ripken, *supra* note 26, at 146 ("In order for a disclosure system to be effective, not only must the information that is supplied be disclosed completely, clearly, and accurately, but it must also be read and comprehended by the consumer.").

48 Lin, *supra* note 46, at 713 ("The emphasis on speed in cyborg finance has led to more automated trading platforms, more reactive executions, less reflective deliberation, and less opportunity for safeguarding.").

49 As an industry, FinTech presents regulatory challenges and opportunities due to its new models. Robo-advisers are but one aspect of FinTech for which new regulatory models are required. See, e.g., William Magnuson, Regulating Fintech, 71 *Vand. L. Rev.* 1167 (2018).

50 Paredes, *supra* note 30, at 433 ("We need to understand better what investors and others do with the information in order to craft a disclosure regime that better satisfies the goals of the federal securities laws.").

51 Model Rules of Prof'l Conduct r. 1.7 (Am. Bar Ass'n 2018).

52 Future work will examine the different models of disclosure and consent in fiduciary relationships to suggest modifications to disclosure in the financial services arena.

53 Thus, scholars predict that "RegTech," technology developed to assist regulatory functions, should see increasing demand from those who regulate as opposed to the industries subject to the regulation. See Dirk A. Zetzche, et al., From FinTech to TechFin: The Regulatory Challenges of Data-Driven Finance, 14 *NYU J. L. & Bus.* 393, 404 ("The next stage in the evolution of RegTech will likely be in response to demand from regulators seeking to use technology to improve their own regulatory capabilities and enhance regulatory outcomes, including through the capacity to undertake near real time surveillance of the markets they are charged with supervising."). See also Stein, *supra* note 8 Regulators agree. See Stein, *supra* note 8 ("We [the SEC] need to be able to adapt with our own RegTech.").

54 Stein, *supra* note 8 ("Just as driverless or autonomous cars are guided by computer code instead of humans, so are a majority of our securities transactions. And we have not changed our regulatory paradigm.").

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55 Speaking in their individual capacities, SEC Commissioners recognize that regulatory regimes are challenged by technology and that technology may be deployed to reframe the regulatory structure. See, e.g., Stein, *supra* note 43 ("This digital revolution results in opportunities for rapid innovation in the financial system. And, it is also disrupting our regulatory paradigm. Our regulatory architecture needs to evolve and stay out on the edge of these developments. We need to be constantly reassessing and redefining our regulatory perimeter as new financial products and financial structures emerge and evolve. Our regulatory approach needs to be flexible and nimble to adapt to this new and constantly changing digital world."); Stein, *supra* note 45 ("The Commission is now challenged with thinking through what it means to regulate a robo advisor. This concept did not even exist when most of the laws applicable to investment advisers were drafted. Most of these laws are based on the idea of a human investment adviser on the other end of the phone or sitting across the table from you."). Similarly, scholars worry about how to approach regulatory frameworks when the technology surpasses the regulation intended to oversee it. See, e.g., Lin, *supra* note 46, at 720 ("As finance continues to innovate, old policies, old laws, and old regulatory frameworks will grow more inadequate to govern and protect new investors in the age of cy-fi. New questions and challenges will arise … .").

56 Lin, *supra* note 50, at 693 ("With the aid of computers, a new aspirational investor paradigm has emerged and holds the potential to be more informed, more diversified, more rational, and faster than previous paradigms. And law must become more cognizant of this emerging, new investor paradigm in order to remain effective.").

57 Stein, *supra* note 45 ("Remaining competitive requires both market participants and regulators to thoughtfully evolve with innovation, not react to it way after the fact.").