

Banking & Financial Services

POLICY REPORT

The Role of Competitive Disclosure in Preventing the Abuse of Financial Consumers¹

By Theresa A. Gabaldon

Introduction

Why take out a mortgage you can't afford?² Why borrow money for college from a private lender when lower-cost federal loans are readily available?³ Why buy an iPad or iPhone with a loan from a payday lender who charges interest in the triple digits?⁴ For that matter, why incur debt at all for such items as the latest iteration of the iPad or iPhone when the version you already have still works?

The traditional view of corporate law asserts that the corporation serves society through its satisfaction of consumers' revealed preferences, which in turn dictate the most efficient allocation of resources contributed by corporate investors, workers, and managers. Social psychology has long taught, however, and legal analysts sometimes now concede, that revealed preference is an unreliable guide to social welfare. Human beings have cognitive limits that routinely may be exploited

in a variety of ways, including the methods in which decisions are framed. The recognition that there are easily manipulable bounds on rationality, self-interest, and free will severely weaken corporate law's familiar claims: if corporations are creating the very preferences they satisfy, the foxes are not only guarding the hen houses, they are running the farm.

Unsurprisingly, US corporations have been paying psychologists and other social scientists for decades and have relied on their insights in devising products and marketing strategies. The result is a marketplace in which a variety of unnecessary and sometimes even harmful products jostle for position before the eyes of a population struggling to make ends (sometimes those of their belts) meet. In some instances, these products are tangible consumption items. In others, they are the financial vehicles that facilitate consumption.

Still, the problem of bounded consumer rationality continues to be viewed as a matter for external regulation rather than as a reason for rethinking some of the givens of corporate governance. This article attempts to explain why the creation of the Consumer Financial Protection Bureau (CFPB) by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010⁵ provides an opportunity to revisit the characterization of bounded consumer rationality as a problem purely extrinsic to corporate law. The punch line is that the CFPB has both broad regulatory and general

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educational mandates that could justify a variety of reforms. Among other powers, it possesses the authority to prevent unfair, deceptive, or abusive acts or practices directed at financial consumers. As discussed in this article, the terms “unfair” and “deceptive” previously were used in legislative directives to other regulatory authorities and have a fairly well-developed jurisprudence largely focused on timely and accurate disclosure. The term “abusive” is less well-understood, however, and has been declared “puzzling” by the CFPB’s new head.⁶ Although it easily might be the case that the CFPB’s power to prevent abusive practices extends to the regulation of financial products on their merits—at least vis à vis some types of consumers—this article makes a more limited claim. That claim is that the CFPB should consider adopting a process pursuant to which the providers of at least some financial products and services could be certified as subscribing to corporate decisionmaking practices designed to be less injurious to consumer interests than the usual shareholder primacy model historically has dictated. One of these practices would involve calling on the directors of companies providing financial products to declare their individual opinions about the advisability of those products for consumers in certain identified circumstances. At the least, this measure would provide consumers with useful information. At best, it might influence the actual design of some of the products offered.

Although direct federal tinkering in corporate governance has long been troubling in some quarters, the proposal advanced is disclosure-based and thus fits fairly neatly into the limited, but expanding, role claimed by the federal government in recent years. The first task of this article is to provide a brief overview of the customary separation of corporate governance and external regulation as well as of the traditional limitations on the federal role as it relates to the former.

Corporate Law v. “Other”

The concept of corporate law generally includes the laws significant to the formation or maintenance of the relationships among traditionally recognized corporate stakeholders as well as the laws preventing at least some of those stakeholders from incurring liability to those outside the corporation. It does not, however, cover subjects such as collective bargaining or consumer protection simply because, as a matter

of tradition, employees and consumers are not characterized as stakeholders.⁷ Laws relating to pollution control, wildlife preservation, and cruelty to animals are excluded for the same reason. This begs the question of whether employees, consumers, trees, polar bears, or test animals should be recognized as corporate stakeholders as a normative matter, but as a descriptive matter it is clear that they are not.

One consequence of the balkanization of legal subject matters is that arguable contradictions arise. For example, the late 20th and early 21st centuries have seen both legislative and popular explosions of interest in limits on liability for the owners of businesses as well as for their managers. Thus, the development and utilization of new forms of limited liability entities has been matched with limits on the fiduciary duties of partners in partnerships and members of limited liability companies, and the directors of corporations have been protected by statutes and provisions in articles of incorporation exculpating them from monetary liability for a variety of defalcations.⁸ What have not matched are developments in a number of laws having significance for the liability of the enterprises themselves. At the state level, these include a wide range of consumer protection devices, such as plain language laws, mandatory cooling-off periods, and prohibition of various substantive contractual terms. At the federal level, they most recently include the provisions of Dodd-Frank.

The power to regulate interstate commerce is notoriously broad, and few would find nationwide protection of consumer interests particularly controversial, much less beyond the power of the federal government to adopt. Federal intervention in corporate governance traditionally has struck a different chord. Although the prevailing view appears to be that even comprehensive federalization of corporate law would be legal,⁹ there has been extended expostulation at every federal incursion into the territory.¹⁰ Opposition to federal involvement in internal corporate affairs partly is justified by enthusiasm for state authority as a general matter as well as by the argument that state competition for corporate charters will both provide would-be incorporators with choices and lead to the development of more efficient corporate rules.¹¹ As discussed in this article, the relatively new school of cultural cognition teaches that reasoned debate is unlikely to resolve what basically are political questions; instead, progress must

be based on solutions that appeal to multiple and competing worldviews. In light of this wisdom, this article stops short of calling for any full-fledged federal attempt to turn consumers into corporate stakeholders. Rather, it works within the framework of more standard consumer protection devices.

The Consumer Financial Protection Bureau

Title X of the Dodd-Frank Act vested the CFPB with the responsibility for regulating consumer financial products—or, as President Obama also put it, “looking out for people...as they interact with the financial system.”¹² According to Section 1021 of the new legislation, the CFPB is to “implement and, where applicable, enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”¹³ In furtherance of this mandate, many preexisting federal laws relating to the protection of financial consumers were brought under CFPB jurisdiction;¹⁴ in addition, the CFPB was given broad authority to prevent unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service.¹⁵ The CFPB is to engage in supervision of many providers of financial products or services to determine both compliance with relevant law and the amount of risk posed by such providers to consumers; subject to certain limits on size, depository and nondepository providers alike are within CFPB supervisory authority.¹⁶ Supervision entails both requiring reports and conducting examinations. The CFPB is expected to conduct regular examinations of regulated entities and is empowered to conduct reviews of single or multiple entities focusing on particular issues of concern.¹⁷ It is specifically authorized to collect and make public information from covered persons.¹⁸ A “covered person” is a provider of consumer financial goods or services, but the term also includes affiliates acting as service providers to such persons.¹⁹ An “affiliate” is any person who controls, is controlled by, or is under common control with another person.²⁰

Legislative Grants of Authority

As noted, the CFPB received a grant of authority with respect to unfair, deceptive, or abusive acts

and practices (sometimes referred to as UDAAP). The precise language permits the CFPB “to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”²¹ The terms “unfair” and “deceptive” derived from preexisting and oft-exercised powers possessed by other authorities, including the FTC,²² the Federal Reserve Board, the Office of Thrift Supervision, and the National Credit Union Administration.²³ The term “deceptive” evidently was believed to be well-enough understood so as to require no legislative gloss. Section 1031(c) does, however, carefully place limits on the CFPB’s ability to define an act or practice as unfair:

- (1) IN GENERAL—The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—
 - (A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and
 - (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.
- (2) CONSIDERATION OF PUBLIC POLICIES—In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.²⁴

Section 1031(d) expresses the Congressional view that the concept of “abusive” also should be subject to constraint:

The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—

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- (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
 - (2) takes unreasonable advantage of—
 - (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
 - (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.²⁵

Even given this constraint, it would appear that Congress believed that it was accomplishing something by granting the CFPB the authority to prevent abusive acts and practices in addition to those that are unfair or deceptive. Exactly what that something was is a little less obvious. One would think, after all, that interfering with understanding would be deceptive and that taking unreasonable advantage of consumers would be unfair. The intended contribution of the new term may be informed, however, by an understanding of the traditional (and continuing) constructions of the older terms.

The CFPB's Manual and the History of Abusive Acts and Practices

In late 2011, the CFPB published an online *Supervision and Examination Manual* (labeled Version 1.0 to reflect expectation of ongoing change).²⁶ Part Two of the manual is titled “Examination Procedures” and is divided into subparts dealing with examinations for compliance with each of the various laws within the CFPB’s jurisdiction, such as the Truth in Lending Act and the Fair Credit Reporting Act. One of the subparts bears the heading “Unfair, Deceptive or Abusive Acts or Practices” and contains a quantity of useful information straightforwardly borrowed from the FTC’s jurisprudence on what constitutes either an unfair or a deceptive act or practice. There is, however, nothing with respect to abusive acts or practices other than the statutory language previously quoted and a caution that “[a]lthough abusive acts also may be unfair or deceptive, examiners should be aware that the legal standards for abusive, unfair, and deceptive each are separate.”

The statutory definition of unfair acts or practices requires that consumers not be reasonably able to avoid

substantial injury. According to the FTC’s inherited interpretation set out in the manual, the inquiry into whether injury from an act or practice is reasonably avoidable turns on whether the act or practice hinders a consumer’s decisionmaking or interferes with his or her ability to take action. The manual states that “[n]ormally the marketplace is self-correcting; it is governed by consumer choice and the ability of individual consumers to make their own private decisions without regulatory intervention.” Nonetheless, “[i]f material information...is modified after, or withheld until after, the consumer has committed to purchasing the product” the not-reasonably-avoidable test will be satisfied. The manual also takes the position that injury is not reasonably avoidable in instances of transactions occurring without the consumer’s knowledge or consent. It cautions, however, that “[a] key question is not whether a consumer could have made a better choice. Rather, the question is whether an act or practice hinders a consumer’s decision-making.” Although this articulation might seem to limit the concept of unfairness to instances of inadequate disclosure, the manual does also state that transactions that are coerced are unfair. In addition, and very importantly, “if almost all market participants engage in a practice, a consumer’s incentive to search elsewhere for better terms is reduced, and the practice may not be reasonably avoidable.” The examples provided of unfair practices all are drawn from FTC jurisprudence and include refusing to release a lien after a mortgage is fully paid, reducing credit limits without notice, and assisting in processing unauthorized checks. Although the manual tends to frame its analysis of the examples by positing that if consumers had been told that these things would occur they could have chosen differently, the earlier references to coercion and to industrywide practice do suggest that lack of disclosure is not the only thing that is unfair.

As noted previously, the Dodd-Frank Act did not define deceptive acts or practices. The manual, however, endorses and extensively discusses the FTC approach to determining when an act or practice is deceptive. The baseline test is as follows:

A representation, omission, act, or practice is deceptive when

- (1) The representation, omission, act, or practice misleads or is likely to mislead the consumer,

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- (2) The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances, and
 - (3) The misleading representation, omission, act, or practice is material.

Much of the additional interpretation provided is a matter of common sense, but several points are worth noting. One of these is that intent to deceive is not necessary for deception to exist. Another is that claims made with knowledge that they are false are presumed to be material, as are all express claims with respect to a financial product or service. Moreover, evaluations of whether statements or omissions are deceptive are to be contextual and require adopting the perspective of the target audience (such as older US citizens, young people, or financially distressed consumers). In addition, it is not necessary that a majority of consumers in the target class would be misled; a significant minority will suffice. The examples of deceptive acts or practices drawn from FTC enforcement actions include such matters as the use of unreadable fine print in television ads and in general suggest that there is latitude for interpretations in this area to be quite consumer-friendly.

Although nothing helpful in defining “abusive” acts and practices is to be found in the manual, there is a history on the subject. Thus, in 1994, Congress enacted the Home Ownership and Equity Protection Act (HOEPA) as an amendment to the Truth in Lending Act.²⁷ HOEPA regularly is described, both in popular accounts and by various government authorities, as responding to abusive lending practices.²⁸ It specifically prohibited (presumably because they are abusive) a number of practices in connection with specified high-cost loans, such as prepayment penalties and negative amortization. It also empowered the FTC to prohibit acts or practices in connection with “refinancing of mortgage loans that it finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower.”²⁹ Nonetheless, the term “abusive” was not defined and has never been well understood.³⁰

As originally introduced in the House of Representatives, the Dodd-Frank Act limited the CFPB's authority to regulate abusive acts and practices as follows:

The Director and the Agency may determine that an act or practice is abusive only if the Director finds that—

- (A) the act or practice is reasonably likely to result in a consumer's inability to understand the terms and conditions of a financial product or service or to protect their own interests in selecting or using a financial product or service; and
- (B) the widespread use of the act or practice is reasonably likely to contribute to instability and greater risk in the financial system.³¹

The systemic risk test called for by Part (B) is notably absent from the provision substituted by the Senate and ultimately enacted. Moreover, the final version expands the prerogative of the CFPB from the power to prohibit acts resulting in inability to understand terms or to protect one's own interests to the power to prohibit interference with the ability to understand terms *and* to prohibit taking unreasonable advantage of a lack of understanding, an inability to self-protect, or reasonable reliance upon a covered person. This change seems to be substantive rather than mere wordsmithing. Most clearly, the CFPB has been given the authority to regulate abuse of trust. More subtly, its ability to prevent acts that result in—that is, *create*—an inability to understand or self-protect has expanded to include prevention of acts that *take advantage* of conditions that evidently may preexist. This apparently constitutes a statutory acknowledgment that not all financial consumers start out as perfectly rational and able to self-protect.

In addition to making use of the term “abusive” in its grant of authority to the CFPB, the Dodd-Frank Act used the term in describing the purpose of a provision dealing with the ability to repay a mortgage. Thus, in connection with a safe harbor established for a particular type of qualified mortgage, Section 1639c(a)(2) states that it is intended “to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability-to-repay the loans and that are understandable and not unfair, deceptive, or abusive.”³² This appears to be supplemental evidence that consumers' preexisting conditions—such as ability to repay—can be abused notwithstanding their ability to understand what is happening to them.

The statutory use of “abusive” was complemented by some amount of on-the-record muttering by Congressional witnesses and statement-making members. For example, “high fees, incentives for brokers that are harmful to borrowers, and lenders steering consumers to products that are more costly than necessary” were described as “abusive practices,”³³ as was “sell[ing] somebody a reverse mortgage and then becom[ing] his or her investment adviser.”³⁴ On the other hand, at least one member expressed opposition to the Act on the ground that certain terms, including “abusive,” were undefined.³⁵ This lack of comfort seems to be shared by the CFPB’s new director who, as noted previously, has declared the CFPB’s power with respect to abusive acts and practices “puzzling.” He went on to say that he did not see it as a weapon that would see frequent use; instead, “[f]or something to be an abusive practice it would have to be a pretty outrageous practice.”³⁶ According to at least some observers, this perspective means “it is unlikely that the CFPB will be pushing the reach of ‘abusive’ practices in the near future.”³⁷

In any event, even without its authority to prevent unfair, deceptive, or abusive acts and practices (UDAAP), the CFPB’s ability to require reports, to examine financial providers, to assess risk to consumers, and to collect and make public information from covered persons probably would suffice to legally justify the type of proposal raised previously and fleshed out in the following sections. Given its UDAAP powers, however, such a proposal would seem beyond legal challenge. The power to prevent providers from taking unreasonable advantage of preexisting conditions well might sustain outright bans on supplying certain products to particular types of consumers and certainly would support either voluntary or mandated recommendations with respect to product advisability. If, as is proposed, providers of financial services merely are encouraged to self-identify as subscribing to best practices, including as relates to product recommendations, consumers’ choices presumably would be enhanced, thus addressing the traditional concern that industry-wide practices unfairly limit those choices. Moreover, the additional information provided by the directors of electing providers³⁸ with respect to their views on the advisability of certain products would enhance consumers’ understanding, thus reducing the possibility that they might be deceived.

Legality aside, the next task of this article is to make the case that the proposal is justified as a matter of practical reality.

The Rational Consumer

The law and economics school of legal analysis posits that the corporation is a “nexus of contracts” among capital providers, managers, employees, and others—including consumers—conducting themselves in a manner that is rationally self-interested.³⁹ Adherents of this school, sometimes known as “contractarians,” regard this account as normative, as well as descriptive. Thus, even though it really cannot be claimed that no legal actor ever behaves irrationally, corporate law is said to operate more efficiently if the possibility of irrationality is not just theoretically minimized but indeed is ignored.

In contrast to the contractarians are the “legal decision theorists”—scholars who advocate the behavioral analysis of law.⁴⁰ These theorists have sought to apply the insights of social psychology and related fields toward the goal of developing a realistic account of how decisions are made in contexts relevant to law and lawmaking. In evaluating the operation of financial markets and profitmaking entities, they frequently have decried assumptions about the rationality of the relevant actors. They have criticized the ability of many such actors to act in accordance with procedural norms of rationality (*e.g.*, consistency and assimilation of new information), focusing on the predictable cognitive heuristics that permit humans to make decisions and identify their own preferences in light of limits on time, information, and actual ability. Legal decision theorists thus have concluded that “human decisionmaking processes are prone to nonrational, yet systematic, tendencies,” resulting in “bounds” on rationality and free will that routinely should be anticipated.⁴¹

Although decisionmaking may be systematically non-rational, legal decision theorists do not claim that lack of rationality occurs uniformly across all populations and in all situations. For example, there is evidence supporting the proposition that education is correlated with better decisionmaking.⁴² Specifically, in the context of selecting mortgage brokers, it appears that better educated consumers pay far less for their loans.⁴³ There also is evidence of quality variance dependent on the decision-maker’s accountability to others.⁴⁴

The prospect of intersubject variation does not, however, undercut the insight that many individuals make nonrational decisions in entirely foreseeable ways. One of these has to do with the tendency to respond predictably to the manner in which a decision is framed. It has, for example, been fairly well established that decisionmaking is affected by whether an outcome is described in terms of achieving a gain or of avoiding a loss—with decisionmakers generally considering the latter to be more important.⁴⁵ Similarly, there is a clearly revealed bias in favor of remaining with the *status quo*. This means, for example, that if a savings plan is designed as one that affirmatively must be selected, there will be significantly less participation than if it is a plan in which participation is the default. Legal decision theorists also have made the claim that many individuals do not test hypotheses in logical fashion, instead preferentially soliciting confirming evidence and simply failing to perceive disconfirming evidence.⁴⁶ Relatedly, they have identified a confirmation bias “in accordance with which exposure to a competing position will not dislodge and may even strengthen the antecedently held position.”⁴⁷

It is fairly easy to see how providers of consumer goods or services can and do appeal to these and other heuristics. Professors Hanson and Kysar have described this type of activity in the context of a call for changes in prevailing schemes for product liability.⁴⁸ Although Professors Hanson and Kysar do not primarily deal with financial products, their findings can easily be extrapolated: there is no particular reason to believe that consumers faced with puzzling financial products⁴⁹ would be capable of, or inclined toward, more rational behavior than would be the case in selecting among tangible product offerings. In fact, studies conducted by academics in the fields of finance and marketing well document the irrationality of financial consumers, noting, for example, the often-exploited tendency to round down from, say, \$399 to \$300, rather than to round up to \$400⁵⁰ and the tendency to rely on economically irrelevant historic performance measures in making investment decisions.⁵¹ Concomitantly, there is an extensive literature dealing with the most effective methods of marketing financial products.⁵² This literature notes many examples of decisionmaking tendencies that are available for exploitation, detailing, for example, ways in which impulsivity can be increased.

Legal decision theory sometimes is viewed as the product of a group of scholars practicing “law and behavioral economics.”⁵³ This group has both noted the importance of the various phenomena identified previously and written broadly on various corporate law subjects; its possible views on the proposal in this article are discussed in more detail in a later section. There is, however, another recent school making interesting contributions to legal decision theory that are highly relevant to matters of consumer choice. “Critical realists” identify shortcomings in law and behavioral economics, advancing the argument that any conversation about rationality, bounded or otherwise, underestimates the importance of situational influence on behavior.⁵⁴ Systematic failure to attend to situation is said to promote “dispositionist discourse” in which purported “common sense” prompts attribution of behavior to individual “disposition,” or choice, rather than to such realities as biologic response to manipulated products and environments.⁵⁵ In illustrating their views, critical realists make quite a convincing case that it is situational manipulation, rather than poor personal choices, that has led to Americans’ obesity epidemic.⁵⁶ Although not yet extending their insights to the financial transactions that facilitate consumption—whether of Big Macs, shelter, or other items—there is no reason to believe that such an extension would be inapt.

The Significance of Role and Accountability

In addition to a number of other nonrational tendencies identified by legal decision theorists is one related to the willingness to respond to role assignment by engaging in conduct that is expected rather than responsive to individual taste.⁵⁷ In this regard, studies have assessed and demonstrated participants’ willingness to administer increasingly painful electric shocks as part of a “teaching” experiment. Over time, the willingness to follow the directions of the experimenter, notwithstanding cries of pain from the putative subjects, appears constant at 61 percent–66 percent.⁵⁸ Somewhat similarly, in the famous “Stanford prison” experiment, randomly assigned “prison guards” rapidly became abusive and the randomly assigned “prisoners” just as quickly became dysfunctionally depressed.⁵⁹ It may be a bit of a stretch, but not entirely far-fetched, to find an analogy here for corporate law. If the majority of individuals are willing to cause physical pain in accordance with the perceived demands of a role they have voluntarily assumed, might they not be just as willing, when acting as directors or

other managers, to inflict financial pain on consumers in accordance with the perceived demands of corporate role?

As noted previously, accountability to others tends to improve the quality of decisionmaking. One would generally anticipate this result, insofar as the decisionmaker might be expected to take more care and avoid self-interest more thoroughly than otherwise would be the case. Accountability researchers have suggested, however, that “self-critical and effortful thinking” are most likely the areas in which a decisionmaker feels he or she will be accountable to an audience with an interest in process rather than in specific outcomes.⁶⁰ When the views of the audience on outcomes are either known or thought to be known, decisionmaking processes often will be truncated and existing biases will be amplified.

This is not particularly good news in the case of corporate directors. It seems fairly obvious that, by reason of the business judgment rule⁶¹ as well as statutes and provisions in articles of incorporation holding directors financially harmless, there is no serious legal accountability for the outcome of their actions—or, within reason, for the shoddiness of the procedures through which those actions are taken.⁶² As a practical matter, however, directors are accountable to markets, with their accountability outcome “scores” flashing on the scoreboards of financial statements and stock price. It should be no surprise when they rather consistently conduct themselves so as to see those scores increase. Similarly, it should be no surprise when the judgments they make do little, if anything, to voluntarily protect consumers.

A Best Practices Proposal

This article takes seriously the possibility that financial consumers are subject to limits on rationality and that many of them, because of predictable heuristics or situational pressures, may not make the choices that strict economic analysis might predict. It also takes the position that it risks little, if any, harm to acknowledge that corporations are capable of exploiting this probable reality, that corporate decisionmakers are encouraged to believe they are duty-bound to engage in such exploitation, and that they act accordingly. It is the task of the remainder of the article to persuade that it would do no harm to counter this tendency, and to do so in a manner that can be justified simply as providing consumers with additional information.

Professor Gregory Mitchell has written of de-biasing reforms to be employed in behavior research. His suggestions include “asking or directing experimental subjects to consider alternative or opposing arguments,” and “asking experimental subjects to explain their choices.”⁶³ This article proposes that these reforms be employed in the case of corporate directors making decisions relevant to the exploitation of financial consumers. It hardly seems draconian or even particularly burdensome to encourage directors to be specifically mindful of the subject of exploitation and to explain their thinking in this regard. The expected benefits would include increased and highly relevant information for consumers as well as some possible impact on the actual products offered.

The basic idea is that the CFPB fairly easily could adopt a process for certifying providers of financial products and services as subscribing to corporate decisionmaking practices designed to be less injurious to consumer interests than the usual shareholder primacy model historically has dictated. Most important, corporate directors of companies electing certification would be called upon to familiarize themselves with their companies’ offerings, to certify their own understanding of those offerings, and to declare their individual opinions about the advisability of those products for consumers in certain identified circumstances. Misrepresentation of opinion would, presumably, be sanctionable as a deceptive practice.

Admittedly, calling on board members to familiarize themselves with all of their companies’ offerings and to certify their understanding of those offerings might result in a reduction in the overall number of products offered. To anyone who suspects that obfuscation may be one of the reasons for product proliferation this is not a bad thing. Moreover, those who were paying attention during the recent financial crisis will recall that rampant failure by both providers and purchasers to understand the attributes of certain financial products was a recipe for disaster.⁶⁴ Very possibly, if a product is too complicated to be understood by the average board member, it simply should not be sold. Of a piece, if the entire slate of product offerings is too expansive for any one director to grasp, perhaps no one is really adequately minding the store.⁶⁵

As a practical matter, identifying financial consumers’ circumstances—or generating meaningful classifications for them—would present challenges. On the other hand, at least a few easy cases would exist. For example, should

anyone ever take a payday loan for a nonessential item if he or she cannot expect to pay it back on payday? Should anyone ever take out a loan at a triple-digit interest rate if a loan on better terms is available elsewhere? Should any student who needs to borrow for his or her education ever take out a private loan before exhausting lower-cost federal options? Should anyone ever take out a mortgage in an amount highly correlated with defaults by borrowers with similar earnings levels? One can imagine, then, a regime in which directors would be prompted to answer questions such as the following:

1. With respect to short-term loans intended to be repaid out of the borrower's next paycheck: In which circumstances should this loan be considered? [*Presumably nondeceptive answer: Only if the borrower is extremely confident that his or her next paycheck will be adequate to repay the loan and its carrying costs as well as provide for continuing living expenses so that no additional borrowing or extension of the term will be necessary.*]
2. With respect to loans bearing interest rates in excess of those likely to be available from alternative lenders: In which circumstances should this loan be considered? [*Presumably nondeceptive answer: Never.*]
3. With respect to private student loans: In which circumstances should this loan be considered? [*Presumably nondeceptive answer: Only after all lower-cost federal options have been exhausted.*]
4. With respect to mortgage loans in the amount of \$X: In which circumstances should this loan be considered? [*Presumably nondeceptive answer: A mortgage loan in the amount of \$X should not be considered by prospective borrowers with annual income below \$Y.*]

Possible Perspectives

The contractarians described earlier in this article characterize the best or most efficient corporate law as providing the set of default contract rules most likely to minimize transaction costs. These rules generally reflect the assumption that corporate managers—primarily the board of directors—act as fiduciaries for the shareholders.⁶⁶ Limiting the duties of the board of directors to serving shareholder interests is thought to be the single best method of limiting managerial opportunism and shirking, owing to the relative efficiency of monitoring by a single class of beneficiaries. The board therefore is regarded as responsible for maximizing the residual value of the firm remaining after nonshareholder claimants are satisfied. This easily

translates to the conjoined assertions that the goal of the corporation is to make money for its shareholders and that the interests of shareholders must be preferred over those of all others with interests in the firm. The resulting template for corporate law is, of course, known as the “shareholder primacy” model. Under this view, even a modest proposal to encourage the board of directors to be purposely mindful of interests other than those of shareholders is controversial: psychological acculturation toward shareholder primacy manifest through profit maximization is distinctly to be favored. This means, as a policy matter, that directors really should be encouraged to exploit consumers if that will contribute to the corporate bottom line. Only if public recognition of the practice were to be likely, and were apt to lead to enough public outcry to result in boycotts, legal prohibition, or something of the sort should exploitation voluntarily be avoided.⁶⁷

The contractarian approach has been quite dominant for decades but does face competitors. One of its more vigorous recent challengers is its close relative, behavioral economics. Behavioral economics, as noted previously, accepts the insights of social science and utilizes empirical studies of human behavior in order to reassess some of the assumptions of the traditional law and economics movement.⁶⁸ Its proponents have established to their own satisfaction that not all economic actors act in their own-self interest—in some instances because of altruism, in some because of predictable cognitive heuristics, and in some because of plain old stupidity.

In accepting that economic actors, including shareholders, sometimes act altruistically,⁶⁹ behavioral economics could be used to formulate a modified iteration of shareholder primacy. In this version, shareholder welfare might be examined in terms of what shareholders might affirmatively desire other than, or in addition to, profit maximization. In other words, psychic profits could be counted toward the desired bottom line. Thus, other-regarding shareholders might prefer less consumer exploitation, even if it led to less profitability. This possibility is problematic, though, for at least three reasons. The first is that a number of shareholders are not individuals but institutions.⁷⁰ The second is the perceived problem of the commons. If the shareholders of one corporation learn that it will limit consumer exploitation but believe that other entities will continue the practice, they are apt to regard their own sacrifice as pointless. The third is that

although some shareholders may be other-regarding, it is by no means clear that all would be. Presumably, it is this expected diversity of viewpoints that explains why mainstream corporate America does not, by and large, attempt to accommodate the possible nonmonetary preferences of shareholders as to a number of matters.

As noted previously, another of the heuristic phenomena explored by behavioral economics has to do with the importance of how a decision is framed. This recognition has prompted some of the school's adherents to propose an approach known as "libertarian paternalism," pursuant to which policy makers may determine which resolution of an issue generally would be preferable, and frame decisionmaking contexts accordingly. Although individuals thus are psychologically encouraged to make decisions in a particular manner, deviation—or opting out—is possible. A simple example involves placing fruit before sugary desserts in school cafeteria lines.⁷¹ With any luck, children then find themselves with scurvy-fighting oranges on their trays and less room for other desserts, but those who are "rational" enough to see through the ploy (say the second time through the line) are free to skip the fruit and go straight for the cupcakes. Given this example, the model does seem a bit odd, because it contemplates that actors may self-prove rationality by opting away from the choice urged by presumably well-informed social planners. In any event, libertarian paternalism would seem to easily accommodate a CFPB-sponsored regime in which consumer choices are framed, in part, by directorial recommendation.

Behavioral economic analysis has spurred the growth of another approach reacting to the recognition that humans do not always act in the ways that conventional law and economics would predict. The "asymmetric paternalism" school calls for paternalistic intervention when the benefits to irrational individuals significantly outweigh the cost to rational individuals of losing the right of choice.⁷² This easily would go so far as to permit the government to dictate outright the frames pursuant to which products would be marketed, thus protecting the irrational while still leaving the rational—capable of avoiding the framing effect—freedom to choose. Providing a sponsored platform for directorial recommendations certainly also should be acceptable.

Yet another relative of contractarianism is the "team production" model, which speaks the language of

neoclassical economics but makes somewhat different starting assumptions.⁷³ Team production scholars describe the board of directors as an independent "hierarchy" mediating among all those with inputs to the corporation that are "team specific." In this view, the proper function of the board is to employ the inputs of financiers, workers, communities, and others in order to maximize the value of the firm. Not incidentally, this requires the board to allocate corporate profits among all inputting groups in a manner all participants will tolerate. Although the proponents of the model do not characterize consumers as having team-specific inputs, they have acknowledged the board of directors' ability to engage in corporate philanthropy⁷⁴ and presumably would find aversion to consumer exploitation an acceptable motivation for directorial decisionmaking. In fact, the team production model appears to have sufficient latitude to permit the board to engage in at least limited moral decisionmaking—extensive enough, at any rate, to roughly emulate the non-self-interested conduct of entrepreneurs.⁷⁵

Contractarians do sometimes respond to criticism. A portion of these responses, being reiterations of basic law and economics assumptions applied to the examination of the precise claims of the newer schools, have generated statements along the lines of the following (specifically in response to the team production model): "By vesting shareholders with an exclusive right to a corporation's residual, then, the principal-agent model facilitates adoption of the sort of mechanisms that can reduce the risk of opportunism and thus minimize the transaction costs associated with inducing team-specific investment."⁷⁶ This is no more or less than a simple reassertion of the basic norm of shareholder primacy, indicating that debate on the subject is at least as much cultural as it is logical. As discussed immediately below, sufficiently divergent world views are unlikely to prevail on one another by means of public reason.

Cultural Cognition

Cultural cognition theory constitutes a relatively recent recognition of the priority of culture in an individual's assessment of such matters as the validity of facts and the perception of risk.⁷⁷ Pursuant to the theory, culture or worldview may be usefully classified by "group" and "grid." "Group" is a question of whether one is oriented toward individualism or communitarianism. "Grid" refers to whether one is inclined toward

hierarchical or egalitarian values. The theory rejects public reasoning as a method of resolving intensely polarizing issues, instead suggesting a process of “expressive overdeterminism” to minimize social discord. Expressive overdeterminism calls for the crafting of solutions that permit validation of divergent world views. Its proponents suggest, for example, a resolution of the gun control debate pursuant to which gun owners registering their guns are paid bounties for doing so, thus validating both the safety concerns of those who would prefer gun control and the autonomy of those who fear loss of the “right” to bear arms of their choosing.

Although corporate exploitation of financial consumers may not be of sufficiently high profile to qualify as an intensely polarizing issue, perhaps it would be if sincere attempts were made to outlaw any large number of financial goods or services simply on the grounds they are substantively abusive. In any event, the issue obviously is one as to which divergent world views would come into play. Individualists and communitarians would be likely to selectively and differentially perceive the validity of scientific studies on heuristics and the like. Individualists might insistently postulate the rationality of consumers and oppose government intervention on their behalf. This is particularly true if they also are hierarchists who regard consumers who lack either financial stability or perfect rationality as not worthy of protection if they are not capable of protecting themselves. Communitarians, on the other hand (particularly those of an egalitarian bent), might go so far as to prefer outright governmental limitations on consumer choice if such limitations would reduce, for example, personal bankruptcies and economically forced relocations. A solution acceptable to many necessarily will disappoint some.

That said, cultural cognition does seem to teach that without cultural agreement, some problems simply will not be resolved; in fact, there may not even be a consensus that they exist. It may well be that exploitation of financial consumers falls in this latter category. Accordingly, those who do see a problem realistically must circumscribe their attempts to solve it. As to this, cultural cognition almost certainly has something to teach. For example, it would be well be to characterize remedial proposals as simple attempts to redress market malfunction. Corporate manipulation of the preferences of financial consumers thus should be described as a type of market failure rooted in lack of disclosure. That lack

may be redressed by encouraging providers of financial goods and services to compete on the basis of the disclosure that they are willing to provide. Although there currently is no legal impediment to such competition, CFPB sponsorship of an appropriate platform (with concomitant enforcement against disclosures that are misleading) would seem to be a useful first step in bringing it about.

Conclusion

This article takes the position that financial consumers cannot be expected to be rational in the strict economic sense. In light of the complexity and proliferation of various financial goods and services, as well as limits on individual time and cognitive ability, consumers inevitably take shortcuts in making decisions. Some of these decisions then turn out to be wrong—in fact, so very wrong that it is almost inevitable that the providers of the goods and services in question foresaw this would be the case. Still, because many of those providers are corporate entities, the argument can be made that the individuals managing the entities were obliged to assist consumers in cutting their own financial throats. Although the obligation might not be a legal one, it nonetheless is one that is psychologically encouraged by market accountability.

The proposal discussed previously is intended to provide financial consumers with better guidance, at least as to decisions that are most likely to be truly disastrous, and to do so in a method that might counter at least a bit of the psychological pressure on corporate directors to make decisions in the name of shareholder primacy. The precise mechanism suggested is to ask directors to (1) familiarize themselves with the consumer financial offerings of the firms for which they act and (2) express (truthful) opinions as to the advisability of those offerings for consumers in particular straits. The platform on which the mechanism would operate is a best-practice certification sponsored by the CFPB. Such sponsorship clearly is within the mandate of the CFPB—so clearly in fact that some will regard it as quite disappointing. Attempts to aggressively exercise the full extent of the CFPB’s authority might, however, result in the type of intense polarization said by cultural cognitivists to defeat resolution of any type. The proposal therefore is pragmatically oriented toward emphasizing that the existing plight of at least some financial consumers is a failure of disclosure—one that may be addressed by encouraging corporations to experiment with competition on the

basis of their consumer-friendly decisionmaking processes and recommendations.

Notes

1. Another version of this article originally was published as Half-a-Cup Better than None: A Pragmatic Approach to Preventing the Abuse of Financial Consumers, 81 GWU L. REV. 929 (2013).
2. See Elizabeth Warren, *Public Safety Regulation as a Model for Financial Services Regulation*, 42 J. CONSUMER AFFAIRS 452, 452 (2008) (describing chance of mortgage “putting your family out on the street” as then one in five).
3. See Matthew Reed, Inst. for College Access & Success, *Critical Choices: How Colleges Can Help Students and Families Make Better Decisions About Private Loans* (2011), available at http://projectonstudentdebt.org/files/pub/critical_choices.pdf (the majority of student borrowers do not exhaust lower-cost federal alternatives before turning to private lenders).
4. See Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?*, 69 WASH. & LEE L. REV. 649, 659 (2012) (defining “payday loan” as “a consumer loan that averages an APR in the triple, even quadruple, digits and requires borrowers to repay the loan in a single balloon payment when they receive their next paycheck”).
5. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.
6. Dave Clarke, *U.S. Abusive Lending Bar Likely Set High—Cordray*, THOMSON REUTERS NEWS & INSIGHT, Jan. 24, 2012, http://newsandinsight.thomsonreuters.com/Securities/News/2012/01/_January/US_abusive_lending_bar_likely_set_high-Cordray/; see also *infra* at ns. 56–69 (discussing “abusive” standard).
7. See Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 25–36 (1991) (defending the exclusion); compare Marleen A. O’Connor, *Restructuring the Corporation’s Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1258–60 (1991) (criticizing the exclusion).
8. See generally Theresa A. Gabaldon, *Experiencing Limited Liability: On Insularity and Inbreeding in Corporate Law*, in *PROGRESSIVE CORPORATE LAW* 111 (Lawrence E. Mitchell ed., 1995) (discussing contradiction between development of limited liability entities and expanding enterprise liability).
9. Cf., E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35, 42–43 (2009).
10. See, e.g., Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1827–1828 (2006).
11. See generally Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 470 (1987).
12. President Barack Obama, *Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act*, THE WHITE

HOUSE OFFICE OF THE PRESS SECRETARY (July 21, 2010, 11:34 AM), <http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act>.

13. Dodd-Frank, tit. X, § 1021, 124 Stat. at 1955.
14. As enumerated at Dodd-Frank Act, tit. X, § 1002 (12), 124 Stat. at 1957, these include the Alternative Mortgage Transaction Parity Act of 1982, the Consumer Leasing Act of 1976, the Equal Credit Opportunity Act, the Fair Credit Billing Act, the Home Owners Protection Act of 1998, the Fair Debt Collection Practices Act, the Home Mortgage Disclosure Act of 1975, the Home Ownership and Equity Protection Act of 1994, the Real Estate Settlement Procedures Act of 1974, the S.A.F.E. Mortgage Licensing Act of 2008, the Truth in Lending Act, the Truth in Savings Act; the Interstate Land Sales Full Disclosure Act, most of the Electronic Fund Transfer Act, most of the Fair Credit Reporting Act, and certain portions of the Federal Deposit Insurance Act, of the Gramm-Leach-Bliley Act and of the Omnibus Appropriations Act.
15. Dodd-Frank, tit. X, § 1031(a), 124 Stat. at 2005. “Consumer financial product or service” is defined at *id.* tit. X, § 1002(5), (15), 124 Stat. at 1956–57, 60.
16. Dodd-Frank, tit. X, §§ 1024–25, 124 Stat. at 1987 (nondespository), 1990 (depository).
17. CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL Overview 6 (Oct. 2011, as amended), available at http://www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf.
18. Dodd-Frank Act, tit. X, § 1022(c)(4), 124 Stat. at 1982–83.
19. Dodd-Frank Act, tit. X, § 1002(6), 124 Stat. at 1956.
20. Dodd-Frank Act, tit. X, § 1002(1), 124 Stat. at 1955.
21. Dodd-Frank, tit. X, § 1031(a), 124 Stat. at 2005.
22. John E. Villafranco & Kristin A. McParland, *New Agency, New Authority: An Update on the Consumer Financial Protection Bureau*, 11–3 THE ANTITRUST SOURCE, Feb. 2012, at 1, 5.
23. Gail Hillebrand, *The Consumer Financial Protection Bureau: Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, 8 BERKLEY BUS. L.J. 219, 221(2011).
24. Dodd-Frank Act, tit. X, § 1031(c), 124 Stat. at 2006.
25. Dodd-Frank, tit. X, § 1031(d), 124 Stat. at 2006.
26. See generally CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL—VERSION 1.0 (Oct. 2011), available at <http://www.consumerfinance.gov/guidance/supervision/manual/>. Quotations from the Manual appearing in the text may all be found at UDAAP 2–9, available at <http://www.consumerfinance.gov/guidance/supervision/manual/udaap-narrative/>.
27. 15 U.S.C. § 1639, as amended.
28. See, e.g., Legal Resources—Statutes Relating to Consumer Protection Mission, Protecting America’s Consumers, Federal Trade Commission, <http://www.ftc.gov/ogc/stat3.shtml>, accessed 8 July, 2012.
29. 15 U.S.C. § 1639 (l)(2)(B).
30. See Frank Salinger, *The Short Legislative History of “Abusive” Acts or Practices (or Why Are We Here, Anyway?)*, GEORGE MASON AGE P. PUB. POLICY INST. ON FIN. SERV. REGULATION, June 2012.

31. H.R. 4173 § 4031(c).
32. 15 U.S.C. § 1639c(a)(2).
33. 155 CONG. REC. H14,759 (daily ed. Dec. 11, 2009) (statement of Rep. Schakowsky), 155 Cong Rec H 14747, at *H14759 (Westlaw).
34. 155 CONG. REC. H14,759 (daily ed. Dec. 11, 2009) (statement of Rep. Frank), 155 Cong Rec H 14747, at *H14759 (Westlaw).
35. 155 CONG. REC. H14,415 (daily ed. Dec. 11, 2009) (statement of Rep. Kingston), 155 Cong Rec H 14408 at *H14415 (Westlaw).
36. See Clarke, *supra* n.6.
37. Villafranco & McPartland, *supra* n.22, at 6.
38. Note that directors of “covered persons” also would qualify as “covered persons” subject to CFPB authority under the definition recited earlier in the text.
39. Michael C. Jensen & William H Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 306–07 (1976) (discussing the corporation as a nexus of principal-agent contracts); see also FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 17 (1991) (discussing the corporate contract); Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 770 (1989) (characterizing the corporation as a nexus of contracts).
40. Gregory Mitchell, Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence, 91 GEO. L.J. 67, 78–79 (2002).
41. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 632, 633 (1999).
42. Mitchell, *supra* n.40, at 87–93.
43. See SUSAN E. WOODWARD, U.S. DEP’T OF HOUS. & URBAN DEV., A STUDY OF CLOSING COSTS FOR FHA MORTGAGES 43–44 (2008), available at http://www.huduser.org/Publications/pdf/FHA_closing_cost.pdf.
44. Mitchell, *supra* n.40, at 110.
45. See Russell Korobkin, *Libertarian Welfarism*, 97 CAL. L. REV. 1651, 1658 (2009) (describing this so-called “framing effect”).
46. Robert A. Prentice, The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation, 95 NW. U. L. REV. 133, 145–46 (2000); Hanson & Kysar, *supra* n.41, at 650.
47. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71, 155 (2000).
48. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999).
49. See, e.g., Warren, *supra* n.2, at 454 (quoting memo from banking consultant to effect that “most bank products are ‘too complex for the average consumer to understand’”); Nicholas Wonder et al., *The Financial Rationality of Consumer Loan Choices: Revealed Preferences Concerning Interest Rates, Down Payments, Contract Length, and Rebates*, 42 J. CONSUMER AFFAIRS 243, 244 (2008) (summarizing literature on consumer confusion “in the face of complex, multidimensional price information such as auto loan financing”).
50. See, e.g., Eric Anderson & Duncan Simester, *Effects of \$9 Price Endings on Retail Sales: Evidence from Field Experiments*, 1 QUANTITATIVE MKTG. & ECON. 93, 93 (2003); Wonder et al., *supra* n.81, at 267.
51. See, e.g., Joseph Johnson & Gerard J. Tellis, *Blowing Bubbles: Heuristics and Biases in the Run-up of Stock Prices*, 33 J. ACAD. MKTG. SCI. 486, 486–87 (2005).
52. A great deal of this research is summarized in Tae Jun Lee, *The Role of Financial Services Advertising on [sic] Investor’s Decision-Making* (May 2011) (unpublished Ph.D. dissertation, Univ. of Tenn., Knoxville), available at http://trace.tennessee.edu/cgi/viewcontent.cgi?article=2090&context=utk_graddiss&ei=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3D%26rct%3D%26q%3Drole%2520of%2520advertising%2520and%2520marketing%2520in%2520consumer%2520financial%2520products%26source%3Dweb%26cd%3D1%26ved%3D0CFgQFjAA%26url%3Dhttp%253A%252F%252Ftrace.tennessee.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D2090%2526context%253Dutk_graddiss%26ei%3DCyLqT8TJLoLb0QHQ07DIAQ%26usq%3DAFQjCNGqZybmNq2nZ92gunnEDMBqmIsqfQ#search=%22role%20advertising%20marketing%20consumer%20financial%20products%22.
53. Gregory Mitchell, Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law, 43 WM. & MARY L. REV. 1907, 1913–16 & n.12 (2002).
54. Jon D. Hanson & David G. Yosifon, The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture, 152 U. PA. L. REV. 129, 136 (2003).
55. David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681, 731 (2008).
56. Adam Benforado, Jon D. Hanson & David G. Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1797 (2004).
57. David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 292 (2003); Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 456 (2007).
58. Jerry M. Burger, Replicating Milgram: Would People Still Obey Today?, 64 AM. PSYCHOLOGIST 1 (2009).
59. Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT’L J. CRIMINOLOGY & PSYCHOLOGY 69, 69–73 (1973).
60. Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 258 (1999).
61. For an explanation of the modern business judgment rule, see Elizabeth S. Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule In Unincorporated Business Organizations?*, 30 DEL. J. CORP. L. 343, 345–49 (2005).
62. See Lawrence A. Hamermesh, *Why I Do Not Teach Van Gorkum*, 34 GA. L. REV. 477, 479 (2000) (discussing the advent of the modern “Raincoat” provision, shielding the Corporate Director of financial liability for a breach of the duty of care); See, e.g., 8 Del. C. § 102(b)(7).
63. Mitchell, *supra* n.40, at 134.
64. See James Fanto, *Stress Testing and Scenario Analysis in Risk Management: Preparing for the Worst*, in THE PANIC OF 2008:

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- CAUSES, CONSEQUENCES & IMPLICATIONS FOR REFORM 77, 81–84 (Lawrence E. Mitchell & Arthur E. Wilmarth, Jr. eds., 2010) (“PANIC OF 2008”); Theresa A. Gabaldon, *The Sewers of Jefferson County*, in PANIC OF 2008 255, 272–73; Patricia A. McCoy, *Federal Preemption, Regulatory Failure and the Race to the Bottom in US Mortgage Lending Standards*, in PANIC OF 2008 132, 139–41; Frank Partnoy, *Overdependence on Credit Ratings was a Primary Cause of the Crisis*, in PANIC OF 2008 116, 119.
65. The proposal could be tweaked, however, to assign certain product lines to certain groups of directors.
66. Easterbrook & Fischel, *supra* n.39, at 4, 91 (1991).
67. This is not intended to mean that economists do not recognize consumer misleading or the like as a form of market failure. Market failures, in their view, generally are to be managed as a matter of law external to the corporation.
68. See, e.g., Ken Greenfield, Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Took, 35 U.C. DAVIS L. REV. 581 (2002); Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471 (1998); Donald C. Langevoort, Monitoring: The Behavioral Economics of Corporate Compliance with the Law, 2002 COLUM. BUS. L. REV. 71.).
69. See Neel P. Parekh, Note, When Nice Guys Finish First: The Evolution of Cooperation, The Study of Law, and The Ordering of Legal Regimes, 37 U. MICH. J.L. REFORM 909, 918, 935 (2004).
70. This problem may or may not be assumed away by positing that after all institutional stacking, or “nesting,” is considered, individual shareholders will be revealed.
71. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1165–66 (2003).
72. See Colin Camerer et al., Regulation for Conservatives: Behavioral Economics and the Case For “Asymmetric Paternalism,” 151 U. PA. L. REV. 1211, 1212 (2003).
73. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999) (discussing the team production approach to the corporation).
74. See generally Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 STETSON L. REV. 27 (1998) (invoking team production model in defense of corporate charity).
75. See generally Einer Elhauge, *Sacrificing Corporate Profits In The Public Interest*, 80 N.Y.U. L. REV. 733 (2005) (focusing on team production model and public interest).
76. Alan J. Meese, The Team Production Theory of Corporate Law: A Critical Assessment, 43 WM. & MARY L. REV. 1629, 1671 (2002).
77. See Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 150–57, 170 (2006).

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