2018

The Rise of Automated Investment Advice: Can Robo-Advisers Rescue the Retail Market?

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THE RISE OF AUTOMATED INVESTMENT ADVICE: CAN ROBO-ADVISERS RESCUE THE RETAIL MARKET?

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"When people are paying 2 percent in fees — that's criminal." — William Hurley, Founder, Honest Dollar[1]

INTRODUCTION

In 2015, serial entrepreneur William Hurly launched a new company, Honest Dollar.[2] The startup offered small and early stage businesses the ability to create employee retirement plans quickly and cheaply.[3] Honest Dollar differed from more established firms. Instead of requiring employers

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1. Stacy Cowley, *Tailoring Retirement Plans to Companies with a Handful of Workers*, N.Y. TIMES (July 16, 2015), https://www.nytimes.com/2015/07/16/business/smallbusiness/tailoring-retirement-plans-to-companies-with-a-handful-of-workers.html?smid=pl-share [https://perma.cc/D69B-Y4X7].
2. *Id.*
3. *Id.*

to have $10 or $20 million in assets to offer a plan, Honest Dollar made retirement plans available for just $8 a month per employee.[4]

Honest Dollar embraced technology to offer automated investment advice—a model some refer to as "robo-advisers."[5] Honest Dollar provided small businesses with retirement savings plans by focusing on the basics and by offering low-cost passive investing options.[6] The platform relied on Vanguard's low-cost funds and gave "participants few choices about how their money will be invested."[7] In 2016, Goldman Sachs recognized the business model's potential and acquired Honest Dollar for an undisclosed amount.[8] Today's rapidly growing automated investment advice firms make it possible for small businesses and even start-ups to offer high quality retirement savings vehicles to employees.

In recent years Wall Street firms have paid increasing attention to automated investment advice firms.[9] These innovative firms offer investment advice through digital platforms.[10] Their websites allow users to complete surveys about their preferences and financial situation.[11] The automated investment advice firms then turn and use that information to create appropriately personalized portfolios.[12]

Consumer interest in automated investment advice continues to grow. One informed observer recently predicted that automated investment advis-

4. *Id.*

5. The Financial Industry Regulatory Authority ("FINRA") uses the term "digital investment advice" to capture the same types of activities. FINRA, REPORT ON DIGITAL INVESTMENT ADVICE 2 (2016), https://www.finra.org/sites/default/files/digital-investment-advice-report.pdf [https://perma.cc/Q8FK-6KSF] [hereinafter FINRA, DIGITAL].

6. Cowley, *supra* note 1.

7. *Id.*

8. Liz Moyer, *Goldman Sachs to Buy Honest Dollar, a Small Plan Start-Up*, N.Y. TIMES (Mar. 14 2016), https://www.nytimes.com/2016/03/15/business/dealbook/goldman-sachs-to-buy-honest-dollar-a-small-plan-start-up.html?_r=0 [https://perma.cc/S5KX-89WU]. Similarly, BlackRock, the world's largest asset manager, snapped up FutureAdvisor in 2015.

9. *See* Alessandra Malito, *In the Wake of BlackRock's FutureAdvisor Deal, Which Independent Robo-Adviser Will be Bought Next?*, INVESTMENTNEWS (Aug. 27, 2015, 2:23 PM), http://www.investmentnews.com/article/20150827/FREE/150829915/in-the-wake-of-blackrocks-futureadvisor-deal-which-independent-robo [https://perma.cc/YD23-LX3A].

10. *See* Paul Sullivan, *The Computer as Financial Planner*, N.Y. TIMES (June 19, 2015), https://www.nytimes.com/2015/06/20/your-money/the-computer-as-a-financial-planner.html [https://perma.cc/ZUF9-GGQS].

11. *See* Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 OHIO ST. L.J. 181, 221 (2017) [hereinafter Edwards, *Conflicts*] ("Financial technology may disrupt much of the traditional investment advice business by allowing algorithms to select appropriate portfolios for persons that meet particular characteristics.").

12. FINRA, DIGITAL, *supra* note 5, at 3 ("Algorithms are core components of digital investment advice tools. They use various financial models and assumptions to translate data inputs into suggested actions at each step of the advice value chain.").

ers may manage $2 trillion in assets by 2020.[13] Today, the two largest automated investment advice providers now manage approximately seventeen billion in assets while continuing to expand their capabilities.[14]

These automated investment advice firms may disrupt and improve the market for investment advice and finally allow modern technology to make financial intermediation more efficient.[15] For a variety of reasons, costs in the sector have remained abnormally high.[16] One study found that "the unit cost of intermediation is about as high today as it was at the turn of the twentieth century."[17] The sector's puzzlingly high costs have persisted even though technology "should lower the physical transaction costs of buying, pooling, and holding financial assets."[18]

This article reviews the tremendous market-disrupting potential automated investment advice firms present as well as some challenges and possible roadblocks ahead. The article opens by discussing the conflicted-advice problem for the retail investing market and the cast of professionals that now serve this market in Part I. In Part II, the article reviews automat-

13. TERESA EPPERSON ET AL., A.T. KEARNEY, HYPE VS. REALITY: THE COMING WAVES OF "ROBO" ADOPTION 26 (2015), https://www.atkearney.com/documents/10192/7132014/Hype+vs.+Reality_The+Coming+Waves+of+Robo+Adoption.pdf/9667a470-7ce9-4659-a104-375e4144421d [https://perma.cc/87Z7-CHMT] ("Between shifts from traditional advisors and 'new investors,' [about] $2 trillion will be managed under robo-advisors by 2020.").

14. *See* Frank Chaparro, *Betterment Has Taken Its First Step Into One of the Hottest Areas of Investing*, BUS. INSIDER (July 19, 2017, 9:00 AM) http://www.businessinsider.com/betterment-sustainable-investment-2017-7 [https://perma.cc/GX83-QQ4W] ("Betterment, the largest roboadviser with $9.5 billion under management, has taken its first step into the world of sustainable investing"); *Robo Adviser Wealthfront Now Offering Loans, Not Just Advice*, INVESTMENTNEWS (Apr. 19, 2017, 4:37 PM), http://www.investmentnews.com/article/20170419/free/170419903/robo-adviser-wealthfront-now-offering-loans-not-just-advice [https://perma.cc/9363-KCFA] ("Wealthfront Inc. said in a blog post Wednesday that it will offer loans, calling the move a first among robo-advisers, which are known for wealth management using automated investing platforms."); Jason Zweig et al., *Talk Is Cheap: Automation Takes Aim at Financial Advisers—and Their Fees*, WALL ST. J. (July 26, 2016, 4:06 PM), https://www.wsj.com/articles/talk-is-cheap-automation-takes-aim-at-financial-advisersand-their-fees-1501099600 [https://perma.cc/X5U2-WGQL] ("Betterment and Wealthfront say they manage $9.7 billion and $7.1 billion in assets, respectively, up from $5.1 billion and $3.5 billion a year ago.").

15. Financial intermediaries connect savers to investment opportunities. They include banks, brokerage firms, investment advisers and others. For a definition of financial intermediaries, see Kristin N. Johnson, *Governing Financial Markets: Regulating Conflicts*, 88 WASH. L. REV. 185, 187 n.2 (2013), who defines "financial intermediaries" as "privately owned and controlled businesses that provide fundamental financial services to financial market participants."

16. *See* Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 577 (2015) (explaining that "[b]ecause fees are revenue to the intermediaries to whom they are paid, intermediaries prefer laws, norms, market structures, and other institutional arrangements that entail higher, not lower, transaction fees").

17. Thomas Philippon, *Has the U.S. Finance Industry Become Less Efficient? On the Theory and Measurement of Financial Intermediation*, 105 AM. ECON. REV. 1408, 1413 (2015).

18. *Id.* at 1434 ("A potential explanation is oligopolistic competition but the link between market power and the unit cost of intermediation is not easy to establish.").

ed investment advice's disruptive potential and explores some potential regulatory and policy concerns about automated investment advice.

I. THE CONFLICTED-ADVICE PROBLEM

In recent decades, financial intermediation has changed in significant ways. American retail investors only rarely buy stocks in individual companies.[19] Instead, most now purchase other securities—shares in funds. These institutional intermediaries dominate the securities markets.[20]

These institutional intermediaries compete against each other for retail investor capital.[21] Often, capital flows to particular institutional intermediaries because of conflicts in the market for financial advice.[22] Many institutional intermediaries gather capital by making payments to financial advisers when they steer their clients into particular investment decisions.[23] This system, and the players that operate within it, now contributes to the retirement crisis.

A. The Retirement Crisis

For decades, "a three-legged stool" has supported Americans through retirement.[24] Stable retirements were supported by Social Security, employer pensions, and personal savings.[25] As employers moved away from defined-benefit pensions and toward offering defined-contribution plans,

19. *See* Anita K. Krug, *Uncertain Futures in Evolving Financial Markets*, 93 WASH. U. L. REV. 1209, 1211 (2016) ("There are thousands upon thousands of mutual funds and other publicly offered investment funds, which, as the dominant investment repositories of retail investors' retirement capital and other assets, have come to play a crucial role in the securities markets.").

20. *See* Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1026 (2009) ("The last thirty years or so have brought a rapid shift toward institutionalization in the financial markets in the United States—in other words, a shift toward investment by mutual funds, pension funds, insurance companies, bank trust departments, and the like.").

21. Edwards, *Conflicts*, *supra* note 11, at 198–99.

22. *Id.*

23. *See* Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 64 (2015) ("Financial advisers, including brokers (who have no fiduciary duty to their clients), make the problem worse. Most of them are compensated based on (entirely legal) kickbacks.").

24. *See, e.g.*, Larry DeWitt, *Research Note #1: Origins of the Three-Legged Stool Metaphor for Social Security*, SOC. SECURITY ADMIN. (May 1996), http://www.ssa.gov/history/stool.html [https://perma.cc/8U7H-ZW93] ("Social Security benefits are described as the 'foundation' upon which individuals can build additional retirement security through company or personal pensions and through savings and investment. For many years, an older metaphor was used to make this point. Social Security benefits were said to be one leg of a three-legged stool consisting of Social Security, private pensions and savings and investment.").

25. *Id.*

the employer pension leg collapsed.[26] Without employer-sponsored defined-benefit pension plans, most retirees will depend entirely on personal savings and Social Security. Unfortunately, the personal savings leg seems unlikely to provide much support for most retirees.[27]

Describing the personal savings leg as "weak" understates the problem. The United States now faces a looming retirement crisis.[28] According to one recent survey, a third of Americans have no retirement savings.[29] In instances where Americans have retirement savings, they often do not have significant assets. Over half of the population has less than $10,000 in assets stowed away.[30] Financial insecurity may be particularly concentrated in minority communities. Over half of "black and Hispanic families have no retirement account savings."[31]

Americans approaching or entering retirement often fail to appreciate the need for savings. One report found that Americans tended to significantly underestimate their actual need for savings.[32] Workers that do not calculate how much they will need often estimate that they will need between $250,000 to $499,000 for retirement.[33] In contrast, workers that calculate their likely needs for a comfortable retirement estimate that they will need between $500,000 and $750,000.[34]

26. Richard L. Kaplan & Kate S. Poorbaugh, *What's the Matter with Retirement Savers?*, 47 CONN. L. REV. 1281, 1314 (2015) ("Employer-provided pensions as independent income streams in retirement rather than facilitated employee savings vehicles have largely disappeared.").

27. *See* Amy B. Monahan, *Employers as Risks*, 89 CHI.-KENT L. REV. 751, 753 (2014) ("Perhaps the primary risk related to retirement is simply the risk of inadequate savings. Individuals who are left to make savings decision on their own may, for a variety of reasons, save at a level that is insufficient to support them in retirement.").

28. *See* Deepa Das Acevedo, *Addressing the Retirement Crisis with Shadow 401(k)s*, 92 NOTRE DAME L. REV. ONLINE 38, 38 (2016), http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4723&context=ndlr [https://perma.cc/X5W2-3JWH] ("[T]he retirement crisis may prove to be one of the most damaging developments facing contemporary America. It invites procrastination, it's remarkably immune to class and industry distinctions, and it's actually two exceedingly complex problems.").

29. Elyssa Kirkham, *1 in 3 Americans Has Saved $0 for Retirement*, TIME (Mar. 14, 2016), http://time.com/money/4258451/retirement-savings-survey/ [https://perma.cc/K5R8-XRAK].

30. *Id.*

31. MONIQUE MORRISSEY, ECON. POLICY INST., THE STATE OF AMERICAN RETIREMENT: HOW 401(K)S HAVE FAILED MOST AMERICAN WORKERS 17 (2016), http://www.epi.org/files/2016/state-of-american-retirement-final.pdf [https://perma.cc/9TTY-WS9Z].

32. ALICIA WILLIAMS & JONATHAN JACKSON, AARP RESEARCH CTR., 2014 RETIREMENT CONFIDENCE SURVEY: A SECONDARY ANALYSIS OF THE FINDINGS FROM RESPONDENTS AGE 50+, at 8 (2015), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2015/2014-RCS-Respondents-50Plus-res-econ.pdf [https://perma.cc/M3NQ-8AYN].

33. *Id.* at 4.

34. *Id.*

The need for personal savings may be particularly great for younger generations. Many observers worry that the Social Security leg of retirement support will either collapse or offer reduced benefits in the future.[35]

B. The Advice Problem

Although professional assistance from qualified financial advisers might help many save for their future, most do not use financial advisers. One survey found that only 28% of Americans surveyed worked with a financial adviser.[36] The investors that do use financial advisers often pay large fees, undercutting their ability to save for retirement.[37] The White House Council of Economic Advisers conservatively estimated the total cost of conflicted financial advice at $17 billion annually.[38]

How much and how to pay financial advisers remains controversial. Many financial advisers assist clients with far more than asset allocation decisions.[39] Some help clients create savings plans and provide significant counseling about how to achieve savings goals. A financial adviser that provides poor and conflicted asset allocation advice while convincing a client to increase her savings rate may cause a client to accumulate significant wealth—despite pitching high-fee products and inefficiently allocating assets. In contrast, an adviser who provides high-quality asset allocation advice but does not increase a client's savings rate may not generate as much wealth accumulation.[40]

The available pool of financial advisers leaves much to be desired. Many self-styled financial advisers receive commission compensation and are paid to steer clients toward high-fee products.[41] The dangers posed by

35. *See* Doug Bandow, Commentary, *Social Security's Coming Crash: The Certain End of Entitlement*, CATO INST. (Oct. 20, 2009), https://www.cato.org/publications/commentary/social-securitys-coming-crash-certain-end-entitlement [https://perma.cc/3JEQ-52U7].

36. BLACKROCK, DIGITAL INVESTMENT ADVICE: ROBO ADVISORS COME OF AGE 3 (2016), https://www.blackrock.com/corporate/en-at/literature/whitepaper/viewpoint-digital-investment-advice-september-2016.pdf [https://perma.cc/RTB8-HZ8V].

37. *See* Anne M. Tucker, *Locked In: The Competitive Disadvantage of Citizen Shareholders*, 125 YALE L.J. F. 163, 181 (2015), http://www.yalelawjournal.org/forum/locked-in-the-competitive-disadvantage-of-citizen-shareholders [https://perma.cc/J9PJ-4JW4] ("High fees can consume up to thirty percent of an investor's return on a thirty-year investment.").

38. *See* COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS 2 (2015) ("the aggregate annual cost of conflicted advice is about $17 billion each year" for retirement savers).

39. *See* Tom Baker & Benedict G. C. Dellaert, *Regulating Robo Advice Across the Financial Services Industry*, 103 IOWA L. REV. (forthcoming) (manuscript at 16–17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932189 [https://perma.cc/F5W7-WFBW].

40. *Id.*

41. *See* Benjamin P. Edwards, *Fiduciary Duty and Investment Advice: Will a Uniform Fiduciary Duty Make a Material Difference?*, 14 J. BUS. & SEC. L. 105, 121 (2014) ("These distorting incentives

this type of commission-driven advice have been known to policy makers for decades.[42] Because much of their compensation comes from selling products, they may not have adequate incentives to provide competent financial counseling and planning services

Despite the well-established dangers, ordinary investors regularly fail to recognize real risks. Instead of realizing that a financial adviser may receive commission compensation, more than half of investors in their sixties or seventies incorrectly believe the adviser provides her advice for free.[43] One audit study sent "mystery shoppers" with well-diversified and low-fee portfolios to meet with commission compensated financial advisers.[44] Even though the financial advisers overwhelmingly recommended switching to the types of higher-fee funds that independent experts counsel against, most of the mystery shoppers left thinking that it would be a good idea to use the same advisers to manage their own money.[45]

Automated investment advice firms may mitigate the conflicted-advice problem and expand access to investment advice. The best platforms will likely provide planning tools to help clients increase their savings rates. By providing greater access to advice at a lower cost, these new firms may reach persons that traditional financial advice firms have not yet served. Of course, the quality of an automated investment advice tool's recommendations depends on the persons that create the automated investment advice tool. If large firms create automated investment advice tools that simply recommend a firm's own, higher-fee funds, automated investment advice may not result in improved asset allocations.[46]

have long been recognized as creating material conflicts between the Broker's interests and the client's interests.").

42. An SEC committee noted the danger posed by these conflicts of interest over twenty years ago. SEC, REPORT OF THE COMMITTEE ON COMPENSATION PRACTICES 7–8 (1995), http://www.sec.gov/news/studies/bkrcomp.txt [https://perma.cc/C23K-4BK2] ("Of particular concern is the practice of firms offering higher payouts when [financial advisers] sell proprietary mutual funds instead of funds of a similar class managed by outside investment companies.").

43. Ben Steverman, *Why You Still Can't Trust Your Financial Adviser*, BLOOMBERG (June 7, 2017, 2:00 AM), https://www.bloomberg.com/news/features/2017-06-07/fiduciary-rule-fight-brews-while-bad-financial-advisers-multiply [https://perma.cc/Q3JT-JL25] ("According to a Cerulli Associates survey last year, a majority of investors in their 60s and 70s either aren't sure what their fees are or believe incorrectly that they pay nothing for advice.").

44. *See generally* Sendhil Mullainathan et al., *The Market for Financial Advice: An Audit Study* (Nat'l Bureau of Econ. Research, Working Paper No. 17929, 2012), http://www.nber.org/papers/w17929.pdf [https://perma.cc/6MRS-KRZG].

45. *Id.*

46. *See* FINRA, DIGITAL, *supra* note 5, at 6 ("Firm vs. client conflicts, however, may remain present for both financial professional- and client-facing digital advice tools, for example if a firm offers products or services from an affiliate or receives payments or other benefits from providers of the products or services.").

C. Advice-Givers Serving the Expanding Retail Market

Much of the confusion around investment advice may flow from the fragmented regulatory structure for providing investment advice.[47] Traditional financial advisers operate within a variety of regulatory structures. The actual duties they owe to their clients depends on the type of product sold, the compensation received, the source of the client's funds, and other factors.[48]

1. Brokers

Commission-compensated stockbrokers (Brokers) regularly market themselves as trustworthy financial advisers.[49] Even though most investors mistakenly believe that brokers owe a duty to provide financial advice in a client's best interest,[50] brokers ordinarily only owe a duty to provide "suitable" advice.[51] The "suitability" standard allows financial advisers to sell clients "suitable" investments—even if they are not necessarily in their client's best interests.[52] After a transaction closes, the law often imposes no

47. *See* Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 47, 52 (2014) (discussing regulatory fragmentation); Christine Lazaro, *The Future of Financial Advice: Eliminating the False Distinction Between Brokers and Investment Advisors*, 87 ST. JOHN'S L. REV. 381, 411 (2013) ("More and more investors do not even realize that there is a distinction between brokers and investment advisers.").

48. Lazaro & Edwards, *supra* note 47, at 49 ("In many cases, a single financial adviser may wear several hats. In each role, the financial adviser owes different duties to retail customers depending on the type of compensation being received, product sold, and locality.").

49. *See generally* Joseph C. Peiffer & Christine Lazaro, *Major Investor Losses Due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty: Misleading Ads Fuel Confusion, Underscore Need for Fiduciary Standard*, 22 PIABA B.J. 1 (2015).

50. SEC, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS at i (2011), http://www.sec.gov/news/studies/2011/913studyfinal.pdf [https://perma.cc/MX8V-A7YH] [hereinafter SEC, FIDUCIARY STUDY].

51. FINRA, FINRA MANUAL, R. 2111 (2014). There are, of course, exceptions. Some states impose a fiduciary duty under common law. *See, e.g.*, Hobbs v. Eichler, 210 Cal. Rptr. 387, 403 (Ct. App. 1985) ("The relevant law is clear. 'The relationship between a broker and principal is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith toward the principal.' . . . ." (quoting Twomey v. Mitchum, Jones & Templeton, Inc., 69 Cal. Rptr. 222, 236 (Ct. App. 1968)). Nevada also recently imposed a statutory fiduciary duty on Brokers consistent with the statutory fiduciary duty it already imposed on financial planners. *See* NEV. REV. STAT. § 628A.020 (1993) ("A financial planner has the duty of a fiduciary toward a client.").

52. *See* Christine Lazaro, *Fiduciary Duty— Now and in the Future*, 17 PIABA B.J. 129, 132 (2010) ("[T]he suitability standard requires that a recommendation merely be suitable for a customer, not necessarily that it be in the customer's best interest."); Patricia A. McCoy, *Degrees of Intermediation*, 50 WAKE FOREST L. REV. 551, 571 (2015) ("Because the duty of suitability is not a fiduciary duty, securities brokers are not required to act in their clients' best interests or diversify their portfolios . . . Nor must brokers avoid recommending investments that will maximize their fees if their advice is suitable otherwise.").

duty on a broker to monitor a client's account or provide additional advice.[53]

2. Investment Advisers

Automated investment advice firms and many traditional financial advisers register as Investment Advisers (Advisers) under the Investment Advisers Act of 1940 (the Advisers Act).[54] Although the statutory text does not explicitly create a fiduciary duty for Advisers, the Supreme Court recognized that Advisers owe their clients a fiduciary duty requiring them to act in their client's best interests.[55] In most instances, Advisers receive compensation tied to a client's assets under management.[56]

3. Insurance Professionals

Many insurance professionals also characterize themselves as financial advisers.[57] Insurance salespersons (producers) operate under varying state laws, making it difficult to state what duties they may owe to their customers.[58] For some products, insurance producers now owe duties similar to the duties owed by securities Brokers.[59]

II. THE POTENTIAL & PERIL OF AUTOMATED INVESTMENT ADVICE

Automated investment advice firms may accelerate the disruption of traditional markets for investment advice and the market for asset management and institutional intermediation.[60]

53. In some instances, Brokers will owe additional duties. *See* SEC v. Zandford, 535 U.S. 813, 823 (2002) (recognizing that the broker managing a discretionary account owed fiduciary duties); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953 (E.D. Mich. 1978) ("[T]he broker handling a discretionary account becomes the fiduciary of his customer in a broad sense.").

54. *See* SEC, FIDUCIARY STUDY, *supra* note 50, at 16–20 (detailing state and federal Adviser registration).

55. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

56. *See* SEC, FIDUCIARY STUDY, *supra* note 50, at 7.

57. *Cf. Rules and Resources*, FINRA, http://www.finra.org/investors/rules-and-resources [https://perma.cc/9U47-NJKX] ("[B]e aware that Financial Analyst, Financial Adviser (Advisor), Financial Consultant, Financial Planner, Investment Consultant or Wealth Manager are generic terms or job titles, and may be used by investment professionals who may not hold any specific credential.").

58. *See* Lazaro & Edwards, *supra* note 47, at 68–71 (discussing insurance producer duties).

59. *Id.*

60. *See* Edwards, *Conflicts*, *supra* note 11, at 198 n.95 ("The market for institutional intermediation is the market for the services of institutional intermediaries. Institutions that manage capital compete against each other.").

A. The Potential Disruption & Efficiency Gains

Automated investment advice firms may reshape wealth and asset management. Traditional firms providing wealth management services may struggle to preserve their profit margins while competing against automated investment advice firms.

1. Disruption to the Market for Investment Advice

In most instances, providing reasonable asset-allocation advice to savers is straightforward and simple. Without any ability to confidently predict market movements, savers should buy broadly diversified indexes.[61]

Despite the ease with which suitable, well-diversified portfolios may be constructed, traditional wealth management firms frequently charge excessive fees for their advice. Paul Smith, the President and CEO of the CFA institute, has explained that "[e]veryone knows we overcharge for what we do. It's obvious."[62] Automated investment advice firms may disrupt these markets and put downward pressure on fees by providing asset-allocation assistance at a fraction of the cost of more traditional firms.[63]

The rise of automated investment advice does not mean that human advisers will stop serving clients. Competitive pressure will drive human advisers to embrace these automated investment advice tools to provide services.[64] Advisers that do not embrace technology may struggle to compete against advisers that use technology to manage client portfolios and gain the freedom to use their time to assist clients with other financial decisions.[65]

Growth in automated investment advice services may now continue at exponential rates, applying increasing downward pressure on prices.[66] While one observer predicted that automated investment advice firms

61. *See* Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 4 (2007) ("If you are acting with the most rationality, you will invest in index funds, which hold broad baskets of securities and bonds reflecting the opportunities and risks faced by the market, recognizing that it is nearly impossible to pursue an active trading strategy that will beat the market over time.").

62. *See* Steverman, *supra* note 43 (quoting Paul Smith).

63. *See* Edwards, *Conflicts*, *supra* note 11, at 221.

64. *See* Anne Tergesen, *Robo Advisers Seen Exploding in Popularity*, WALL ST. J. (Dec. 11, 2015, 7:08 PM), http://www.wsj.com/articles/robo-advisers-seen-exploding-in-popularity-1449860367 [https://perma.cc/FGB4-YFXB] (quoting Michael Kites as saying that "'in 10 years there will be two kinds of advisers—those who use technology and those who are out of business'").

65. *Id.*

66. *See* Zweig et al., *supra* note 14 (quoting financial planner explaining that it has "'always been questionable whether or not advisers were earning our money at 1% and up'" and that "'[t]he spread's got too narrow'").

would manage $2 trillion in 2020,[67] others estimate the figure may swell to $5 to $7 trillion by 2025.[68]

As financial advisers increasingly rely on automated investment advice tools to provide asset allocation assistance, many will shift away from collecting commission revenue in exchange for selling particular products. A shift away from commission-driven financial advice has been underway for some time because of regulatory pressure to address conflicts of interest.[69]

2. Accelerating Change in the Institutional Intermediation Market

Changes in the delivery of financial advice drive changes in the asset management sector. A tremendous number of actively-managed mutual funds rely on traditional, commission-compensated brokerage distribution channels to raise capital.[70] If automated investment advice firms continue receiving fees primarily from assets under management or fixed annual fees, they face less of an incentive to steer client assets toward underperforming actively-managed funds.[71]

Significant changes in asset management are underway. Shifting asset-allocation decisions by automated investment advice firms and others have already begun to affect many asset managers. Investor assets increasingly migrate from actively-managed funds toward passively-managed funds.[72] Ideally, assets will continue to migrate from active to passive management until active management no longer reliably loses to passive management.[73]

67. EPPERSON ET AL., *supra* note 13, at 26.

68. Tergesen, *supra* note 64.

69. *See* Lisa Beilfuss, *Who Is Winning with the Fiduciary Rule? Wall Street*, WALL ST. J. (Aug. 11, 2017, 5:00 PM), https://www.wsj.com/articles/who-is-winning-with-the-fiduciary-rule-wall-street-1502443804 [https://perma.cc/5XNM-T78H] ("Firms are pushing customers toward accounts that charge an annual fee on their assets, rather than commissions which can violate the [fiduciary rule].").

70. *See* Benjamin P. Edwards, *Financial Advice Is a Thicket of Conflicts. Wall Street Wants to Keep It That Way*, WASH. POST. (Dec. 28, 2016), https://www.washingtonpost.com/opinions/financial-advice-is-a-thicket-of-conflicts-wall-street-wants-to-keep-it-that-way/2016/12/28/0ec72e34-c6f0-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.ebd28aed10a8 [https://perma.cc/E6H5-6VS9] (arguing that reduced reliance on commissions "would kill the incentive for financial advisers to pitch lousy products with embedded fees to their clients").

71. *See* Edwards, *Conflicts*, *supra* note 11, at 201 ("In the market for institutional intermediaries, picking losers is easy—as a group, the funds that charge high fees for active management are going to suffer relative underperformance.").

72. *See, e.g.*, Aaron Black, *Legg Mason: A Survivor in the Active-Manager Massacre*, WALL ST. J. (June 18, 2017, 4:20 PM), https://www.wsj.com/articles/legg-mason-a-survivor-in-the-active-manager-massacre-1497817231 [https://perma.cc/CR8G-SXR7] ("So far this year, investors have pulled tens of billions of dollars from actively managed mutual funds in favor of low-cost exchange-traded funds.").

73. *See* Edwards, *Conflicts*, *supra* note 11, at 201 (explaining that the balance between active and passive management should coalesce around a more efficient equilibrium).

3. Efficiency Gains

Changes in wealth and asset management should create efficiency gains for society. The asset management industry now rakes in approximately $88 billion in annual fees.[74] If automated investment advice firms and other forces move assets away from higher-fee funds, the overall cost of asset management should decline. As intermediaries capture a smaller percentage of investor assets, investor gains increase.

Economic growth may also benefit from reduced fees flowing to financial intermediaries. Some research indicates that nations with bloated financial intermediation sectors experience significantly slower growth.[75] Automated investment advice firms may reduce the overall amount of capital captured by financial intermediaries, freeing the capital for investment.

B. Potential Regulatory Concerns

Balancing the benefits of automated investment advice against its risks will require cautious regulatory engagement. Effective regulatory responses will require independence, as well as financial and technological literacy.[76]

1. Systemic Risk Regulation

The exponential growth and potential scale of automated investment advice firms have significant systemic implications. If increasing numbers of consumers allocate their assets using the same or similar automated investment algorithms, wide swaths of the population could experience highly correlated losses.[77] Dominant automated investment advice firms controlling massive market shares may also introduce new cybersecurity risks. If a hacker caused an automated investment advice firm to suddenly sell substantial assets, it could significantly disrupt markets.[78]

74. MICHAEL RAWSON & BEN JOHNSON, MORNINGSTAR, 2015 FEE STUDY: INVESTORS ARE DRIVING EXPENSE RATIOS DOWN 1 (2015), https://news.morningstar.com/pdfs/2015_fee_study.pdf [https://perma.cc/8LD4-XGW9].

75. *See* Judge, *supra* note 16, at 575 ("[R]ecent studies suggest that the relationship between the size of a country's financial sector and the rate of its development is an inverted 'U'—having a robust financial system is critical for economic growth, but too much finance impedes development.").

76. *See* Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1310 (2017) ("Effective publicly run digital intermediaries would require well-funded, capture-resistant agencies committed to performance metrics and perhaps pushing the bounds of allowable governmental data collection.").

77. *See* Baker & Dellaert, *supra* note 39, at 29–30 ("[I]f the models underlying competing robo advisors are sufficiently alike, there is a risk of highly correlated losses that could even pose systemic risk.").

78. *See* Tom C.W. Lin, *The New Market Manipulation*, 66 EMORY L.J. 1253, 1292 (2017) ("With mass misinformation schemes, parties can manipulate the marketplace through fake regulatory filings, fictitious news reports, erroneous data, and hacking.").

Despite the potential future risks, regulators should not move overzealously and subject automated investment advice firms to higher standards than those currently applied to natural persons.[79] Moves by regulators to impose excessive regulatory burdens on automated investment advice firms in the name of consumer protection or systemic risk reduction may actually be calculated to raise costs for disruptive entrants and to protect the profitability of existing intermediaries.[80]

2. Shifting Regulatory Standards

Automated investment advice firms may also face risks from shifting regulatory standards in the regulation of investment advice. At the present, automated investment advice firms face regulatory uncertainty from multiple federal regulators. Changes in the federal regulatory environment may amplify or diminish forces supporting widespread movements to automated investment advice platforms.

a. The Department of Labor Rule

To address conflicts in the market for investment advice, the United States Department of Labor issued a rule (the Fiduciary Rule) requiring persons giving advice about retirement accounts to provide advice in the best interest of retirement savers.[81] Labor's Fiduciary Rule remains controversial and the Department of Labor has begun to reconsider the rule pursuant to a presidential memorandum.[82]

While a modified or enfeebled Fiduciary Rule from the Department of Labor may not directly impact automated investment advice firms, the change to the regulatory environment may diminish the incentive for traditional financial advisers to migrate to different methods of providing advice. Without the restraint imposed by the Fiduciary Rule, many financial advisers may opt for the high fees obtainable by selling high-commission products.

79. Baker & Dellaert, *supra* note 39, at 3 ("At the same time, however, it is important not to overreact and not to set a higher bar for automated advisors than for human advisors. For now, the standard against which automated advisors should be compared is that of humans, whom we know are much less than perfect.").

80. *See* Benjamin P. Edwards, *The Dark Side of Self-Regulation*, U. CIN. L. REV. (forthcoming 2017) (manuscript at 36–37), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2829592 [https://perma.cc/84RW-QWT3] ("[I]t is difficult to distinguish legitimate investor protection initiatives from interventions designed to drive up costs for a potentially disruptive competitor.").

81. Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 10, 2016) (codified at 29 C.F.R. pts. 2509, 2510, 2550).

82. *See* Fiduciary Duty Rule, 82 Fed. Reg. 9675 (Feb. 7, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-02-07/pdf/2017-02656.pdf [https://perma.cc/CE6T-YNG8].

b. The Looming SEC Rulemaking

The SEC has also solicited comments about the appropriate standards of conduct for Advisers and brokerage firms.[83] With rulemaking likely to ensue, automated investment advice firms will need to adapt to a changing regulatory environment. If the SEC leaves the current fiduciary standards in place for Advisers, existing automated investment advice firms may qualify as fiduciaries.[84]

3. Conflicts

Automated investment advice firms also face conflicts of interest. Because of their potential ability to direct massive capital flows, many Wall Street firms will seek to influence the algorithms used to allocate funds. For example, plaintiffs recently filed a class action lawsuit against Morningstar and Prudential raising issues with an automated investment advice tool known as "GoalMaker."[85] Plaintiffs allege that the GoalMaker automated investment advice tool would "steer retirement investors . . . into high-cost investments that pay unwarranted fees to" Prudential.[86] The complaint alleges that GoalMaker was presented to savers as providing "unbiased asset allocation modeling" even though it actually "systematically influenced [investors] to put their money into a variety of high-cost retirement funds that paid excessive fees to the Prudential Defendants."[87] If proven, these allegations go directly to the worst fears about automated investment advice tools.

Automated investment advice firms may face other conflicts. For example, if their compensation derives from assets under management, they may hesitate to recommend wise transactions that reduce their assets under management. For example, if a client should acquire an insurance policy, an automated investment advice firm might not push the need for insurance as aggressively as an insurance producer would. Similarly, automated investment advice firms might recommend against paying down other debts that would reduce their assets under management.

83. Public Statement, Jay Clayton, Chairman, Sec. & Exch. Comm'n, Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (June 1, 2017), https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31 [https://perma.cc/PLS7-R7JK].

84. *See* Nicole G. Iannarone, *Computer as Confidant: Digital Investment Advice and the Fiduciary Standard*, 93 CHI.-KENT L. REV. 141 (2017).

85. Class Action Complaint at 2, Green v. Morningstar, Inc., No. 1:17-cv-05652 (N.D. Ill. Aug. 3, 2017).

86. *Id.*

87. *Id.* at 5.

4. Public Judicial Oversight

As automated investment advice firms capture increasing market share, judicial oversight remains essential. Many financial services firms now impose arbitration agreements and class action waivers on consumers.[88] If these agreements become widespread in the automated investment advice sector, public courts may not be presented with opportunities to update common law standards for a new technological context. Additionally, the public would also lose the ability to discover reputational information through public court processes. For example, if the GoalMaker dispute discussed above had been shunted into arbitration instead of a public court, this article would not have had the opportunity to review the complaint's allegations.

CONCLUSION

Automated investment advice firms offer significant benefits. If their platforms improve the delivery of high-quality, less-biased financial advice, their growth may unlock significant benefits. If these firms improve asset allocation and induce users to increase their savings rates, they may mitigate the coming retirement crisis. At the least, automated investment advice firms seem likely to accelerate changes in the asset management industry and to shift more investors toward passive investing models.

As these firms grow, regulators will need to grow their expertise and capabilities to provide effective oversight for these new models.[89] To avoid unwarranted regulatory burdens, regulatory oversight should scale with the assets managed automated investment advice firms.[90] Because rapidly automated investment advice firms already manage billions, regulators should fairly review their operations and devote resources to developing greater competency as digital regulators.[91]

88. *See generally* Benjamin P. Edwards, *Arbitration's Dark Shadow*, NEV. L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012246 [https://perma.cc/Z6JD-MDYC].

89. *See generally* Van Loo, *supra* note 76.

90. The SEC announced that it would scrutinize "robo-advisers" in its 2017 Examination Priorities. SEC, EXAMINATION PRIORITIES FOR 2017, at 2 (2017), https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2017.pdf [https://perma.cc/AJ8J-HFTZ].

91. *See* Van Loo, *supra* note 76, at 1323 ("To keep up, agencies will need to develop increasingly sophisticated and automated tools.").