Potential Consumer Harm Due to Regulation on Financial Advisory Communication in the FinTech Age

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This article examines potential consumer harm that may arise due to regulating modern financial services communication technology with rules written in the early 20th century. It is argued that disparities in record keeping regulation across communication mediums disincentivizes the use of technology capable of generating records for consumer retention, while incentivizing the use of technology which shields financial advisors from accountability. Experimental evidence is provided in support of this argument. Further, it is argued that regulation disparities across communication mediums may result in more wrongful accusations of advisor misconduct, less reporting of genuine misconduct, less self-policing among industry members, and greater unrectifiable consumer harm. Objections to these arguments are considered, along with practical guidance for consumers, regulators, and policy makers.

Keywords: communication, consumer protection, financial advice, planner–client relationship, record keeping, regulation

Consumer interactions with a financial planner generally include a high degree of asymmetric information. Most financial planners possess far greater financial knowledge—including knowledge of financial markets, products, and regulation—than the consumers they work with. This asymmetry places consumers in a vulnerable position and elevates the importance of trust in the planner–client relationship. Successful financial planners are generally highly skilled at building trust among clients and prospective clients. However, this trust is not always warranted, and sometimes financial planners will engage in fraudulent or deceptive behavior. In such cases, communication records are a powerful tool for enabling consumers to build a misconduct case against financial planners. Yet a consumer's ability to build a misconduct case is often dependent upon the existence of communication records, and not all mediums of communication are equally conducive to producing such records.

In this article, the consumer harms which may arise due to the policies enforced by regulatory bodies—such as the Securities and Exchange Commission (SEC) and Financial Industry Regulatory Authority (FINRA)—which incentivize or disincentivize the use of various communication technologies are evaluated. This article contributes to the existing literature by exploring unintended consequences of financial advisory regulation that have not been addressed in existing literature, presenting a deductive argument of the existence of such unintended consequences, and providing empirical evidence that is supportive of some of the logical conclusions reached. In particular, the empirical findings of this study suggest that advisory communication regulations do influence financial advisor behavior, and do so in a manner that nudges financial advisors away from using common communication mediums that provide stronger evidence of communication that can protect consumers, such as text messaging, in favor of communication mediums that provide weaker evidence that can protect consumers, such as telephone.

This article proceeds as follows. Background information is covered, including communication mediums commonly utilized by financial planners and their clients, as well as existing regulations which influence communication technology adoption among financial planners. Next, it is argued that existing regulations disincentivize the use of

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communication technologies which generate permanent records capable of enabling consumers to hold financial planners accountable, while incentivizing the use of communication technologies which decrease accountability. Results from an experimental study examining the influence of current regulation on financial advisor behavior are then provided. Results from the empirical analysis in this article support several of the arguments made in the preceding section. In particular, experimental evidence is provided which suggests that current regulations discourage the use of communications mediums that provide consumers with evidence of communication content (e.g., text messaging) and encourage the use of communication mediums which provide no evidence of communication content (e.g., telephone). Finally, objections to the arguments of this article are considered, as well as practical guidance for consumers, policy makers, and regulators.

Background

Technology, Financial Planning, and Consumer Well-Being

Technology is a potentially powerful tool for promoting consumer financial well-being. Cao, Gong, and Zeng (2020) found that social media use for personal finance purposes was associated with positive financial outcomes and user satisfaction. While it has been noted that more research is needed to better evaluate the impact of financial planning interventions (Collins, 2017), studies have found engaging in financial planning to be positively associated with consumer outcomes. Moreland (2018) found that obtaining financial advice was positively associated with other positive financial behaviors. Financial planning has also been found to potentially have non-financial benefits to individuals, as interventions have been found to positively impact cognitive outcomes for individuals, such as improving self-control (Tumataroa & O'Hare, 2019). Chan, Huang, and Lassu (2018) found that when seeking information to improve financial well-being, individuals only considered sources with perceived attributes that aligned with their preferences. Chan et al.'s (2018) findings have relevance to both technology and financial planning with respect to improving consumer financial well-being, as their findings suggested that tailoring communication channels to align with consumer preferences could be one potential way to improve the likelihood of utilizing an information source.

Mediums of Planner–Client Communication

Prior research has found communication to be a key element in determining the level of client trust with a financial planner (Christiansen & DeVaney, 1998). Further, Christiansen and DeVaney (1998) found that trust was associated with client commitment, and subsequent studies have found that numerous communication tasks, skills, and topics were all associated with the perceived trust and commitment among financial planners and their clients (Sharpe, Anderson, White, Galvan, & Siesta, 2007). A recent study found that planner–client communication was an important predictor of client satisfaction, trust, and commitment—although results indicated that it was important to examine different types and frequencies of planner–client communication in order to understand the nuances of such relationships (Cheng, Browning, & Gibson, 2017).

Face-to-Face. Face-to-face communication is one of the most fundamental mediums of communication in the planner–client relationship. Financial planners often meet with clients in person at locations such as a financial planner's office, the client's home or office, or in a public space such as a coffee shop or restaurant. In many ways, face-to-face communication is much richer than other forms of communication in the planner–client relationship. For instance, in addition to the words exchanged in a face-to-face conversation, communication also happens in additional ways, including, but not limited to, vocal tone, body movements, physical contact, and signals sent through the use of artifacts such as clothing (Duncan & Fiske, 2015). Because financial planning is a credence good, meaning that it is hard for consumers to assess the quality of services provided even after those services have been delivered (Sharma & Patterson, 1999), cues picked up from face-to-face communication can be helpful for trying to assess other characteristics of a financial planner, such as their credibility and trustworthiness. Additionally, financial planners may rely on the high degree of information conveyed through face-to-face communication as a means to assess the validity of client statements made verbally or through other forms of communication (e.g., a client may say they are comfortable taking a certain level of risk, but their face-to-face communication behavior may indicate otherwise). One disadvantage of face-to-face communication is that the back-and-forth, synchronous nature of such conversation can result in incomplete contemplation of responses and poor recall of details

discussed. Additionally, face-to-face communication leaves no physical or digital evidence of what was communicated.

Telephone. Telephone is another form of communication highly utilized by financial planners. Like face-to-face communication, telephone communication is synchronous. However, unlike face-to-face communication, telephone communication is purely auditory and conversation participants cannot rely on visual cues, although certain auditory cues can still convey a high level of information (e.g., pauses, tone, and articulation). Similar to face-to-face communication, the synchronous nature of telephone communication can result in incomplete contemplation of responses and poor recall of details. While telephone communication leaves little evidence regarding the topic of a synchronous conversation (assuming a conversation is not recorded), digital evidence may be generated in the forms of call records (calls sent, calls received, length of calls, etc.). Additionally, telephones with voicemail can enable asynchronous communication, as those engaging in a conversation can sequentially leave voice recordings with one another and carry out a conversation. This form of asynchronous telephone communication does generate considerable evidence of the topic of a conversation, as well as additional details such as the date and time of a call.

Mail and Facsimile. In addition to face-to-face communication and telephone, written communication—often in the form of mail or facsimile—has been the third primary medium of planner–client communication for much of modern history. With the exception of face-to-face written communication (e.g., passing a note back-and-forth) and unlike face-to-face or telephone communication, traditional written communication is purely asynchronous. This results in communication that is often more deliberate in how it is expressed and articulated. However, much of the richness contained within face-to-face or telephone communication is lost in written communication, as the precise meaning of one's words and the subtle visual or auditory cues often embedded in other forms of communication can be hard to convey in writing. Written communication does generate physical evidence which can easily be stored in digital format, although forgery can present issues in determining the authenticity of written communication.

Electronic Communication. Since the 1980s, new forms of communication technology have become widely available. For the sake of simplicity, this article refers to these new technologies as "electronic communication," although that term is not intended to be used in a precise or limiting manner. Spurred by tremendous progress in computing technology, huge advancements have been made in consumer communication abilities, to the point that today two individuals of relatively modest means—one in the United States and the other in China—can participate in a synchronous video call using a small wireless device they carry around in their pockets. Forms of communication commonly utilized by financial planners and their clients would include email, text messaging (short message service [SMS] and multimedia messaging service [MMS]), social media (e.g., Facebook, Twitter, and LinkedIn), and video conferencing.

Unlike face-to-face, telephone, and traditional written communication—all of which contain relatively high levels of homogeneity of use within their respective mediums—electronic communication is often much harder to generalize. For instance, electronic communication is often hard to classify as exclusively synchronous or asynchronous, as the synchronous nature of electronic communication often depends on how it is used. For instance, email and text messaging are often thought of as asynchronous in nature, yet the two may be more akin to synchronous communication when two or more individuals engage in uninterrupted back-and-forth communication. Additionally, electronic communication can often contain a mixture of traditional visual, auditory, and written communication, as well as less traditional forms of communication, including communication through third-party images or videos (e.g., emojis, memes, and filters). Electronic communication varies in the type of evidence left behind as well. While often electronic communication leaves a high degree of evidence which consumers can choose to store physically or digitally, some forms of electronic communication, such as Snapchat, are specifically designed to reduce the amount of evidence left behind.

Regulation of Communication in Financial Services. In the United States, financial advisor communication is generally regulated in one of three ways: (a) § 275.203A-1(a)(1) of the Investment Advisers Act of 1940 (IAA) states that

Registered Investment Advisers (RIAs) managing $100 million or more in assets are generally regulated by the SEC; (b) § 275.203A-1(a)(1) of the IAA states that RIAs managing less than $100 million are generally regulated by state securities regulators, which, in practice, often adopt model rules developed by the North American Securities Administrators Association (NASAA) that align with those enforced by the SEC; and (c) broker-dealers (BDs) are generally regulated by the FINRA, which is a self-regulatory organization (SRO) that is overseen by the SEC. Due to the parity that typically exists between rules enforced under (a) and (b), there is effectively one set of regulatory rules which governs RIAs and another set of regulatory rules which governs BDs. Specifically, the IAA governs RIAs, while FINRA Rules govern BDs.

Regulation of Communication Within RIAs. The IAA identifies two forms of communication of particular importance to planner–client communication which are subject to additional regulatory oversight: written communication and advertisements. Regarding written communication, § 275.204-2(a)(7) of the IAA states:

> Originals of all written communications received and copies of all written communications sent by such investment adviser relating to: (i) Any recommendation made or proposed to be made and any advice given or proposed to be given; (ii) Any receipt, disbursement or delivery of funds or securities; (iii) The placing or execution of any order to purchase or sell any security; (iv) The performance or rate of return of any or all managed accounts or securities recommendations.

Notably, the aforementioned section of the IAA captures any modern form of written electronic communication—such as written communication through email, text messaging, and social media—but it does not capture visual or oral electronic communication, such as planner–client use of video conferencing or Voice over Internet Protocol (VoIP) communication.

The second broad category of communication regulation covered by the IAA is advertising. IAA advertisement regulation focuses on fraudulent, deceptive, or manipulative business advertisements. Regarding the definition of advertisements, § 275.206(4)-1(b) of the IAA states:

> For the purposes of this section the term ***advertisement*** shall include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

Regarding the retention of advertisement records, § 275.204-2(a)(11) of the IAA states:

> A copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons (other than persons connected with such investment adviser), and if such notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication recommends the purchase or sale of a specific security and does not state the reasons for such recommendation, a memorandum of the investment adviser indicating the reasons therefor.

Notably, the requirements regarding the retention of records related to advertisements are a bit broader, as the requirements do encompass oral and visual forms of communication, such as radio and television. Additionally, a financial advisor's website or content posted through various content sharing platforms, such as video sharing platforms (e.g., YouTube) or blogging platforms (e.g., Medium or WordPress) may be considered advertisements, depending on the nature of the content.

Regulation of Communication Within BDs. FINRA is responsible for regulating BDs. FINRA rules classify electronic communication subject to oversight and record keeping in three broad categories: advertisements, sales literature, and correspondence (National Association of Securities Dealers [NASD], 2006). FINRA Rule 2210 defines correspondence as written communication, including electronic communication, which is made available to 25 or

fewer retail investors. Such communication is subject to supervision and must be retained for record keeping purposes, as outlined in FINRA Rule 2210. FINRA Rule 3110 outlines specific requirements firms must fulfill in order to supervise their brokers. Notably, FINRA Rule 3110(b)(4)(A) states that such supervision must include:

> Incoming and outgoing written (including electronic) correspondence to properly identify and handle in accordance with firm procedures, customer complaints, instructions, funds and securities, and communications that are of a subject matter that require review under FINRA rules and federal securities laws.

Supervision requirements also apply to electronic chat rooms, instant messaging, websites, research reports, and online seminars (NASD, 2006), as well as social media (FINRA, 2010), blogs (FINRA, 2010), mobile applications (FINRA, 2017), and communication via personal devices with clients, such as SMS text messaging with a personal phone (FINRA, 2011, 2017).

Regulatory Similarities Among All Financial Advisors. Despite the differences in specific rules and entities governing RIAs and BDs, many commonalities exist in the regulation of communication between both segments of the financial advisory industry. Of particular importance to the issues considered within this article, nearly all written communication between a financial advisor and their client—electronic or not—must be supervised and retained by a financial advisory firm, whereas non-written communication (e.g., a phone call or in-person meeting) is subject to neither supervision nor retention. While some forms of oral communication are required to be supervised and retained (e.g., a public appearance deemed to be an advertisement), this generally does not apply to one-on-one communication between a financial advisor and their client.

Arguments

Impact of Regulation on Communication Medium Adoption

In this section, it is argued that existing regulations discourage the use of communication technologies which generate permanent records capable of enabling consumers to hold financial planners accountable. The main argument for this position is as follows:

> Premise (P) 1: All else being equal, when the burden of using one communication medium is increased, other communication mediums become relatively more attractive.
> P2: From the perspective of financial advisors and the firms they work for, existing financial advisory regulations impose considerable burdens on written communication that are not imposed on non-written communication (e.g., burdens are placed on text messaging that are not placed on telephone or in-person meetings).
> Conclusion (C) 1: Therefore (from P1 and P2), all else being equal, existing financial advisory regulations incentivize the use of non-written communication.
> P3: Relative to non-written communication, written communication (electronic or not) creates more tangible evidence that can allow consumers to hold financial advisors accountable.
> C2: Therefore (from C1 and P3), all else being equal, existing financial advisory regulations disincentivize the use of communication mediums which allow consumers to hold financial advisors accountable.
> C3: Conversely (from C2), existing financial advisory regulations incentivize the use of communication mediums which make it difficult to hold financial advisors accountable.

Conclusions C2 and C3 will be empirically examined in the experimental study presented later in this article. Specifically, the following hypotheses will be tested:

> **H1:** Under current regulatory rules (compared to a hypothetical scenario without current restrictions on financial advisor communication), financial advisors are less inclined to reply to clients via text message.

> **H2:** Under current regulatory rules (compared to a hypothetical scenario without current restrictions on financial advisor communication), financial advisors will, in lieu of texting, use some alternative forms of communication which do not provide evidence of communication that can be retained by the consumer (e.g., a phone call).

Impact of Communication Regulation on Achieving Just Outcomes

In this section, it is argued that regulation disparities across communication mediums may result in less just outcomes, including higher levels of unrectifiable consumer harm, higher levels of wrongful accusations of advisor misconduct, lower levels of reporting genuine misconduct, and lower levels of self-policing among industry members. The arguments for such positions are as follows:

> P4: Relative to non-written communication, written communication generates more reliable evidence for ex-post evaluation of planner–client communication by a neutral third-party.
> C4: Therefore (from C1 and P4), all else being equal, existing financial advisory regulations incentivize the use of communication which generates less reliable evidence.
> P5: When less reliable evidence of planner–client communication is available, the potential to engage in opportunistic behavior which unjustly exploits the counterparty in a planner–client relationship is greater (including both a planner exploiting a client and a client falsely accusing a planner of wrongdoing).
> C5: Therefore (from C4 and P5), all else being equal, existing financial advisory regulations increase the potential to engage in opportunistic behavior which unjustly exploits the counterparty in a planner–client relationship.
> P6: When less reliable evidence of planner–client communication is available, the likelihood of an independent third-party judge or arbiter reaching a just verdict in a planner–client dispute is reduced (where a just outcome would include both exonerating a party wrongfully accused and holding a wrongdoer accountable when rightfully accused).
> C6: Therefore (from C4 and P6), all else being equal, existing financial advisory regulations decrease the likelihood of reaching a just verdict during third-party resolution of a planner–client dispute.
> P7: When less reliable evidence of planner–client communication is available, consumers are less inclined to report genuine incidents of misconduct.
> C7: Therefore (from C4 and P7), all else being equal, existing financial advisory regulations decrease the likelihood of consumers reporting genuine incidents of misconduct.
> P8: When less reliable evidence of planner–client communication is available, financial service professionals are less capable of self-policing one another and reporting financial advisors who engage in misconduct.
> C8: Therefore (from C4 and P8), all else being equal, existing financial advisory regulations decrease the ability of financial service professionals to self-police one another and report other financial advisors engaged in misconduct.

Together, the deductive logical arguments from the prior sections make the case that current financial advisory communication regulations may have unintended consequences which may result in harm to consumers, while also discouraging communication behavior that would help hold financial planners engaged in wrongdoing accountable and potentially exonerate wrongfully accused financial planners who have not engaged in misconduct.

An Experimental Study

In this section, the methods and results from an experimental study testing the effects of current regulatory policy on financial advisor behavior are presented. This study examines the communication methods financial advisors would use to communicate with clients in hypothetical scenarios. Specifically, this study tests Hypotheses 1 and 2 developed from the logical arguments in the prior section.

Method

A convenience sample of 99 financial advisors from the United States was recruited via social media platforms including LinkedIn and Facebook. Four respondents from outside of the United States were excluded from the analysis due to differing international regulatory regimes, and 5 respondents were excluded due to missing data, resulting in a final analytic sample of 90 respondents. The only demographic information collected was a financial advisor's age, which ranged from a minimum of 23 to a maximum of 75 (M_{Age} = 38.92; SD_{Age} = 10.78). Participant age was asked on the final page of the survey (on a page after the measurement of the dependent variable in this analysis) to reduce the risk of biasing respondents.

Respondents were randomly assigned to one of two versions of the survey. A full copy of the survey used in this study, which was overseen by the Institutional Review Board at the University of Southern Maine, is available from the author upon request. In the first version of the survey (control group), respondents were asked to indicate how they would most likely communicate with clients in various scenarios. While it was not explicitly stated (to reduce the likelihood of biasing respondents or hinting at the key relationship of interest within the study), because respondents were asked to indicate how they would respond without any further qualifications, it is presumed that these individuals in the control group were responding within the context of existing regulatory and professional requirements. The second version of the survey (treatment group) asked participants to respond to the same scenario prompts, except respondents were given the following prompt at the beginning of their survey: "Many financial advisory firms/employers restrict how financial advisors may communicate with their clients. Please answer the questions on this page assuming that ***NO RESTRICTIONS*** are in place and that you can compliantly communicate with clients ***however you prefer***."

Respondents were asked to indicate how they would most likely communicate with a client (given options of face-to-face communication, email, text message, phone call, social media, and mail) based on three different scenarios. The first two scenarios—(a) congratulating a client after being highlighted in a local newspaper for a community service award; and (b) sharing a news article with investment information relevant to a client—were only provided as an attempt to make the focus of the study less apparent to participants. The third scenario was the scenario of interest in this study, which read: "Your client sends you a text message with a question about an investment proposal that you presented to them 30 minutes ago. Assuming the question is fairly straightforward, which of the following communication methods would you be ***MOST*** likely to use to respond to your client"? The scenario of interest was intentionally set up in a manner that was thought to most commonly elicit a response via text message in order to better illustrate the effect, if any, of current regulatory policies.

Because some firms have adopted technology which makes it feasible to comply with regulations and archive communication via means such as text messaging and social media, respondents were also asked to indicate whether their firm or employer currently prohibits them from discussing investment information with clients via any of the communication methods covered in this survey. If individuals reported that they were prohibited from communicating with clients via text message, they were also asked to agree or disagree with two follow-up prompts: (a) "If I were allowed to, I would text some investment information to my clients," and (b) "I have sometimes called my clients to answer questions I would have usually answered with a text message if I was not prohibited from doing so." All of the questions related to technology that could or could not be used were asked on a separate page following the scenario of interest (along with the question about a client's age) to reduce the risk of bias being introduced by these questions.

Although participants were assigned at random, more respondents ended up in the control group (n = 51) than the treatment group (n = 39) due to random chance. Another important dimension on which respondents varied was whether their current employers prohibit respondents from texting (n = 50) or do not (n = 40). Among those who were not allowed to text, 28 respondents (56.00%) were in the control group and 22 respondents (44.00%) were in the treatment group. Among those who were allowed to text, 23 respondents (57.50%) were in the control group and 17 (42.50%) were in the treatment group. 77.50% of respondents who are allowed to text reported that they would reply to an investment-related text message with a text message, whereas only 20.00% of respondents whose firms prohibit texting indicated that they would respond via text message. Among advisors who are not allowed to text clients, 44.00% reported that they would reply to an investment-related text message via a phone call and 36.00% reported that they would reply via email. Among advisors who are allowed to text clients, 7.50% reported that they would reply to an investment-related text message via phone call and 15.00% reported that they would reply via email. Full descriptive statistics are summarized in Table 1.

Results

Several multinomial logistic regressions were used to predict the indicated method of reply in response to receiving an investment-related question from a client via text message. Multinomial logistic regression provided the ability to isolate the effect of the treatment (being told to reply how one would without existing regulatory restrictions in place) after controlling for other differences between groups

TABLE 1. Descriptive Statistics

			Full Sample (n = 90)		Cannot Text Clients (n = 50)		Can Text Clients (n = 40)	
			n	**Percentage**	***n***	**Percentage**	***n***	**Percentage**
Cannot text clients			50	55.56	50	100.00	0	0.00
Can text clients			40	44.44	0	0.00	40	100.00
Control			51	56.67	28	56.00	23	57.50
Treatment			39	43.33	22	44.00	17	42.50
Selected Method of Reply								
Email			24	26.67	18	36.00	6	15.00
Phone			24	26.67	22	44.00	3	7.50
Text			41	45.56	10	20.00	31	77.50
	Min	Max	Mean	*SD*	Mean	*SD*	Mean	*SD*
Age	23	75	38.92	10.78	38.04	9.43	40.03	12.30

that persisted despite random assignment (i.e., age and being allowed to text clients). Consistent with Nieuwenhuis, Forstmann, and Wagenmakers (2011), the first analysis included all respondents (regardless of ability to text clients) with an interaction term between ability to text clients and treatment status. Two additional models were estimated among only those who were allowed to text clients and those who were not. The purpose of these additional analyses was to generate more easily interpretable models and to better quantify the effect size of the treatment among those who were not allowed to text clients. Coefficient estimates from all three multinomial logistic regression models are reported in Table 2.

In the model including all respondents, the overall fit was moderate with a pseudo r-squared value was 0.260. In the additional analyses restricted to only those who could not or could text clients, the pseudo r-squared values were lower at 0.147 and 0.070, respectively. A significant relationship was observed among the interaction term between treatment and being allowed to text ($p < .05$) when comparing those who reported responding via email in comparison to those who in the base group (text message). Because marginal effects cannot be computed for interaction terms (Williams, 2012) and evaluating the interaction term was the primary reason for conducting the analysis among all respondents, marginal effects were computed for the secondary analyses to provide more easily interpretable results. Full marginal effect results are provided in Table 3.

On average, among otherwise similar individuals who were not allowed to text clients, being in the treatment group (i.e., those told to respond while disregarding current policies) compared to the control group (i.e., the answering based on current practices) increased the probability of responding to a client's investment inquiry via text message by 0.369 ($p < .001$) and decreased the probability of responding via phone by 0.172 ($p < .1$) and via email by 0.198 ($p < .01$). Among respondents who were allowed to text clients, no significant effects of the treatment were observed. On average, among otherwise similar individuals who were not allowed to text clients, a one standard deviation increase in an advisor's age decreased the probability of responding via phone by 0.157 ($p < .01$) and increased the probability of responding via email by 0.192 ($p < .001$). No significant effects were observed between age and method of reply among those who worked for firms which allowed texting.

In addition to the multinomial logistic regression analysis above, some binary (agree/disagree) survey questions were asked only of individuals whose current firm or employer does not allow texting investment information to clients. Consistent with the large effect sizes observed in the multinomial logistic regression above, 50.9% of respondents who reported that they currently cannot text their clients investment information reported that they would text their clients investment information if they were allowed to. Additionally, 70.9% of respondents who reported that they currently cannot text their clients investment information reported that they have called clients to answer investment questions

TABLE 2. Results From Multinomial Logistic Regressions Predicting Advisor Communication Method Selected for Response to an Investment-Related Text Message From a Client

	Full Sample (n = 90)		Cannot Text Clients (n = 50)		Can Text Clients (n = 40)	
	B	***SE***	**b**	***SE***	**b**	***SE***
Selected Method of Reply						
Text (Base Outcome)	–	–	–	–	–	–
Email						
Intercept	0.465	1.325	−1.448	1.976	−2.388	1.804
Age	0.034	0.028	0.085	0.050	0.003	0.039
Treatment	−2.162*	0.945	−2.361*	0.992	1.156	0.943
Text allowed	−4.194***	1.097	–	–	–	–
Treatment * text allowed	3.413*	1.359	–	–	–	–
Phone						
Intercept	4.266**	1.564	2.798	1.899	1.287	2.850
Age	−0.064†	0.037	−0.025†	0.050	−0.102	0.087
Treatment	−1.871*	0.919	−1.903*	0.911	−0.085	1.322
Text allowed	−4.206***	1.079	–	–	–	–
Treatment * text allowed	1.697	1.586	–	–	–	–
Model Fit Statistics						
N	90		50		40	
Log likelihood	−71.009		−44.838		−25.168	
LRχ2 (df)	49.94*** (8)		15.42** (4)		3.77 (4)	
Pseudo R^2	0.260		0.147		0.070	

Note. df = degrees of freedom; SE = standard error.
†p < .1. *p < .05. **p < .01. ***p < .001.

that they otherwise would have responded to via text if they were allowed to do so.

Discussion

In this section, implications of the empirical results are discussed, objections to the arguments presented logically are considered, and practical guidance for consumers, policy makers, and regulators is presented.

Empirical Results

Several important insights from the empirical analysis of this study are worth discussing further. First, while the empirical portion of this study cannot speak to all conclusions presented (particularly C5 through C8), the empirical findings of this study are consistent with conclusions C1, C2, C3, and C4. Consistent with the arguments presented in this study, it does appear that existing policies disincentivize the use of text messaging (a form of communication which generates a permanent record of content discussed) and incentivize the use of telephone (a form of communication which provides no permanent record for consumers to rely on).

Evidence for these conclusions exist not only in the increased probability of responding via text message among advisors in the treatment group (i.e., those told to disregard existing policies) versus the control group, but also in the increased probability in responding via text message by advisors who are presently in firms that allow them to text clients. Point estimates of the base probabilities of responding to the investment-related text message by text message ranged from 0.20 at firms which do not allow text messaging to 0.78 at firms which do allow text messaging. This difference is notable given that the point estimates suggest a 390% higher rate of reply via text message among advisors at firms which do not prohibit text messaging.

TABLE 3. Marginal Effects From Multinomial Logistic Regression Predicting Advisor Communication Method Selected for Response to an Investment-Related Text Message From a Client

	Cannot Text Clients (n = 50)			Cannot Text Clients (n = 40)		
	Method of Reply			Method of Reply		
	Text	Phone	Email	Text	Phone	Email
Variable	**MarginalEffect (SE)**	**Marginal Effect (SE)**	**Marginal Effect (SE)**	**Marginal Effect (SE)**	**Marginal Effect (SE)**	**Marginal Effect (SE)**
Treatment						
Treatment vs. control	0.369***	−0.172†	−0.198**	0.039	−0.051	0.013
	(0.105)	(0.094)	(0.071)	(0.068)	(0.035)	(0.061)
Age						
+1 *SD*	−0.035	−0.157**	0.192***	−0.175	−0.02	0.195
	(0.043)	(0.055)	(0.054)	(0.175)	(0.063)	(0.177)
Base Probabilities						
p(y|base)	0.200	0.440	0.360	0.775	0.075	0.150

Note. *df* = degrees of freedom; *SD* = standard deviation.
†$p < .1$. *$p < .05$. **$p < .01$. ***$p < .001$.

The effect of current policy versus a hypothetical change in policy can also be assessed via comparison of the control and treatment groups in this study. Among advisors currently prohibited from texting, the probability of replying by text message increased from 0.20 to 0.57 (a 285% increase) when advisors currently prohibited from texting were asked to answer as if any such restrictions were not in place. As would be expected, no statistically significant difference in response behavior was observed between the control and treatment groups among those who are currently allowed to text. Interestingly, the preference for texting and against phone calls was stronger among those who currently can text clients. This may suggest that exposure to the real-world practice of texting clients could result in even higher rates of actual responding by text message (particularly in lieu of phone calls) than advisors who are not familiar with the practice anticipate. It is also worth noting that not all shifts toward texting necessarily reflect higher rates of communication via means that generate permanent records for consumers. Among advisors who cannot text clients, some of the 0.369 increase in probability of texting clients was merely a shift from one form of written communication (email) to another (texting). However, the 0.172 reduction in probability of replying via phone calls would entirely represent a shift from a method of communication which generates no permanent record of the content discussed to a method of communication that does.

Objections

Limitations of These Empirical Data. The sampling methodology used in this article is a limitation of the article. Ideally, a sample would be larger and would not rely on a convenience sample. However, regarding the size of the sample (n = 90), the present study does surpass the guidelines of having at least 10 respondents per independent variable when conducting multinomial logistic regression (Schwab, 2002). While drawing from a representative sample was not feasible for the purposes of this study, it is worth considering the ways in which this sample may be suspected to differ from the population of financial advisors in the United States. Because respondents were recruited via social media, it may be suspected that the sample was younger and more technologically savvy than the industry generally is. Indeed, the average age of an advisor in the present study (38.9 years old) was younger than the average age of a financial advisor that has been reported by other sources as roughly 50 years old (Cerulli Associates, 2017; Marsh, 2015). Furthermore, a 2016 survey conducted by Putnam Investments found that adoption of social media for business purposes was only 85% among financial advisors (Putnam Investments, 2016). Notably, advisors would not need to have adopted social media for business purposes to have encountered one of the recruitment posts, and the percentage of financial advisors on social media has likely continued to grow since 2016, but it is still the case that recruiting via social media will result in an overrepresentation of those who use social media more frequently or at all.

It is not clear how this younger and, likely, more technologically savvy sample might bias the results. On one hand, such respondents may be more likely to feel comfortable using text messaging as a form of communication compared to older generations, and therefore were more likely to report adoption in the event that texting was an option. However, on the other hand, such individuals may be more likely to work at or run firms which have sought out the means to archive text messaging communication, and therefore the proportion of advisors that presently have access to such tools may be overstated in this analysis. While the empirical findings of this study should not be seen as generalizable to the entire financial advisory industry, the conclusions of this article are still based on a strong logical foundation, and the experimental findings of this study provide some initial empirical evidence which is consistent with the logical arguments made in this manuscript.

Speculative Nature of Some Premises. One objection to the arguments presented in this article is that some of the premises are speculative. A concern with any logical argument is that though the reasoning may be valid (i.e., conclusions are properly derived from the premises), the premises themselves may be false. An argument is deemed to be sound only if it is both valid and its premises are actually true (Shapiro & Kouri Kissel, 2018). Therefore, though the logic presented in the arguments of this article may be true, if the premises themselves are not, then the arguments would be unsound.

This is a valid concern. Unfortunately, because data on the implications of financial advisory communication regulation are limited (beyond what has been considered in the present study), some of the premises presented in this article are necessarily speculative. It is the author's opinion that premises used in these arguments are reasonable enough

to further contemplation of the important logical conclusions of such premises, despite the unfortunate lack of data. For instance, while P1 (*all else being equal, when the burden of using one communication medium is increased, other communication mediums become relatively more attractive*) could be false, price-theoretic considerations (see Landsburg, 2013) provide strong justifications for this premise. While it is possible that communication medium adoption would increase as it becomes more burdensome to users, this would violate many other empirical findings associated with human behavior and the use of one's scarce resources.

Incentives Exist Regardless of Regulation. From P1 and P2 it was concluded in C1 that existing financial advisory regulations incentivize the use of non-written communication. One objection to this conclusion may be that such incentives exist regardless of regulation—that is, if the burdens placed on written communication by FINRA and the SEC were removed, it would still be the case that financial advisors who intend to engage in wrongdoing would be incentivized to leave as little evidence as possible, therefore eschewing written communication in favor of non-written communication. Two replies to this objection should be considered.

First, while it is true that advisors who intend to engage in wrongdoing may choose communication channels which hinder the ability to conduct an ex-post examination of the advisor's communication with their client, it is not necessarily the case that every instance of advisor misconduct is intentional. Sometimes misconduct may be unintentional, such as instances of negligence or financial advisor ignorance. Because many companies have banned financial advisors from texting clients due to lacking the technology needed to comply with industry regulations (Werner, 2018), many simple inquiries which may have otherwise been answered via text message may instead be answered via a phone call. This constant but subtle push of advisors away from communication mediums that generate evidence which can protect consumers, can result in greater consumer harm even when financial advisors are not intending to engage in wrongdoing. The 2017 high profile case between former National Basketball Association (NBA) athlete Tim Duncan and his former financial advisor, Charles Banks, illustrates this dynamic, as text messages from Banks to Duncan played a key role in determining what exactly was said between the two (Contreras, 2017). Had Banks called Duncan instead of texting him, Duncan would not have had as reliable of evidence for evaluation by a third-party.

Second, the intent of this article is not to argue that the use of non-written communication to obfuscate evidence of wrongdoing is solely the result of industry regulation. Given the physical or digital evidence often left by written communication, it does have advantages as a communication medium for those who wish to engage in wrongdoing. It is therefore likely that non-written communication will continue to be a preferred medium of communication for those with ill intentions, but nonetheless, this article argues that existing regulations discourage the use of written communication beyond levels that would already occur due to ill intentions.

Benefits May Outweigh the Costs. Another objection to the argument presented in this article may be that while it is true that existing financial advisory regulations discourage the use of technology mediums that best allow consumers to hold financial advisors accountable, it is not necessarily the case that these harms to consumers outweigh the benefits of strict requirements regarding the monitoring and retention of all written communication. This is a valid objection and one that deserves further consideration. The purpose of this article is not to provide a full cost–benefit analysis of the existing regulation (the empirical data for such an analysis are not currently available). Instead, the purpose of this article is to acknowledge the often-overlooked reality that, at least at the margin, current policies do push financial professionals toward communication mediums that make it more difficult for consumers who have been wronged to pursue justice. Though a complete cost–benefit analysis cannot currently be conducted, this current exploration is still worthwhile because marginal improvements in policy are available which can reduce the degree to which consumers may be harmed without entirely eliminating the policies which may benefit consumers.

Practical Implications

Regulation. The primary issue with the existing regulatory framework is that it pushes advisors toward non-written communication (above and beyond incentives that may already exist to engage in non-written communication). Policy makers could address such disparities in several ways. One approach would be to increase regulation of non-written communication, requiring firms to record and retain

all planner–client communication regardless of its form. This approach would have the advantage of being highly thorough and provide a great deal of detail when assessing claims of wrongdoing. However, this approach would have some serious limitations as well, including placing a tremendous burden on firms, potentially interfering with a planner's ability to build trust with their clients (e.g., if a client is uncomfortable being recorded in-person), potentially infringing on consumer autonomy (e.g., if a client does not wish to have their intimate conversations with a professional recorded and retained for compliance purposes), and being potentially impossible to implement in some circumstances (e.g., if a planner and client are attending a concert together).

Nonetheless, there is some precedent for requiring the recording of phone calls within the financial services industry. Under the Dodd-Frank Act, the Commodity Futures Trading Commission (CFTC) did initially propose rules that would have placed considerable recording burdens on firms (possibly even requiring recording of unrelated face-to-face conversations, according to the arguments of some—e.g., see public comments regarding Adaptation of Regulations To Incorporate Swaps—Records of Transactions, 2012 in the *Federal Register*, Vol. 77, No. 246, pp. 75, 525–575, 528), and ultimately implemented rules ("Regulation 1.35(a)") that still required the recording of phone calls "limited to those oral communications which lead to a transaction in a commodity interest" (*Federal Register*, Vol. 77, No. 246, p. 75, 528). Regulation 1.35(a) was amended in 2015 to further scale back some of the oral record keeping requirements after a series of no action letters were issued due to some of the challenges associated with implementing and complying with oral record keeping regulation (see *Federal Register*, Vol. 80, No. 247, p. 80, 247). While there is precedent for such oral record keeping requirements, to this author's knowledge, no similar requirements have yet been placed on individuals primarily serving as retail financial advisors.

Another approach that would eliminate disparities between communication mediums could be to liberalize communication regulations and eliminate the need to record and retain written communication (though such a policy could be adopted without changing the requirements that apply to advertisements). There would be some benefits to this approach. First, there is no clear harm or vulnerability introduced through written communication which does not exist through non-written communication as well. Additionally, many written forms of communication—such as text messaging—are categorically more similar to in-person communication than they are to advertisement. One issue with existing regulations is that they were written in the first half of the 20th century, prior to the tremendous growth in consumer communication technology that has occurred since the 1980s. At the time of writing the current rules, policy makers could not have anticipated the ways in which communication would evolve as technology progressed. A second advantage to this approach is that it could allow financial planners to compliantly communicate with clients through the mediums clients prefer, which could help build trust and greater commitment to take actions which improve financial well-being. Consumers have shown tremendous interest in utilizing SMS text messaging for communication, yet, nearly two decades after text messaging was adopted by consumers in the United States, many financial advisors still lack access to tools which would allow them to compliantly text their clients (Thrasher, 2018). However, a considerable downside to this approach may be that valuable information that is retained and accessible under current policies for assessing advisor misconduct could be lost.

Additionally, many policy solutions exist between the two previously presented extremes. Even partial liberalization—particularly with respect to new forms of communication technology or those which are hard to capture and retain—could reduce the disincentives for advisors to communicate with clients in writing. For instance, the centralized nature of email makes it easy to record and retain all communication through this medium. Even the smallest firms have technological solutions available to them that make this type of communication easy to retain. As a result, keeping the requirement to retain email but liberalizing policies associated with less centralized forms of communication that are inherently harder to capture—such as SMS text messaging or newly developed social media applications—could provide a better balance between capturing what is reasonably easy to capture and allowing advisors to communicate with clients through mediums which better enable clients to hold advisors accountable. Additionally, different approaches such as risk-based monitoring—similar to special requirements under FINRA Rule 3170 for specific firms which have been found to be engaged in misconduct to record and monitor their telephone use—could be applied

to limit recording requirements to only high-risk firms or those firms that have demonstrated tendencies to engage in misconduct in the past.

The present considerations are also inherently intertwined with debates regarding the role and function of financial regulation in protecting consumers. As financial options have expanded greatly for Americans over the past century, so too has responsibility for households to make decisions in wider and more cognitively demanding contexts (Ryan, Trumbull, & Tufano, 2011). Financial literacy has been seen as an important tool for helping consumers navigate a more "do-it-yourself"-oriented landscape. However, it has been noted that the focus on financial literacy as a means to empower consumers does raise issues with respect to the tension that exists between empowerment (i.e., enabling consumers to better make their own decisions) and responsibilization (i.e., transferring responsibilities previously provided by a government back to individuals; Williams, 2007). Furthermore, positions regarding the proper degree of paternalism among regulators in the area of household finance range considerably (Campbell, 2016). These broader questions are all outside of the scope of this article, but the present analysis can help provide one illustrative example of ways in which well-intentioned policies aimed and promoting consumer financial well-being can fail to achieve their aim.

Consumer Self-Protection. In addition to policies put in place through regulation, consumers themselves can demand more accountable communication from financial advisors. Examples of such behavior could include documenting what was covered in an in-person meeting and asking an advisor to affirm the accuracy of the client's notes via email, as well as recording of in-person meetings for the client's own records. One benefit of the continued progression of technology is that consumers now have more options than ever to take protection into their own hands and improve their ability to hold advisors accountable. Promoting consumer self-protection also has the advantage of giving consumers more autonomy for determining how they want to engage with an advisor, and what information they would like retained about themselves in corporate records.

Financial Planners. Financial planners may wish to more consciously reflect on the ways in which regulation may intentionally or unintentionally influence their communication decisions. Particularly for financial planners that have a fiduciary duty to act in the best interest of their clients, it may be worth considering the ways in which simple decisions—such as how to respond to a client text message—could be influencing consumer well-being. Technological solutions which allow financial planners to compliantly text clients are increasingly becoming available at lower costs for practitioners. As a result, financial planners may wish to consider adopting such technologies not only as a means to communicate with clients via their preferred methods, but also because doing so can allow financial planners to communicate in a way that empowers consumers and may help build trust. However, despite trends with respect to the development of technological solutions specific to text messaging, financial planners should also remain cognizant that this will likely not be the last time that consumer preferences run ahead of technological solutions, and, as a result, financial planners may wish to consciously reflect on how regulation may be influencing their use (or not) of certain emerging social media platforms or other communication methods that may provide benefits to consumers, including greater consumer protection.

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