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COMPARATIVE REGULATION OF MARKET INTERMEDIARIES: INSIGHTS FROM THE INDIAN LIFE INSURANCE MARKET

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Comparative Regulation of Market Intermediaries: Insights from the Indian Life Insurance Market

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Global economic growth and financial liberalization are rapidly increasing the size and depth of insurance markets in emerging markets, and millions of consumers are purchasing life insurance for the first time. Insurance can be a complicated product, and many households in emerging markets have low levels of financial literacy. Many life insurance products are complex, and insurance companies, agents, and/or brokers may stand to profit by steering customers towards policies which offer relatively less value to consumers but relatively higher commissions to agents.

We consider regulation of the sales of insurance as a means for reducing the amount of mis-selling that occurs. This paper was inspired by a field experiment we conducted in India, in which we sent mystery shoppers to visit life insurance agents and solicit financial advice. The experiment and results are reported in Anagol *et al*. (2013).[1] A key finding of the experiment was that life insurance gave unsuitable advice: for some types of clients, agents recommended the wrong product more than 80 percent of the time.[2] Because Indian insurance law is a work-in-progress, we ground our analysis in a consideration of the regulatory regimes used to govern insurance sales in the United States.

In part I, we provide background information on the life insurance markets in India and the United States. In part II, we focus on the regulation of commissions disclosure in the United States and India, before proceeding to a discussion of the results of our field experiment in India, exploiting a recent disclosure mandate for a particular class of life insurance products. In part III, we discuss the more general issue of regulation of advice, focusing on the three-tiers of legal duty (caveat emptor, suitability, and fiduciary) present in U.S. law. These place differing duties upon different types of agents in their product recommendations to, and interactions with, consumers. We use this as a springboard to discuss the recent Indian "suitability" rhetoric appearing in both Indian insurance regulation and broader financial reform efforts. In Section IV, we present our experimental evidence on how quality of advice responded to consumer sophistication, preferences, and needs, in addition to market competition. That evidence gives rise to our recommendations regarding the emerging Indian standards. In Section V, we briefly conclude.

Comparing Life Insurance Markets in the United States and India

In both the United States and India, the life insurance markets involve significant amounts of money and people. In the United States, life insurance premium payments to insurers exceed $100 billion annually,[3] with the majority of people in the United States covered by some type of life insurance.[4] In India, life insurance premium payments to insurers were close to $60 billion[5] and recent estimates suggest that less than twenty percent of Indians have life insurance.[6]

In contrast to the American system of private providers and state-level regulation, federal regulation and a dominant public provider define the Indian life insurance market.

In 1956, the Indian government nationalized the life insurance industry, and for over 40 years only one company, the government-owned Life Insurance Corporation of India (LIC), was permitted to offer insurance. In 1999, financial liberalization permitted the entry of private insurers; they introduced new products and distribution channels.[7] While competition from dozens of private sector competitors has decreased LIC's market share since 2000, LIC continues to be the dominant player in the life insurance market in terms of both total premiums and new premiums. Due to greater competition, the largest market shares are much lower in the United States: the two market leaders, MetLife and Prudential, hold a combined market share of only 30% of the total life insurance premiums collected in 2012.[8]

In terms of regulation, state regulation defines U.S. insurance whereas India's regulation is largely national. One might point to Dodd-Frank's creation of the Federal Insurance Office (FIO) as evidence of a federalizing trend in American insurance. Yet the FIO is neither a regulator nor supervisor but rather only a data collection and monitoring entity.[9] In contrast, the IRDA regulates the national licensing requirements for insurers, including business conduct guidelines. One example of those guidelines, the IRDA's 2010 mandate on commissions disclosure for particular life insurance products, constitutes the basis of our analysis on the effect of such regulatory requirements on agent recommendations.

The qualifications and characteristics of agents selling life insurance differ between the United States and India. American insurance agents generally are licensed in the states they work, most often work on commission, and possess at least a high-school diploma.[10] The Bureau of Labor Statistics predicts the number of jobs for insurance agents to grow more quickly over the next decade than most occupations, the growing role of the internet in insurance marketing and sales notwithstanding.[11] Indian agents also work on commission, but they possess national licenses, for which the 12th grade education is also the educational prerequisite, though for applicants from rural areas, a 10th grade education will suffice.[12]

India may technically have more insurance agents, even adjusted for its population, but they tend to work part-time and the profession may be losing its appeal. Around 2010, when the number of life insurance agents in the United States was just shy of 200,000,[13] India had already hit its peak of 3 million agents, many of whom were working in an ad hoc fashion.[14] However, decreased financial prospects, due both to regulatory reform and declining consumer demand, have led to annual attrition rates of over 50%, inspiring recent efforts to professionalize and stabilize the agent base.[15] Despite a recent contraction in new premiums,[16] analysts remain optimistic about growth in the Indian life insurance market given that the ratio of life insurance premium to GDP remains less than half of some developed countries.[17] On the other hand, despite the BLS's prediction of growth in insurance agents generally (including life insurance, property insurance, etc.), the number of households with life insurance is decreasing in the United States[18] In sum, the pervasiveness of life insurance agents and the nature of their employment differ between the two countries, though both employment sectors are experiencing uncertainty.

Lastly, life insurance customer behaviors and preferences regarding agents differ between the United States and India. These differences are highlighted in a recent 2012 global life insurance customer survey by Ernst & Young.[19] While the survey's online platform over-represents the urban and affluent, the survey provides preliminary insights.[20] First, Indian consumers do more research than consumers in any other country – nearly three quarters of respondents said they did a fair or great deal of research before buying a product, as compared to less than a third of American respondents, who typically take a more passive approach.[21] This may be a partial response to Indian consumers' expressed concerns about "mis-selling," where agents focus on commissions over consumer needs.[22] Second, despite the emergence of online platforms, both Americans (82%)[23] and Indians (94%)[24] cite personal interactions with intermediaries (agents) as important to the purchase process. Yet while surveyed Indians steadfastly believed that insurers make an effort to retain them as customers (77%), a faith surpassing every other country,[25] American consumers feel the exact opposite (12%).[26] Third and finally, an important commonality underlies the desire for personal product advice: a majority of consumers cite product complexity as a reason for seeking out advice, noting that experts are needed to decode the technicalities.[27] Thus, while Indian customers tend to conduct more independent research and to perceive more agent effort, the very existence of agents comports with customers' preferences and needs for advice in both countries. Our research uses a unique field experiment to test the quality of this advice, particularly whether agents' advice comports with customers' stated product preferences and needs.

Comparing Disclosure Mandates

Before discussing quality of advice, we first turn to the issue of commissions disclosure. We first discuss commissions disclosure in the United States before turning to India.

The United States

As noted before, insurance is regulated at the state rather than federal level, leading to differing disclosure mandates across the United States. Recently enacted New York state law, for example, mandates insurance agents to affirmatively disclose either orally or in writing the general compensation incentives of the agent.[28] They do not however require general disclosures of compensation quantities.[29] The agent must only disclose, in written form, quantities and sources of compensation in response to a consumer inquiry.[30]

The New York law was particularly significant as a catalyst for national reform. Prior to the law's passage in January of 2011, the National Association of Insurance and Financial Advisors, a prominent trade group which includes licensed life insurance agents, had no policies regarding commission disclosure.[31] In response to the New York law, the group changed its agnostic stance and now encourages the over 45,000 agents that belong to its local associations to fully disclose all commission amounts on securities and insurance products, *if* a consumer asks.[32] This change accorded with other non-governmental groups advocating for commissions disclosure in the life insurance industry.[33] New York is a significant example, but its disclosure standards are not universal. Colorado requires disclosure of a standard compensation schedule to the purchaser, while California requires disclosure only after the sale is completed, and only to certain classes of consumers.[34]

These contemporary commissions disclosure debates are taking place around the world, motivating our research in India. As of April 2013, Hong Kong required disclosure of fees on insurance sales by insurance brokers, but only when those fees exceed the "usual market rate."[35] These regulations emerge from a highly-publicized court case in which the plaintiff sued his financial advisor for losses on insurance instruments, alleging a conflict of interest.[36] Similarly, the Netherlands imposed a ban on commissions on life insurance products while the United Kingdom imposed a ban on life insurance investment and savings products but carved out an exception for term (protection only) products.[37]

Experimental Evidence from an Indian Disclosure Mandate

A particularly salient example of such a disclosure policy from an emerging market is India's commissions disclosure mandate for equity-linked insurance products. On July 1, 2010, the Indian insurance regulator mandated that insurance agents must disclose the commissions they would earn when selling a specific type of whole insurance product called a unit-linked insurance product (ULIP). ULIPs are very similar to whole insurance policies, except that the savings component is invested in equity instruments with uncertain returns. This regulation was enacted as the Indian insurance regulator faced criticism from the Indian stock market regulator that ULIPs should be regulated in the same way as other equity-based investment products. The insurance regulator responded to these criticisms by requiring agents to disclose commissions when selling ULIPs.

There are two specific features of this policy. First, it is important to note that the disclosure of commissions required on July 1st is in addition to a disclosure requirement on total charges that came into effect earlier in 2010. Prior to July 1, agents were required to disclose the total charges (i.e. the total costs, including commissions) of the policies they sell, but they were not required to disclose how much of those charges went to agent commissions. Thus, the new legislation requiring the specific disclosure of commissions gives the potential life insurance customer more information on the agency problem between himself and the agent, but does not change the amount of information on total costs. This allows us to interpret our results as the effect of better information about agency, rather than better information about costs more generally.

Our empirical research documents two important effects of the regulation: first, the percentage of ULIP recommendations made to our experimental auditors dropped precipitously after the regulation came into effect.[38] Yet agent recommendations shifted from high-commission ULIPs to high-commission whole insurance products, and this effect was not contingent on whether auditors affirmatively inquired about commissions. Mandating commissions disclosure of particularly high-commission products may therefore affect product recommendations, but if the disclosure mandate is not universal, agents may simply recommend other high-commission products.

Quality of Advice

In contrast to the relative simplicity of disclosure, regulating the quality of advice is a much more difficult task and often hinges on the legal duties of intermediaries to the insurance consumer (prospectively, the insured). As with the earlier discussion of commissions disclosure mandates, we begin by discussing quality of advice in the United States and then turn to India.

Agent Duties in the United States

In the United States, these intermediary legal duties can roughly be grouped into three categories: *caveat emptor* (the buyer must beware as the intermediary possesses little or no duty), suitability, and fiduciary (the highest duty). In discussing these categories, we discuss two examples of intermediaries, “agents” and “brokers,” which typically refer to slightly different relationships in the American context. While both serve as market intermediaries, “agents” are tied to insurers and act as their company representatives or legal agents. “Brokers” are independent middlemen who often represent the insured.[39] New Jersey law, for example, explicitly incorporates this distinction, though the legal distinctions hinge on functional rather than nominal labels.[40]

Retail life insurance agents usually fall into the *caveat emptor* category of duty. These agents explicitly serve as salespeople in armslength transactions with individual consumers, and therefore have minimal legal duties, if any, to those consumers. As a Pennsylvania federal court articulated the legal standard, such an agent does not act "out of a special duty to act for the consumer's exclusive benefit, but rather out of a duty to his employer--and to his own self-interest--to sell its products as successfully as possible."[41] The only legal proscriptions on agent advice arise from liability for negligent or fraudulent misrepresentation – material falsities or omissions can potentially give rise to common law tort liability where such acts are the proximate cause for insurance-related damages. Yet agents' opinions about the quality, suitability, or desirability of a policy will not give rise to such claims.[42] State administrative agencies follow similar legal standards in addressing consumer complaints.[43] State law thus provides few bounds to the quality of advice by insurance agents.

Brokers, on the other hand, may be held to a higher standard that we call professional negligence or suitability. Generally, when a broker agrees to obtain insurance for a client for the purposes of a commission, they are held to a duty of care that reflects reasonable skill and diligence.[44] This duty is often called professional negligence because states tend to impose liability when brokers "fail to exercise the care that a reasonably prudent businessman in the brokerage field would exercise under similar circumstances."[45] In instances where an insurance agent consensually undertakes to act on behalf of the insured, a higher, broker duty might arise even for an individual otherwise labeled as an agent for the insurer.[46] The requirement that a broker "use reasonable care, diligence, and judgment"[47] reflects a higher standard for quality of advice than *caveat emptor*, though the interpretation of those terms across jurisdictions can vary.

Generally, insurance brokers are not held to the highest duty, that of a fiduciary. As opposed to reasonableness or general suitability, the term fiduciary can be defined as a strict duty to a high standard of care based on good faith, trust, and confidence.[48] It is a duty of loyalty that precludes conflicts of interest, burdening insurance brokers who may be "dual agents," purportedly serving the insured while responding to incentives by the insurer. However, in 2011, New York's highest court held that an insurance broker does not have a common law fiduciary duty to disclose to its customers incentive arrangements that the broker has entered into with insurance companies.[49] The case relied on existing jurisprudence holding that, absent special circumstances, the relationship between brokers and clients is not fiduciary in nature.[50] Yet in some states, such as California, there is no clear answer as to whether the highest fiduciary duties apply to insurance agents and brokers.[51] When courts hesitate to create common law fiduciary duties, legislative or regulatory responses may nonetheless create heightened standards.[52]

One complicating aspect of insurance regulation is where products marketed as life insurance fall under the purview of stricter, federal securities regulation. Annuities are a classic example. Yet even securities regulation faces its own internal tensions, disparate duties, and evolving, politically-responsive regulation. When Congress raised the standard of conduct of securities brokers from *caveat emptor* to one of professional duty in 1934 with the creation of the SEC, it was responding to the Great Depression. Nonetheless, the legislation was a compromise, establishing a duty but measuring that duty in terms of internal industry standards rather than well-defined extrinsic metrics.[53] Similarly, in the wake of the financial crisis, Dodd-Frank has tasked the SEC with investigating the merits of establishing a fiduciary standard for securities broker-dealers, who are currently subject to a suitability standard.[54] Since licensed investment-advisors (who are fee rather than commission based and regulated by a different statute)[55] are subject to the highest fiduciary standard, broker-dealers may provide, for example, a higher-priced (and higher commission) product even if a lower-cost one with better returns exists. The latter product might theoretically meet the suitability, but not fiduciary, standard. Higher duties therefore limit the recommendations made, and commissions received, by agents in their interactions with consumers.

In summary, American retail life insurance agents who act as representatives of the insurer are legally held to minimal standards of conduct in the quality of advice they offer to consumers. Brokers, where they act as representatives of the insured, are held to a higher professional standard, though not necessarily a fiduciary one. However, where particular life insurance products implicate securities such as annuities or mutual fund-linked term insurance, the fiduciary standard more likely applies.

Emerging Standards in India

The term "suitability" became a significant factor in the Indian life insurance regulation in 2013. The IRDA issued regulations requiring a standardized suitability analysis to form the basis for recommendations by a spectrum of intermediaries: "agents, bancassurance [sale of insurance through a bank], brokers and its [insurer's] employees."[56] The mandated suitability analysis involves three main stages: data collection, analysis, and verification. First, the IRDA's standardized form asks the intermediary to collect consumer information including demographics, current assets, expected family liabilities (education, health, etc.), and expected future income.[57] After this data collection phase, a mandatory section requires the insurer to answer two queries: why the "policy is most suited for the proposer" and whether the product proposed is based on need, demand, or agent recommendation.[58] The regulations provide little insight on how these questions should be answered - they demand neither that the preceding quantitative information be referenced nor do they specify the level of detail required in substantiating the recommendation. Nonetheless, in the third stage, both the intermediary and the customer must sign an acknowledgement that the "product recommended is suitable for the proposer."[59] In the alternative, where the customer rejects the agent's recommendation and chooses a different product, the intermediary and consumer must memorialize this divergence.[60]

Despite requiring detailed data upon which to make product recommendations and requiring both intermediaries and consumers to verify "suitability," suitability is not defined. The regulatory language lends itself to the logical inference that "suitability" is something more than a *caveat emptor* regime and something less rigid than a fiduciary duty. In that sense, retail sales agents in India under the Draft Code would be held to a higher standard than retail sales agents in the U.S, who are governed by the *caveat emptor* regime.

In terms of implementing these suitability regulations, insurers are instructed i) to train their agents on the new documentation requirements as well as the suitability analysis, ii) to monitor agent documentation to assure that suitable recommendations are in fact being made, and iii) to maintain the records for five years for inspection by the IRDA.[61] Yet the lack of regulatory clarity on which vectors of underlying data are "suitable" for which life insurance products means that the regulations leave a definitional hole in consumer protection despite this extensive recordkeeping.

The suitability rhetoric is not limited to the life insurance context; it pervades India's broader financial reform. In 2013, India also released the Report of the Financial Sector Legislative Reforms Commission based on a perceived need to modernize its financial regulation.[62] At the agency level, this modernization incorporated regulatory consolidation, with the Report recommending the merger of the IRDA with the Securities and Exchange Board of India (SEBI), Forward Markets Commission (FMC), and Pension Fund Regulatory and Development Authority (PFRDA) to create a new, unified regulatory agency.[63] The report, which included a Draft Code, also offered language regarding "fair disclosure", "suitability of advice", and their intersection to be implemented by the regulator.

In addressing "fair disclosure," Draft Code incorporates both substantive and procedural mandates. Procedurally, the Draft Code mandates that the disclosure be made "sufficiently before entering into a contract," in writing, and in a manner "that enables the customer to make reasonable comparison of the financial product."[64] Substantively, the Draft Code only provides suggested topics, noting that the Regulator (proposed as the newly unified agency described earlier) may require disclosures regarding product benefits and risks, effects of contractual terms, and consumer rights under any law or regulation.[65]

The Draft Code's ambitious "suitability" requirement, only partially exposited through statutory language, parallels the IRDA regulations' similarly promising but ambiguous language. The Draft Code demands that the "retail advisor must ensure that the advice given is suitable for the retail consumer after due consideration of the relevant personal circumstances of the retail consumer."[66] In the Draft Code, as in the IRDA regulations, if the consumer foregoes the advisor's recommendation and purchases a different product, a signed acknowledgment of the divergence is required.[67] While the Draft Code language defines (or, more accurately, fails to define) suitability as broadly as the IRDA regulations, the Code, as a model statute, explicitly leaves the task of administration and clarification to the Regulator, who can implement clarifying regulations. In contrast, with the current life insurance suitability mandate, the IRDA, as a regulatory agency, is the final implementer, leaving only the courts and subsequent regulation as a source of specificity.

The Draft Code also explicitly addresses the interaction between disclosure and suitability. While the Regulator must ultimately decide which financial products fall under the purview of the suitability regulations, the Draft Code mandates that, in exercising this judgment, the Regulator must take into account the "sufficiency of the disclosures made . . . to allow retail consumers to assess the suitability of the financial product or financial service for their purposes."[68] A retail advisor must also disclose to consumers "any conflict of interests, including any conflicted remuneration that the retail advisor has received or expects to receive for making the advice to the retail consumer."[69]

Before discussing the results of our experiment, we summarize our discussion of quality of advice in the United States and India with three basic observations. First, suitability of advice pervades modern insurance regulation, whether in American common law professional negligence claims or in emerging Indian financial regulation architecture. Nonetheless, the Indian standard is at least facially higher, given that agents fall under a suitability purview as opposed to the *caveat emptor* standard in the United States. Two, "suitable advice" in the Indian context takes on the stature of an affirmative right yet the lack of clarity on how suitability is defined and evaluated jeopardizes that right's practical implications. Finally, the acknowledgment that consumer preferences may often conflict with consumer needs and therefore the agent's suitability analysis gives rise to the question of how those conflicts shape the quality of advice. That question constitutes the basis of a second component of our research, discussed in the next section.

Quality of Advice in India: An Experiment with Associated Recommendations

In addition to measuring the effects of disclosure regimes on product recommendation (discussed in Section II), our field experiment in urban India also pursues a second goal: documenting the responsiveness of quality of advice in a setting in which one product is unambiguously more appropriate than other products. Whole life insurance, a popular product in the Indian market, is economically inferior to a combination of investing in savings accounts and purchasing term insurance, and yet we find that life insurance agents overwhelmingly encourage the purchase of whole insurance and rarely recommend term.

The generally poor quality of advice is confirmed by our findings. For individuals for whom term is the most suitable product, only 5% of agents recommend purchasing only term insurance, while 74% recommend purchasing only whole.[70] We also documented a range of wildly incorrect statements made by agents, such as: “You want term: are you planning on killing yourself?", “Term insurance is not for women", and “Term insurance is for government employees only."[71]

Experimental Evidence from Auditor Cues

Beyond documenting the generally poor quality of advice, by randomizing the content of our scripts in our audits, we also specifically explore how four different attributes affect the quality of advice: customer sophistication, customer needs, customer bias (stated preference for a product), and competition.

First, with regards to bias and need, we varied the auditors’ stated preferences for term as well as their need for term. In the latter case, need for term was signaled by the auditor mentioning concerns about the effects of dying early on his family’s position as well as wanting to cover risk affordably. The need for whole was signaled by mentioning the desire to save and invest money for the future through a product that would provide financial discipline. We find that neither an initial customer bias nor customer need for term insurance increases the probability of a recommendation of *only* buying term life insurance. However, both the bias and need increase the probability of a product recommendation that *includes* term insurance. Such a bias or need also increases the amount of risk coverage recommended by the agent, but does not increase the corresponding premium, largely because term insurance provides more risk coverage per rupee of premium. Agents thus “cater” to customers (either their beliefs or needs) primarily by recommending term insurance products as an addition to high-commission whole insurance products, rather than recommending only the purchase of term.

Second, with regards to competition, we experimentally reduced the agent's perceived amount of market power by varying whether the customer mentions that they had talked to other providers and wanted to compare offers. The auditors lacking the competition treatment only mentioned having discussed life insurance with a friend. We are particularly interested in competition’s effect where the customer is biased towards whole insurance but demonstrates a need for term insurance. In this setting the agent has the potential to de-bias the auditor as their beliefs are inconsistent with their insurance needs. When the threat of competition looms, we find that the agent is substantially more likely to de-bias customers by recommending a product that include term. However, when the dependent variable is a binary indicator for a product recommendation of term only, there is no longer a competition effect. Moreover, we do not find that competition leads agents to de-bias customers who have a belief that term insurance is a good product but express a need for whole. In summary, in the limited circumstances where competition has an effect, we find that agents mainly compete by recommending term policies on top of whole insurance policies, as opposed to completely de-biasing the customer and recommending only term.

Finally, we vary auditor cues of sophistication. In this experiment, sophisticated auditors mention that they have spent time shopping for policies and are familiar with the different types of policies. The unsophisticated auditors affirmatively conveyed their lack of knowledge and confusion. We find that sophistication does in fact lead to higher quality advice. Yet similar to the results in the bias versus needs experiment, it appears that agents attempt to cater to more sophisticated types by including term as a part of a recommendation, as opposed to exclusively recommending term.

Recommendations

Our findings lend themselves to three particular critiques of both the IRDA regulations and Draft Code. First, insofar as commissions-motivated agents improve their quality of advice by creating composite recommendations which mix suitable products with unsuitable products as opposed to recommending only the suitable products, the IRDA regulations should clarify how the "suitability analysis" judges such composite recommendations. If the practice is a professional norm across licensed agents, extrinsic suitability standards (rather than professional negligence standards alone) would be needed to truly protect consumers. While suitability standards provide a middle ground between *caveat emptor* and fiduciary standards, adding a suitable product to an unsuitable product does not clearly make the composite recommendation more suitable.

Second, since our research suggests that agents may in fact cater to consumer preferences, even when they conflict with consumer need, the relationship between preferences and suitability analysis needs elaboration. In addition to our research, a recent American audit study examining the quality of portfolio allocation guidance found that agents recommend higher-risk portfolios for wealthier individuals, are biased towards active management, and do not do a good job of undoing customer biases – the phenomenon of catering is thus not limited to the financial products market in India.[72] On the one hand, the IRDA regulations may address this conflict by requiring consumers to acknowledge when their product purchases diverge from the agent's "suitable" recommendation. Yet, in the absence of a clearer suitability standard, it's possible that such customer preferences will be incorporated into the agent recommendation, particularly when those preferences are in line with the agent's compensation interests. Our research also suggests that competition among agents will not necessarily remedy this catering. Thus, the role (if any) of consumer preferences in suitability analysis needs to clarified by the IRDA.

Third, we caution against the Draft Code's suggestion that disclosures may sufficiently promote suitable financial product recommendations, exempting certain product classes from suitability requirements. For example, we find evidence that commissions disclosure causes agents to shift recommendations towards other high-commission products where disclosure is not required, not necessarily to more suitable products. Our research exploits a disclosure mandate that applies to a single class of products, so commissions disclosure across *all* products might produce a different equilibrium. Yet given the practical limits on how much disclosure can be mandated, how well individual consumers can incorporate multiple disclosures, and the efficacy of such disclosures, the

IRDA should move cautiously before relying on disclosure as a substitute for suitability regulation.[73]

In sum, India's recent reforms in the insurance industry and prospective reforms in the financial industry endeavor to create substantive rights to suitable advice, exceeding American standards in certain regards. Experimental evidence, such as the research we summarize here, can play an important role in testing the theoretical limits of these frameworks and ensure that the regulations effectuate the consumer protection they are meant to accomplish.

Conclusion

As consumers, particularly in emerging markets, begin to engage in complicated financial products markets, the role of intermediaries as sources of advice will come under further scrutiny. Our comparative regulation analysis hopefully has crystallized two overarching themes. First, even seemingly disparate markets such as the life insurance markets in India and the United States often overlap in their market characteristics and their regulatory regimes. Second, financial regulatory efforts do not always create the intended impacts in human behavior, but creative field experiments can shed light on regulatory limitations and identify promising interventions.

Notes

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2. *Infra*, Section IV, at 12.
3. AMERICAN COUNCIL OF LIFE INSURERS, 2011 LIFE INSURERS FACT BOOK XIII; INSURANCE INFORMATION INSTITUTE (INDIA), LIFE INSURANCE – LIFE/HEALTH INSURANCE INDUSTRY STATEMENT, 2008-2012 (2013) , http://www.iii.org/facts_statistics/life-insurance.html.
4. INSURANCE INFORMATION INSTITUTE (INDIA), LIFE INSURANCE (2013), http://www.iii.org/facts_statistics/life-insurance.html ("Sixty-two percent of all people in the United States were covered by some type of life insurance in 2013, according to LIMRA's 2013 *Insurance Barometer*.").

5. INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY (IRDA), ANNUAL REPORT 2011-2012 (“Life insurance industry recorded a premium income of 2,87,072 crore during 2011-12 as against 2,91,639 crore in the previous financial year, registering a negative growth of 1.57 per cent.”).

6. BHARATI PATHAK, THE INDIAN FINANCIAL SYSTEM: MARKETS, INSTITUTIONS AND SERVICES 697 (2011) (“The outreach of insurance is equally modest at 20 percent of the insurable population in case of life.”); Kartik Goyal, *Hidden Cash Lures Subbarao to Rural India Worth $24 Billion*, BLOOMBERG, Mar. 20, 2013, http://www.bloomberg.com/news/2013-03-19/hidden-cash-lures-subbarao-to-indian-villages-worth-24-billion.html (“Sixty percent of the 1.2 billion population remains outside the formal banking system. Only 10 percent has life insurance and 0.6 percent uses non-life insurance.”).

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9. U.S. DEP'T OF TREASURY, FEDERAL INSURANCE OFFICE, http://www.treasury.gov/initiatives/fio/about-fio/Pages/default.aspx.

10. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK: INSURANCE SALES AGENTS - SUMMARY (2010), http://www.bls.gov/ooh/sales/insurance-sales-agents.htm#tab-4 (“A high school diploma is the typical requirement for insurance sales agents, although more than one-third of insurance sales agents have a bachelor’s degree. Public speaking classes can be useful in improving sales techniques, and often agents will have taken courses in business, finance, or economics. Business knowledge is also helpful for sales agents hoping to advance to a managerial position.“).

11. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK: INSURANCE SALES AGENTS – JOB OUTLOOK (2010), http://www.bls.gov/ooh/sales/insurance-sales-agents.htm#tab-6.

12. IRDA, REG./7/2000, INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY (LICENSING OF INSURANCE AGENTS) REGULATIONS 3(4) (2000) (“Qualifications of the applicant.--- The applicant shall possess the minimum qualification of a pass in 12th Standard or equivalent examination conducted by any recognised Board/Institution, where the applicant resides in a place with a population of five thousand or more as per the last census, and a pass in 10th Standard or equivalent examination from a recognised Board/ Institution if the applicant resides in any other place.”).

13. Leslie Scism, *A Hot Job for Hard Times: The Life-Insurance Agent*, WALL ST. J., Mar. 19, 2010 (“In all, the number of U.S. life-insurance agents affiliated with a specific company today is down nearly a third since the 1970s, to 174,000, according to Limra. Their average age is up to 56.”).

14. *Indian Insurance: Rogue Agents*, THE ECONOMIST, Oct. 29, 2011 ("At the peak of India's strange insurance hysteria a few years ago there were almost 3m people flogging life-insurance policies.").

15. Devina Sengupta & Sreeradha D. Basu, *Life insurance companies struggling to retain employees, pursue change*, ECON. TIMES OF INDIA, Apr. 26, 2013.

16. Megha Mandavia, *Bajaj Finserv sees life insurance industry contracting this year*, DNA INDIA, May 16, 2013, http://www.dnaindia.com/money/1835342/interview-bajaj-finserv-sees-life-insurance-industry-contracting-this-year ("As far as life insurance is concerned we have seen total premiums drop by 8%, though new business premium are up 10%. However, because of all these new regulatory changes that have again recently happened in February, we think the industry can contract in 2013-14 before growth comes back in 2014-15."); TOWERS WATSON, INDIA MARKET LIFE INSURANCE UPDATE ISSUE 50, Apr. 16, 2013, http://www.towerswatson.com/en-IN/Insights/Newsletters/Asia-Pacific/india-market-life-insurance/2013/India-Market-Life-Insurance-Update-April-2013 ("Pulled down by the 22 per cent fall in weighted new premium collections of the Life Insurance Corporation of India (LIC), the life insurance industry recorded a decline of approximately 15 per cent year-on-year in weighted new business premium collections in the first 11 months of FY2012-13 (April 2012 to February 2013). Private players were relatively more stable and recorded a decline of approximately 3 per cent in weighted new premiums in this period.").

17. *See, e.g.* MCKINSEY AND CO., INDIA LIFE INSURANCE 2012, *available at* http://www.mckinsey.com/locations/india/mckinseyonindia/pdf/insurance_a_summary.pdf ("But the market is still at a nascent stage in its evolution. The ratio of life insurance premium to GDP in India is currently about 4 per cent, much lower than developed market levels of 6 to 9 per cent. In several segments of the population, penetration is lower than potential. For example, in urban areas, penetration of life insurance in the mass market is about 65 per cent, and it is considerably less in the low-income unbanked segment. In rural areas, life insurance penetration in the banked segment is estimated to be about 40 per cent, while it is marginal at best in the unbanked segment.").

18. LIFE INSURANCE AND MARKET RESEARCH ASSOCIATION (LIMRA), OWNERSHIP OF INDIVIDUAL LIFE INSURANCE FALLS TO 50-YEAR LOW, Aug. 30, 2010, http://www.limra.com/Posts/PR/News_Releases/Ownership_of_Individual_Life_Insurance_Falls_to_50-Year_Low,_LIMRA_Reports.aspx?LangType=1033.

19. ERNST & YOUNG, AMERICAS: GLOBAL CONSUMER INSURANCE SURVEY 2012; ERNST & YOUNG, INDIA: GLOBAL CONSUMER INSURANCE SURVEY 2012.

20. ERNST & YOUNG, AMERICAS, *supra* note 19, at 35.

21. ERNST & YOUNG, INDIA, *supra* note 19, at 11 ("Our survey indicates that customers around the world are increasing their use of research before buying a policy. This is particularly true in India, where 74% of consumers surveyed say they perform a fair or great deal of research before buying a product — a higher proportion than any other location that we surveyed. While some of this can

potentially be attributed to differing understanding of what constitutes research, the difference is still quite marked. In China, another fast-growth market with a rapidly growing middle class, the equivalent percentage is 44% and in more mature economies like the UK and US the percentages are even lower — 37% and 31% respectively.”).

22. ERNST & YOUNG, AMERICAS, *supra* note 19, at 13 (“In the Americas, the two most common reasons consumers cite for seeking assistance are that they need expert assistance to make important financial decisions (52% of consumers) and that they do not know which products best meet their needs (41%)”); ERNST & YOUNG, INDIA, *supra* note 19, at 8 (“Mis-selling is also a concern in India, where a belief persists that distributors are sometimes more focused on selling products to trigger commission payments than on meeting customers’ needs. There is a further idea that agents do not always share the correct information on returns or the timeframe in which payments will be made. This implies that many consumers feel confident at the time of purchase, but at a later date realize that some features of the policy are not in line with what was promised by the agent. The Insurance Regulatory and Development Authority (IRDA) has intervened and reviewed the commissions on unit-linked products in an attempt to increase transparency and has indicated that it might do the same for traditional products.”).

23. ERNST & YOUNG, AMERICAS, *supra* note 19, at 14.

24. ERNST & YOUNG, AMERICAS, *supra* note 19, at 13.

25. ERNST & YOUNG, INDIA, *supra* note 19, at 18.

26. ERNST & YOUNG, AMERICAS, *supra* note 19, at 19.

27. ERNST & YOUNG, INDIA, *supra* note 19, at 13 (“The main barriers that prevent customers from transacting for themselves are product complexity and a lack of transparent information about how products will meet their needs. The most common reasons cited for the continuing use of agents in India are that the products on offer are “too technical and complicated” (53%) and that consumers feel they need expert assistance to make more important financial decisions (42%). Forty-two percent also state that they are unclear which products best suit their needs and just over a quarter (26%) use an agent because they are unsure how to measure product performance.”).

28. 11 NYCRR (Reg. 194) § 30.3(a).

29. *Id.*

30. 11 NYCRR (Reg. 194) § 30.3(b).

31. Leslie Scism, *Insurance Fees, Revealed*, WALL ST. J., Mar. 30, 2012, http://online.wsj.com/article/SB10001424052702304177104577305930202770336.html.

32. *Id.*

33. Meg Fletcher, *NAIC moves forward on disclosure rule for producers*, **BUS. INS.,** Dec. 12, 2004, http://www.businessinsurance.com/apps/pbcs.dll/article?AID=9999100015882 (discussing how the National Association of Insurance Commissioners embraced the beginnings of a commissions disclosure standard nearly a decade ago).

34. Ameritas, COMMISSION DISCLOSURE REQUIREMENTS FOR PRODUCERS (2010), newyork.ameritasgroup.com/producer/737_4747.asp.

35. Rick Adkinson, *New insurance rule far from transparent on fee disclosure*, SOUTH CHINA POST, Mar. 25, 2013, http://www.scmp.com/business/money/markets-investing/article/1198780/new-insurance-rule-far-transparent-fee-disclosure.

36. *Id.*

37. Lachlan Colquhoun, *Australia proposes ban on commission,* FIN. TIMES, Sept. 4, 2011, http://www.ft.com/intl/cms/s/0/c8bf2050-d536-11e0-bd7e-00144feab49a.html#axzz2Wc1kafgC. *See also* JEREMY FORTY & KEITH WALTER, TOWERS WATSON, COMMISSIONS – THE BEGINNING OF THE END? (2012).

38. Santosh Anagol, Shawn Cole, & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market* 20 (2013) (manuscript on file with the author).

39. Francis J. Deasey, American Bar Association, Brief, The Liability of Insurance Agents and Brokers 44 (2000).

40. Polar Int'l Brokerage Corp. v. Investors Ins. Co. of Am., 967 F. Supp. 135, 139 (D.N.J. 1997) ("New Jersey law distinguishes between insurance agents and insurance brokers. An insurance broker is a "person who, for a commission, brokerage fee, or other consideration, acts or aids in any manner concerning negotiation, solicitation or effectuation of insurance contracts as the representative of the insured ... " An insurance agent is a "person authorized, in writing, by any insurance company to act as its agent to solicit, negotiate or effect insurance contracts on its behalf or to collect insurance premiums and who may be authorized to countersign insurance policies on its behalf.") (internal citations omitted).

41. Weisblatt v. Minnesota Mutual Life Insurance Co. 4 F. Supp. 2d 371 (E.D. Pa. 1998).

42. Douglas R. Richmond, *Insurance Agent and Broker Liability*, 40 TORT TRIAL & INS. PRAC. L.J. 1, 13 (2004).

43. CALIFORNIA DEPARTMENT OF INSURANCE: GENERAL INQUIRIES AND COMPLAINTS, *available at* http://www.insurance.ca.gov/contact-us/0200-file-complaint/(stating that the agency will address complaints based on "misconduct or theft of premiums"); MARYLAND INSURANCE ADMINISTRATION, FILE A COMPLAINT, *available at* http://www.mdinsurance.state.md.us/sa/consumer/file-a-

complaint.html (noting that the primary role of the Maryland Insurance Administration is to protect consumers from illegal insurance practices by ensuring that insurance companies and producers that operate in Maryland act in accordance with State insurance laws).

44. Douglas R. Richmond, *Insurance Agent and Broker Liability,* 40 TORT TRIAL & INS. PRAC. L.J. 1, 10 (2004).

45. David Paige, *Potential Sources of Legal Liability for Life Insurance Agents and Brokers*, § 7:2 in The Law of Commercial Agents and Brokers (Eds. Britton Weimer, Clarence Hagglund, & Andrew Whitman) (Thompson/West, 2007).

46. Douglas R. Richmond, *Insurance Agent and Broker Liability,* 40 TORT TRIAL & INS. PRAC. L.J. 1, 10 (2004).

47. Mher Asatryan, *What are the Fiduciary Duties of Insurance Agents and Brokers?,* 35 LOS ANGELES LAWYER 16, 16 (2012) (quoting *Kotlar*, 83 Cal. App. 4th at 1123).

48. Black's Law Dictionary (9th ed. 2009) ("[O]ne who owes to another the duties of good faith, trust, confidence.").

49. THE FIDUCIARY DUTY OF INSURANCE BROKERS IN NY (2011), http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C3695%5CThe-Fiduciary-Duty-Of-Insurance-Brokers-In-NY.PDF (discussing *People ex rel. Cuomo v. Wells Fargo Insurance Services Inc.*).

50. *Id.*

51. Mher Asatryan, *What are the Fiduciary Duties of Insurance Agents and Brokers?,* 35 LOS ANGELES LAWYER 16, 16 (2012), http://www.lacba.org/Files/LAL/Vol35No6/2953.pdf ("While there is no appellate precedent in California permitting an insured to sue an insurance broker or agent on a common law cause of action for breach of fiduciary duty, California courts have been hesitant to confirm outright that this cause of action is inapplicable to insurance brokers and agents. For example, in Workmen's Auto Insurance Company v. Guy Carpenter & Company, Inc., the Second District Court of Appeal initially definitively answered the question of whether insurance brokers owe any fiduciary duties to insureds in the negative. However, any relief this decision brought to insurance agents and brokers was short-lived, as the opinion was vacated and depublished by a subsequent rehearing, which affirmed the initial opinion but remained unpublished.").

52. The Employee Retirement Income Security Act (ERISA), for example requires the naming of fiduciaries and outlines their functions ("For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly."). 29 U.S.C.A. § 1102 (West).

53. Matthew P. Allen, *A Lesson from History, Roosevelt to Obama – The Evolution of Broker-Dealer Regulation*, 5 ENTREPRENEURIAL BUS. L. J. 1, 20 ("Broker dealers were and are regulated under the '34 Exchange Act. Before the Great Depression, there were no standards governing the conduct of those selling securities to the public. Roosevelt and Congress used the 1934 Exchange Act to raise the standard of professional conduct in the securities industry from the standardless principle of caveat emptor to a "clearer understanding of the ancient truth" that brokers managing "other people's money" should be subject to professional trustee duties. But neither Roosevelt nor Congress wanted the federal government to regulate the brokerage industry on a wide scale. This was because industry participants were seen as better able to more quickly respond to regulatory problems given their expertise and intimate knowledge of the securities industry.").

54. Dodd-Frank Wall Street Reform and Consumer Protection Act § 913; *see* Elizabeth MacBride, *Fiduciary Standard Soon May Regulate Brokers-Dealers Deals*, CNBC, Apr. 29, 2013, http://www.cnbc.com/id/100662116.

55. Investment advisors are governed by the Investment Advisors Act of 1940 whereas Brokers are governed by the Securities Exchange Act of 1934.

56. IRDA, REG./10/68, Standard Proposal Form for Life Insurance Regulations § 8(a) (2013).

57. IRDA, Standard Proposal Form for Life Insurance Regulations pp. 22 – 30.

58. *Id.* at 30.

59. *Id.* at 30.

60. *Id.* at 31.

61. IRDA, Standard Proposal Form for Life Insurance Regulations §§ 8 – 10.

62. GOVERNMENT OF INDIA, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION ix (2013) ("Dozens of legislations enacted from the 1870s were the foundations of this important catalytic sector. Many of them were enacted when financial economics was not born and the financial sector was at its infancy. In the last 100 years financial policies and practices have undergone many paradigm shifts. But its legal foundations, though amended in piecemeal fashion at times, remained more or less static with serious fractures visibly harming the system. These 'fault lines', once more or less hidden, are now evident openly in the form of lack of legal clarity on responsibility and powers of regulators, inter-regulatory disputes, regulator-regulated court battles, adventurism of market participants and the growing shadow banking and shadow financial sector. How do we address the new world of finance with the institutions and the equipment from a non-financial era?").

63. GOVERNMENT OF INDIA, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION xxv (2013).

64. GOVERNMENT OF INDIA, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION: DRAFT CODE CH. 20, § 95(2) (2013).

65. *Id.* at CH. 20, § 95(3) (2013).

66. *Id.* at CH. 22, § 100(1)(b) (2013).

67. *Id.* at CH. 22, § 100(3)(a) (2013).

68. *Id.* at CH. 22, § 101(3) (2013).

69. *Id.* at CH. 22, § 102(1)(a) (2013).

70. Santosh Anagol, Shawn Cole, & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market* 20 (2013) (manuscript on file with the author).

71. Santosh Anagol, Shawn Cole, & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market* 20 (2013) (manuscript on file with the author).

72. Sendhil Mullainathan, Markus Noth, & Antoinette Schoar, *The Market for Financial Advice: An Audit Study*, mimeo, Harvard University (2012).

73. *See generally* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011). "Not only does the empirical evidence show that mandated disclosure regularly fails in practice, but its failure is inevitable. First, mandated disclosure rests on false assumptions about how people live, think, and make decisions. Second, it rests on false assumptions about the decisions it intends to improve. Third, its success requires an impossibly long series of unlikely achievements by lawmakers, disclosers, and disclosees." *Id.* at 651. "But even for food labeling—the simplest and most understandable case of daily disclosures—evidence is mixed." *Id.* at 675.