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Fixing Standard-Form Contracts

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FIXING STANDARD-FORM CONTRACTS

Shirly Levy[*]

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I. INTRODUCTION

For consumers, it is both the best and worst of times. In today's market, as never before, large companies are at the mercy of consumers' expectations and demands. At the same time, however, suppliers continue to exploit consumer weaknesses with their standard-form contracts.[1] Moreover, consumers' strengths and weaknesses alike are magnified by digital markets. This article aims to enhance consumer power by drawing lessons from another market – the financial market. Specifically, this article advocates for the introduction of third-party advisory services, which this article terms "contract advisors." These new agents would perform a similar advisory role to that of proxy advisors or credit rating agencies in financial markets. Such contract advisors would unleash consumers' latent power to overcome buyer-side weaknesses.

The 2020 boycott of Facebook (now Meta) is an example of how large companies bend to consumer expectations and demands – not just their expectations as consumers, but also as human beings. In June 2020, roughly 400 businesses,[2] including large companies such as Coca-Cola, Ford, and Unilever, publicly announced that they were "hitting pause on hate" and ceased advertising on Facebook for one month in a protest campaign labeled #StopHateForProfit.[3] The campaign focused mostly on Facebook's inability to properly monitor and prevent racist and violent content on its platform. By withholding their advertisements, the companies proclaimed that they were valuing freedom and equality. These large companies were trying to appease their consumers that participated in the campaign.[4] The #StopHateForProfit campaign demonstrates how the largest companies respect consumer power, which

1. *See infra* Section II Part C.

2. *See* Shannon Bond, *Over 400 Advertisers Hit Pause on Facebook, Threatening $70 Billion Juggernaut*, NPR (July 1, 2020), https://www.npr.org/2020/07/01/885853634/big-brands-abandon-facebook-threatening-to-derail-a-70b-advertising-juggernaut [https://perma.cc/K9PB-VMLB].

3. *See* the list of businesses at *Participating Businesses*, Stop Hate for Profit, https://www.stophateforprofit.org/participating-businesses [https://perma.cc/HFE6-TXET] (last visited Feb. 20, 2023); *see also* Rachel Lerman, *Facebook Faces a Growing Advertising Boycott After Consumer Goods Giant Unilever Joins*, Wash. Post (June 27, 2020), https://www.washingtonpost.com/technology/2020/06/26/facebook-advertising-boycott-unilever; Queenie Wong, *Facebook Ad Boycott: Why Big Brands 'Hit Pause on Hate'*, Cnet (July 7, 2020), https://www.cnet.com/news/facebook-ad-boycott-how-big-businesses-hit-pause-on-hate ("[T]he Anti-Defamation League, the NAACP and Color of Change called on businesses to 'hit pause on hate' and not advertise on Facebook in July. The social network makes nearly all of its money from ads, raking in more than $70 billion in revenue last year.").

4. "Boycotting Facebook is obviously more cost-effective than paying for ads, they receive free media publicity and appeal to socially-conscious consumers. Some say that it is only the combination of once-in-a-century pandemic, rampant unemployment, and social unrest that allowed for this movement against corporations at this time." Jon Swartz, *The Facebook Ad Boycott Could Pay Off for Companies More Than Advertising on Facebook*, MarketWatch (July 4, 2020), https://www.marketwatch.com/story/the-facebook-ad-boycott-could-pay-off-for-companies-more-than-advertising-on-facebook-2020-07-01.

springs them into action.[5]

However, there is a plethora of manifestations of how large companies take advantage of consumer weaknesses through standard-form contracts and unfriendly user agreements. Consider Apple's forum selection clause for dispute resolution in its "Media Services Terms and Conditions"[6] which reads as follows:

> You and Apple agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California, to resolve any dispute or claim arising from this Agreement.[7]

This nonnegotiable boilerplate term[8] seems utterly ridiculous for consumers that do not reside on the West Coast, as well as consumers outside the U.S.[9] Does Apple really expect consumers to travel to Santa Clara for an app-related dispute? Apple has locations all over the country, and it seems reasonable to offer at least one venue for adjudication in each state, but it does not.

A similar dispute resolution boilerplate term in Uber's policy was recently hammered down by a Canadian court.[10] In June 2020, the Supreme Court of Canada ruled that an arbitration clause in Uber's standard-form contract for its drivers, which required disputes to be resolved through mediation and arbitration in the Netherlands, was

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5. For Facebook, the boycott is unlikely to have a big financial impact. The top 100 brands on Facebook in 2019 likely brought in only 6% of Facebook's total $70 billion in annual ad revenue. Sheila Dang & Katie Paul, *Facebook Frustrates Advertisers as Boycott over Hate Speech Kicks* Off, REUTERS (July 1, 2020), https://www.reuters.com/article/us-facebook-ads-boycott-idUSKBN2424GS.

6. *See Apple Media Services Terms and Conditions*, APPLE INC., https://www.apple.com/legal/internet-services/itunes/us/terms.html [https://perma.cc/J6R7-99WP] (last visited Dec. 31, 2022).

7. *Id.* Another questionable Apple policy, given the uniformity of their products worldwide, is: "Products can be returned only in the country in which they were originally purchased." *Apple Retail Store Purchase Policies*, APPLE INC., https://www.apple.com/legal/sales-support/sales-policies/retail_us.html [https://perma.cc/72N4-GLV4] (last visited Feb. 19, 2023). Thus, Apple itself enjoys the international economies of scale in the marketing of its products but does not allow consumers the same benefit.

8. For an extensive discussion of boilerplates and the challenges they pose, *see* David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 984 (2005) ("Standard-form contracts offered to consumers contain numerous terms and clauses, most of which are ancillary to the main terms of the transaction. We call these ancillary terms 'boilerplate provisions.' . . . [M]ost consumers do not read boilerplate provisions or, if they do, find them hard to understand . . . .").

9. *Apple Media Services Terms and Conditions*, *supra* note 6. However, residents of the European Union are not bound by the law and forum of California. *Id.* ("If you are a citizen of any European Union country or Switzerland, Norway or Iceland, the governing law and forum shall be the laws and courts of your usual place of residence.").

10. Uber amended its dispute resolution protocols to allow arbitration in the province or territory where a driver resides. Following the *Heller* case, Uber also shifted its Canadian operations from the Netherlands to Canada. Tara Deschamps, *Uber Canada Shifts Operations from Netherlands to Canada*, TORONTO STAR (June 24, 2021), https://www.thestar.com/business/2021/06/24/uber-canadas-ride-hailing-eats-businesses-to-shift-from-being-based-in-netherlands.html.

unconscionable and therefore invalid.[11] In its decision, the court stated:

> Heller [the plaintiff] provides food delivery services in Toronto using Uber's software applications. To become a driver for Uber, Mr. Heller had to accept, without negotiation, the terms of Uber's standard form services agreement. Under the terms of the agreement, Mr. Heller was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. Mr. Heller earns between $400-$600 a week. The fees represent most of his annual income.[12]

Another troubling example is Facebook's (now Meta's) nonnegotiable privacy terms in its data policy, which read:

> We collect information about the people, Pages, accounts, hashtags, and groups you are connected to and how you interact with them across our Products, such as people you communicate with the most or groups you are part of. We also collect contact information if you choose to upload, sync or import it from a device.
>
> We collect information about how you use our Products, such as the types of content you view or engage with; the features you use; the actions you take; the people or accounts you interact with; and the time, frequency and duration of your activities.[13]

Facebook collects information about its users both on and off Facebook in order to entice advertisers.[14] Although Facebook's users enjoy its services free of charge, they should nevertheless be considered consumers because they pay for their consumption of the service by allowing Facebook to sell their personal information.[15] And, given the

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11. *Uber Technologies Inc. v. Heller,* [2020] 447 D.L.R. 4th 179 (Can.). The Canadian Supreme Court described the doctrine as follows: "Unconscionability is an equitable doctrine that is used to set aside 'unfair agreements [that] resulted from an inequality of bargaining power.' Initially applied to protect young heirs and the 'poor and ignorant' from one-sided agreements, unconscionability evolved to cover any contract with the combination of inequality of bargaining power and improvidence. This development has been described as 'one of the signal accomplishments of modern contract law, representing a renaissance in the doctrinal treatment of contractual fairness.'" *Id.* at para. 54 (citations omitted).

12. *Id.* at para 2. Heller started a class proceeding against Uber in 2017 for violations of the *Employment Standards Act of 2000 and* Uber brought a motion to stay the class proceeding in favor of arbitration in the Netherlands. *Id.* at ¶ 3.

13. *Data Policy*, FACEBOOK, https://www.facebook.com/privacy/policy/version/20220104 [https://perma.cc/EPL4-V5JX] (Jan. 4, 2022).

14. Facebook collects data through third parties, through people's spending habits, through users' other devices (such as tablets and phones), and through photos and GPS location. *See id.*; *see, e.g.*, Joanna Stern, *Facebook Really Is Spying on You, Just Not Through Your Phone's Mic*, WALL ST. J. (March 7, 2018) https://www.wsj.com/articles/facebook-really-is-spying-on-you-just-not-through-your-phones-mic-1520448644 (discussing Facebook's "microphone conspiracy"); *WhatsApp Privacy Policy*, WHATSAPP, https://www.whatsapp.com/legal/privacy-policy [https://perma.cc/7JW7-CPCL] (Jan. 4, 2021).

15. Facebook primarily (98%) makes money by selling advertising space on its various social media platforms. In 2018, Facebook had a net income of $22.1 billion on $55.8 billion in total revenue

abovementioned standard-form contract, all users have no choice but to accept the invasive anti-privacy terms.[16] Facebook offers no other option for consumers to pay for its services.

Can anything be done to address the challenges of consumer standard-form contracts? This article draws an analogy between the consumer market and the financial market. The public is deeply invested in the financial market both directly and indirectly through mutual and pension funds. Public investors in public companies face similar challenges to those of consumers in the service and product markets. Public investors usually hold a small stake in each company, are typically dispersed, lack information, and cannot cooperate or coordinate their actions directly with other investors. However, the weaknesses of public investors have been mitigated by the rise of third-party advisory services which serve as intermediaries between investors and the companies, i.e. proxy advisors that advise investors on how to vote as well as credit rating agencies that serve in an advisory role for debt investors.

Importantly, both types of agents not only serve in an advisory role, but their strength and investor support allow them to negotiate with the largest corporations for the benefit of shareholders and bondholders. As mentioned above, this article discusses the advantages of creating a new entity, the contract advisor, to perform a parallel role in consumer markets. The basic idea is to facilitate the operation of a new market player, which would mitigate consumer shortcomings by using its power to influence the terms of consumer contracts. Armed with the right incentives, as discussed below, contract advisors may become powerful enough to negotiate on behalf of consumers with commercial giants such as the Big 5 tech companies.[17] If such a vision materializes, it could be the end of standard-form contracts as we know them. The remainder of this article discusses the role and possible advantages of such contract

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for a net profit margin of 39.6%. *See Facebook's Stock Has Gained 70% Since 2017. Why?*, FORBES (Feb. 27, 2020), https://www.forbes.com/sites/greatspeculations/2020/02/27/facebooks-stock-has-gained-70-since-2017-why.

16. Larry Downes, *GDPR and the End of the Internet's Grand Bargain*, HARV. BUS. REV. (Apr. 9, 2018), https://hbr.org/2018/04/gdpr-and-the-end-of-the-internets-grand-bargain ("In May 2018 the General Data Protection Regulation (GDPR) came into effect in the European Union. The regulations forces companies (including for U.S. companies doing business abroad) that are collecting information on customers to have clear and frequent consent ('opt-in') from consumers about sharing their data, and allow for permanent removal of individuals' information. The penalties for failing to comply are remarkable (the greater of €20 million or 4% of annual revenues) and the companies can be held responsible for violations by third-party users."); *see also* Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, 6, 83; GDPR ENF'T TRACKER, https://www.enforcementtracker.com (last visited Feb. 19, 2023) (GDPR enforcement tracker of companies that were fined).

17. *Big Tech*, WIKIPEDIA, https://en.wikipedia.org/wiki/Big_Tech (last visited Mar. 5, 2023).

advisors, as well as the means of making their business plan viable.

First, Section II of the article describes major consumer shortcomings, including asymmetric information, rational apathy, no-reading, and behavioral biases. Section III points out the similarities between consumer shortcomings and the challenges facing both equity and debt investors in the financial market. Further, Section III describes the emergence of certain institutions, especially proxy advisors and credit rating agencies, to overcome the inability of public investors to collaborate or negotiate their investment contracts. Section IV presents the proposal and vision of this article – promoting the introduction of contract advisors to rate and negotiate consumer contracts on behalf of consumers. This article discusses how such advisory services can emerge and gain power, as well as the possibility of regulatory encouragement, which may support the emergence of contract advisors, as was the case with the rise of third-party advisory services in the financial market. Section V briefly concludes by reiterating the vision behind contract advisors.

II. CONSUMERS' SHORTCOMINGS AND INEFFICIENT CONTRACT TERMS

Generally, consumer contracts are unilaterally drafted by suppliers and offered to consumers on a take-it-or-leave-it basis. Consumers can either accept or reject the offered contractual terms, with no room for negotiation. This is undoubtedly true when it comes to online transactions.

There is, of course, an advantage to using standard-form contracts – and both sides of the transaction share the benefit. In a nutshell, standard-form contracts reduce transaction costs and ensure consistency in the contractual terms applied to similar transactions.[18] Hence, they allow cheap and prompt contracting between the parties.

In fact, standard-form contracts are a necessity in the mass marketing of services and products. An alternative reality, in which each contract is negotiated and customized separately,[19] would be in sharp contrast to the nature of modern markets.[20] Huge economies of scale arise from these

18. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1222-23 (1983) (discussing different ways in which form documents promote efficiency).

19. *But see generally* Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417 (2013) (discussing personalization of contracts by assigning default terms in contracts or wills that are tailored to the individuals' own personalities, characteristics, and past behaviors).

20. The literature has identified that suppliers insist on standard harsh terms, but in practice agree to the consumer's request ex gratis. *See, e.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 831, 833 (2005) ("[C]ontracts that appear on paper to be one-sided against the consumer may in reality be implemented in a balanced way. The distinction between contracts on paper and their actual implementation is one that has received much attention from the literature on relational contracts between businesses.").

one-size-fits-all contracts. Simply put, one-size-fits-all contracts spare the supplier from having to facilitate lengthy and costly negotiations with each consumer. Such negotiation costs would often be prohibitive to the transaction as a whole and translate to higher contractual prices.[21] In addition to costly negotiations, customized contracts would also yield added challenges and costs for the duration of the contract. Customization would lead to variations in contractual terms, making it harder for the supplier to monitor and manage its contractual obligations.[22] Customization would also involve more litigation regarding the interpretation of the contract due to the variety of contractual terms.[23] Customization might also require delegating discretion to many different agents who would negotiate the contract on the supplier's behalf. All of these transaction costs help explain why standard-form contracts are here to stay. Nevertheless, it is necessary to acknowledge their shortcomings and to search for consumer-friendly solutions. The answer that this article provides is a blueprint for collectivized negotiation through third-party advisory services, but we must first acknowledge the depth of the problem.

However, the vast use of standard-form contracts drafted by suppliers raises consumer concerns about the efficacy of their terms. In theory, under certain restrictive assumptions, standard consumer contracts may nevertheless contain only efficient terms.[24] In a competitive market some argue that even if the contract is drafted one-sidedly by the supplier, the supplier allegedly has an incentive to provide the best possible terms to maximize the value of the contract for the consumer.[25] Such maximization

21. Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, WIS. L. REV. 679, 699 (2004).

22. In addition, suppliers can signal their equal treatment of all consumers, thus easing consumers' fear of subsidizing others or being exploited. *See, e.g.*, Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 728 (2008).

23. *Id.* In the extreme, contractual variations may even impede mergers and acquisition transactions, because it is harder to analyze the business of the acquired company.

24. *See, e.g.*, Rakoff, *supra* note 18, at 1230 ("But the presence of competition may give reason to believe that firms are not making extraordinary returns and, accordingly, that customers are getting a fair deal, even in ignorance."); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUDS. 283, 284 (1995) ("The efficiency argument concludes that courts should enforce all voluntary contracts that do not produce negative externalities, regardless of their distributive consequences."). Moreover, certain consumers are also less susceptible to the downsides of standard-form contracts. *See, e.g.*, PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW 234 (2019). In addition, reputational constraints can also sway suppliers to provide efficient terms. *See, e.g.*, Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUDS. 1 (2014) (arguing that firms are concerned for their reputation if onerous terms might eventually be discovered).

25. *See* Bebchuk & Posner, *supra* note 20, at 828; Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979) (arguing that competition among firms can be sufficient to generate optimal prices and terms for all consumers). However, Schwartz and Wilde also explain that suppliers would not have the right incentives to provide optimal contractual terms when an insufficient number of consumers are adequately informed of the content of the contractual terms. Schwartz & Wilde, *supra*, at 660.

would, in turn, allow the supplier to charge a higher price for the product or service.[26] And if one supplier does not offer the optimal terms, then a competitor will do so and drive the first supplier out of the market.[27]

However, the aforesaid optimistic efficient contracting argument hinges on some questionable assumptions, namely that consumers are aware of the contractual term, understand whether it is efficient or not, and then price it accordingly (such pricing can occur directly or through market forces).[28] In practice, this is far from the truth. Consumers most often do not read the contracts to which they are a party they enter into.[29] Even when they do read, they suffer from severe asymmetric information challenges as well as cognitive limitations and behavioral biases.[30] Therefore, the more plausible narrative in practice is that sophisticated suppliers are able to take advantage of consumer shortcomings by swaying the contract terms in their favors. In modern markets, especially online contracting, the suppliers are typically mighty corporations who have all the means and capabilities to sway the contractual terms in their favor.

In practice, we often find contractual terms that impose high costs on the consumer that far exceed the expected benefit to the supplier. Examples of such inefficient and discriminatory terms include limitations on liability or damages, warranty exclusions, arbitration and forum selection clauses, penalty fees, unilateral cancellation rights or price changes, and permission to use personal information.

While a full account of consumer weaknesses is beyond the reach of this article, a brief discussion of some key consumer weaknesses is necessary. This discussion will clarify why off-the-rack solutions, such as increased disclosure, cannot provide a proper remedy for the challenges facing consumers. It will also lay the groundwork for the analogy this article wishes to draw from financial markets and the solutions offered therein for investors' weaknesses. First, Part A discusses the consumer no-reading phenomenon. Then, Part B touches on unequal bargaining power as well as the information asymmetry between consumers and

26. Bebchuk & Posner, *supra* note 20, at 828.

27. In theory, even in the absence of competition there could be efficient contracting. *See id.* at 829 ("Nor is it obvious why a monopolist would offer suboptimal terms rather than just charge a monopoly price for balanced terms, a price that would be higher because the consumer was receiving greater value.").

28. *See* Schwartz & Wilde, *supra* note 25, at 660 ("Put another way, if enough consumers comparison-shop to make it profitable for firms to compete on price and quality, firms also are likely to compete on terms."). However, some scholars are skeptical of the "informed minority" argument. *See* Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts"*, 78 U. CHI. L. REV. 165, 166 (2011) ("When too few buyers are sensitive to standard terms (that is, they fail to read them, understand them, or care about them), there is no 'informed minority' of comparison shoppers that will induce sellers to internalize buyers' preferences.").

29. *See generally* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014).

30. *See infra* Section II Part B and C.

sophisticated suppliers, and Part C ends with a brief discussion of behavioral biases and consumers' limited willpower.

A. The No-Reading Problem

Consumers rarely read standard-form contracts, especially ones that are lengthy and include fine print.[31] Some suppliers exacerbate the problem by overwhelming consumers with information by creating a situation of "information overload," which results in even less reading.[32] The literature has found that consumers spend incredibly little time going over the contract and mostly use "rules of thumb" in making their decision.[33] The literature has identified the following consumer tendencies: instead of rational decision-making, consumers are reducing their decisions to a small number of factors; engaging in a process of satisficing; and stopping their inquiry before they have all the information needed to make informed choices.[34] The issue of consumers rarely reading standard-form contracts is heightened when it comes to online contracting.

In 2011, Professor Marotta-Wurgler measured whether and for how long consumers read end-user license agreements ("EULAs") attached to purchases of software products.[35] In a typical online transaction, consumers can either click "accept"[36] or choose to forgo the transaction. Sometimes the hyperlink to the underlying terms of the transaction is positioned next to the "accept" button.[37] According to Marotta-Wurgler, the existence of the hyperlink increased the chances of reading by a mere 0.36%.[38] In another study, Marotta-Wurgler and her co-authors found that among 48,154 users of ninety major online software sites, approximately only 0.01% chose to access the EULA.[39] Among those 0.01%, the average length of time spent reading the agreement was 62.7 seconds, with a

31. Abraham L. Wickelgren, *Standardization as a Solution to the Reading Costs of Form Contracts*, J. INST. THEOR. ECON. 30, 31 (2011).

32. *Cf.* David M. Grether, Alan Schwartz & Louis L. Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 278 (1985) (arguing that information overload does not result in much harm).

33. Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955); Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCH. REV. 129, 136 (1956) (arguing that the rational person would choose an option that meets a certain threshold of requirements, and not an option that maximizes his preferences); s*ee also* Hillman & Rachlinski, *infra* note 57, at -452 54.

34. Hillman & Rachlinski, *infra* note 57, at 451.

35. Marotta-Wurgler, *supra* note 28 (testing clickstreams of 47,399 households to 81 Internet software sites).

36. Since 2012, clicking is considered signing. *See* Electronic Signatures in Global and National Commerce Act § 101, 15 U.S.C. § 7001 (2012).

37. As opposed to "shrinkwrap"—i.e., licenses that can be seen only after the buyer purchased the product.

38. Marotta-Wurgler, *supra* note 28, at 168.

39. Bakos et al., *supra* note 24, at 19.

median time of 32 seconds.[40] Ninety percent of users spent less than 2 minutes on the contract, despite its lengthy and complex nature.[41] These studies are part of a growing body of research that shows that the introduction of digital contracts has aggravated the no-reading problem.[42]

Why do consumers not read contracts? The lengthier, more complex, and more time-consuming the contract is, the more rational it is for consumers to refrain from reading it. The cost of reading perhaps surpasses the value of the contract and is not worth the benefit.[43] However, this explanation is not all encompassing. According to Professors Ayres and Schwartz, "[t]he data also suggest that people do not read important parts of one-time contracts such as home mortgage agreements," indicating that the problem persists even when the stakes are high.[44] Reading and analyzing the consumer contract is a public good that consumers, as a group, fail to achieve, given the obvious collective action problem that stands in their way. Consumers have no way to unite and meet the challenge. Instead, the challenge must be addressed by joint action and through delegation of power to a third party, as Section IV of this article suggests.

No-reading is indeed a significant problem given how easily consumers may enter a contractual trap. Lack of consumer awareness allows suppliers to include unfair provisions, which go beyond what is reasonably necessary to protect their legitimate commercial interests.[45] In the absence of reading, there is a higher risk that the supplier will extract payment from the consumer without the consumer being aware that the price does not reflect the reduction of value due to the biased clauses.

Few scholars argue that the "no reading" problem does not lead to poor results. For instance, Ayres and Schwartz claim that consumers might still understand the essence and critical terms of the contract, and instead of reading, could infer knowledge by other means such as reading online

40. *Id.*

41. *Id.*

42. *See, e.g.*, William J. Woodward, Jr., *Contraps*, 66 HASTINGS L. J. 915, 922 (2014); Yifat Nahmias, Dalit Ken-Dror Feldman, Ganit Richter & Daphne R. Raban, *Games of Terms,* 45 VT. L. REV. 387, 414 (2020).

43. Avery Katz, *Your Terms or Mine? The Duty to Read Fine Print in Contracts*, 21 RAND J. ECON. 518, 520 (1990) (arguing that no reading is logical given the "low probability of ever triggering any of the clauses contained in the agreement"); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts,* 88 N.Y.U. L. REV. 240, 253 (2013) (reporting that, on average, end user license agreements have become several hundred words longer between 2003 and 2010).

44. Ayres & Schwartz, *supra* note 29, at 546; *see also* KLEIMANN COMM. GRP., KNOW BEFORE YOU OWE: EVOLUTION OF THE INTEGRATED TILA-RESPA DISCLOSURES (2012), https://files.consumerfinance.gov/f/201207_cfpb_report_tila-respa-testing.pdf.

45. For examples of extreme and amusing clauses found hidden in contracts and terms of services, *see* Lindsey Dean, *10 Fantastic Hidden Clauses in Contracts and End User License Agreements*, INFOTRACK (June 7, 2017), https://www.onelegal.com/blog/fantastic-clauses-hidden-in-contracts-and-eulas (list of fantastic hidden clauses in EULAs, including Amazon referring in its policy to "Zombies").

reviews, comparing notes with friends, and past experiences.[46] Ayres and Schwartz then suggest that the Federal Trade Commission promulgate a policy that would require mass-market sellers to become informed about what are considered unexpected or unfavorable contract terms, and then provide consumers with warnings about such terms in a cautionary standardized box on the cover of every standardized contract.[47]

However, it is hard to believe that such measures offered by Ayres and Schwartz will overcome the problem. A growing literature argues that mandatory disclosure is far from being a panacea.[48] Just as consumers do not read contracts today, it is doubtful they would read and understand the warnings that regulators could require suppliers to add to the contract. The lack of reading therefore poses a tremendous challenge and requires special tools to protect consumers, as explained in more detail below.

Consumers are in a highly inferior position vis-à-vis suppliers. The next two Parts briefly touch upon their poor position, which sophisticated suppliers could easily take advantage of. Part B deals with information asymmetry and unequal bargaining power, and Part C deals with cognitive limitations and behavioral biases.

B. Unequal Bargaining Power and Information Asymmetries

Consumers, almost by definition, have an inferior bargaining position.[49] The individual consumer faces sophisticated suppliers, frequently large powerful companies supported by a fleet of shrewd lawyers and experts. Moreover, consumers purchase the product or service as part of their day-to-day activity, while suppliers depend on the volume of these transactions for their livelihood and thus have more "skin in the game." In addition, when consumers urgently need a certain product, they are more inclined to accept the terms of the contract as they are, without

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46. Ayres & Schwartz, *supra* note 29, at 551; Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L. J. 193, 229 (1998) (arguing that consumers do not read contracts, among other reasons, because they rely on community notions and fair dealing). Others argue that consumers rely on the seller's reputation. *See, e.g.*, Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 341-42 (2008) (arguing that firm reputation is an important factor to keep in mind when discussing the law of online standard-form contracts); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 600 (1982) ("It is more rational simply to ignore the terms and hope that you have happened on an honest seller who is more interested in building reputation for fair dealing than in extracting the maximum possible gain from each individual transaction.").

47. Ayres & Schwartz, *supra* note 29, at 553.

48. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

49. *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (arguing that suppliers have a market incentive to include terms which favor themselves, whether or not such terms are efficient).

spending time looking for alternatives. Weak competition in the market may further weaken the position of consumers, and weak competition is a matter of reality as most product markets are oligopolistic.[50] It is therefore evident that consumers are punching above their weight when transacting with sophisticated suppliers.

Adding to their inferior bargaining power, consumers also suffer from a collective action problem, as multiple consumers are facing a single supplier with no means to unite and cooperate. In today's market, however, this collective action problem may no longer be evident since some social digital platforms allow individuals to unite. For example, in 2021, using message boards, 2.6 million investment-app users encouraged each other to mass-buy GameStop stock to squeeze short-sellers for profit.[51] There is no doubt that digital communities can mobilize people, including consumers, to take action.[52]

However, consumers continually face information asymmetries. Consumers are often poorly informed regarding many features of the products or services they buy, such as the quality of the product, other prices available in the market, or better alternatives in general. More importantly, asymmetries also exist in relation to understanding the meaning of the contractual terms, their future implications, and the availability of better terms among competitors, if there are any.

Unlike sophisticated suppliers, the individual consumer cannot grasp the full meaning of each contractual clause such as terms regarding privacy and the potential use of the consumer's personal information. Consumers can hardly understand which contractual provision could protect them and which could harm them.[53] More so, in order to fully comprehend all contractual provisions, the consumer must take into account different possible future circumstances, making the task especially difficult.

Ultimately, suppliers take advantage of these information gaps. Suppliers can also, and quite often do, adopt sales tactics or wording that amplify these information gaps. Additionally, other tactics are used to take advantage of consumer behavioral biases, as explained below.

50. Robert E. Hall, *New Evidence on the Markup of Prices Over Marginal Costs and the Role of Mega-Firms in the US Economy* (Nat'l Bureau of Econ. Rsch., Working Paper No. w24574, 2018).

51. Courtney Majocha, *What the GameStop Surge Means for Wall Street*, Harv. L. Today (Feb. 3, 2021), https://today.law.harvard.edu/what-the-gamestop-surge-means-for-wall-street (interviewing Professor Jesse Fried).

52. *See infra* Section IV.

53. Ramifications of some contractual terms, for instance those that are related to privacy, lie in the distant future. In the words of President Obama to a high-school student's question who asked what to do in order be president, "be careful what you post on Facebook. Whatever you do, it will be pulled up again later somewhere in your life," *Obama Advises Caution in Use of Facebook*, AP (posted Sep. 8, 2009), https://www.youtube.com/watch?v=si1gNXqH7iw [https://perma.cc/T5XL-QWM2].

C. Behavioral Biases[54]

Aside from asymmetric information and weak bargaining power, consumers tend to suffer from many behavioral biases as well as weak willpower. The literature has linked the failure to read to the cognitive impediments that cause consumers to underestimate or overestimate certain contractual provisions.[55] This Part touches briefly on this important phenomenon that further aggravates consumers' position.

Consumers tend to be overly optimistic. Consider the salient over-optimism demonstrated so frequently by gym enrollment. Obtaining a gym membership is an ongoing transaction. Consumers often face two options: a pay-per-visit method or a periodic membership. The longer the subscription period, the higher the discount. Many consumers respond to such a choice by opting for the long-term subscription option that includes the discount. However, in practice, it often turns out that gym members were overly optimistic and made much less use of the gym than anticipated.[56]

This behavioral phenomenon can affect many other contractual arrangements. For example, the consumer is overly optimistic that the unfavorable contract term will not be triggered.[57] Such over-optimism results in the consumer's willingness to overpay.[58]

Consumers suffer from other behavioral biases that sophisticated suppliers can exploit. For example, in money-back provisions, consumers tend to make purchases under the assumption that they will be able to take advantage of the refund options. However, in practice, consumers fail to use these refund options. Behavioral biases that have fancy titles such as over-optimism, status quo (i.e. the tendency to stick to the current state),[59]

54. Korobkin, *supra* note 49, at 1217-18 (arguing that boundedly rational consumers do not incorporate all available information into their purchase decisions, which creates incentives for the suppliers to include inefficient and low-quality terms).

55. *See, e.g.*, Hillman & Rachlinski, *infra* note 57, at 450-54; Korobkin, *supra* note 49, at 1232-34.

56. Stefano DellaVigna & Ulrike Malmendier, *Paying Not to Go to the Gym*, 96 AM. ECON. REV. 694, 716 (2006). The study followed 7,752 subscribers of three large gyms in the U.S. over three years and found that subscribers who opted for a fixed monthly fee (of about $70) visited the gym 4 times a month on average. Those subscribers actually paid about $17 per visit, while they could pay $10 if they opted for a membership card with a fixed number of entries. It is apparent that those subscribers overestimated the number of times they would actually visit the gym. *Id.*

57. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 54-452 (2002) (finding that consumers consistently underestimate bad outcomes). Schwartz & Wilde discuss four sources of cognitive error that could affect people's assessment of the odds of product defects: cognitive dissonance, misuse of the "availability" and "representativeness" heuristics, and a possible tendency to ignore very low probability events. *See* Schwartz & Wilde, *supra* note 25, at 1436.

58. *See* Ayres & Schwartz, *supra* note 29; Hillman & Rachlinski, *supra* note 57, at 454 n.138.

59. Once the consumer buys the product and owns it, the chances that he will seek to part with it a few days later decrease, if only because of the tendency to preserve the status quo (or alternatively due to the sense of loss that accompanies return). *See generally* Cass R. Sunstein & Russell Korobkin, *The*

endowment (i.e. the tendency to give added value to items within one's possession),[60] and procrastination (i.e. the tendency to delay tasks),[61] prevent consumers from exercising their rights in practice, as they fail, time and again, to acknowledge their weaknesses at the time of purchase. Moreover, suppliers who are aware of these consumer weaknesses can manipulate them for their own purposes. For instance, suppliers can extend the cancellation period. At first glance, such a policy seems to benefit the consumer, but in practice, it works to their detriment as in practice the long cancellation period exacerbates the tendency to procrastinate.[62] The supplier can resort to various other tactics during the return period which will make the life of the consumer difficult and prevent actual returns.[63] Ultimately, suppliers can detect consumer weaknesses and devise contractual traps to exploit them.

Consider a consumer who signs a credit card contract with the issuer. Suppose the consumer has read and knows that they must pay high late payment fees if they miss a monthly credit card payment. The consumer agrees to the contract nonetheless. They may do so because they are present-biased (i.e., suffer from myopia) and therefore undervalues how much they will suffer from the penalty in the future, or because they are overly optimistic and overestimate their ability to pay on time.[64] As a result, the consumer enters into an inefficient credit card contract, not because they have not read or are unaware of the late payment penalty, but because they fail to appreciate how often they would incur the penalty.

To conclude, consumers are extremely vulnerable and can thus be quite easily manipulated. Section III below discusses the analogous difficulties

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Status Quo Bias and Contract Default Rules, 83 CORNELL L. REV. 608 (1998); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002); Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35, 48 (1993).

60. Once the consumer has acquired ownership or an object has been handed over to his possession, the consumer's point of view changes and the value of the object increases in her eyes. Studies show there is a significant deviation from the assumption of rationality. *See, e.g.*, Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L. Q. 59 (1993); Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

61. Ironically, granting a money-back clause can be detrimental to consumers who have made a decision to purchase a product based on being able to return it, but in practice they are unaware that their chances of exercising the right are low due to the procrastination from which they suffer. Perhaps lessons from consumers' responsiveness to vehicle recalls can shed light on the extent of the problem. *See, e.g.*, Stephen W. Pruitt, *When Recalls Matter: Factors Affecting Owner Response to Automotive Recalls*, J. CONSUMER AFFS. (1994) ("… [E]ven on relatively high profile NHTSA recall campaigns, consumers have responded poorly. For instance, in late 1992, NHTSA… reported the cumulative response rate for 11 of 16 recent child-safety-seat recall campaigns was under ten percent. Interestingly, even in the highly publicized GM side-saddle fuel tank pickup truck case, an NHTSA official has predicted only about a 30 percent consumer response rate should the vehicles be recalled.").

62. BARRY SCHWARTZ, THE PARADOX OF CHOICE – WHY MORE IS LESS 71 (2004).

63. Levy, *infra* note 159.

64. Grether, Schwartz & Wilde, *supra* note 32, at 278 ("Consumers also have been shown to overestimate the likelihood of conjoint events but to underestimate the likelihood of disjoint events.").

of public investors in the financial market. However, the financial market has developed certain (partial) solutions in the form of collectivized negotiations performed by special advisory bodies. Later, Section IV draws useful lessons for consumer protection.

III. TAKEAWAYS FROM FINANCIAL MARKETS

Investors in publicly traded securities – shareholders and bondholders alike – suffer from similar problems to those of consumers. There are also many differences, but for this article's purpose, it is important to flesh out the assertion that public investors and consumers have much in common. Such similarity allows this article, in turn, to draw lessons from an important financial market development – the rise of third-party advisory services. Consider first the case of public shareholders and then the case of public bondholders.

Shareholders have a right to vote on certain corporate matters of high importance. These include elections to the board of directors,[65] approval of major structural changes such as a proposed merger,[66] and additional matters including so called "say on pay" about executive pay,[67] or alterations to the corporate charter.[68] Shareholders can theoretically exercise their voting rights in person at the annual general meeting (or a special meeting), but more realistically, they vote remotely by proxy.[69]

Consider, for instance, a proposal at the annual meeting that the company adopt an anti-takeover provision in its charter.[70] One such prominent provision is a staggered board provision. With the adoption of a staggered board, the directors of the company are commonly divided into three classes, with each class up for election once every three years.

65. DEL. CODE ANN. tit. 8, §§ 141, 211(b) (2014); MODEL BUS. CORP. ACT § 7.01 cmt. (AM. BAR. ASS'N 2002).

66. DEL. CODE ANN. tit. 8, § 251 (2014).

67. *Dodd-Frank* Wall Street Reform and Consumer Protection Act § *951, 124 Stat. 1376, 1899 (2010); see generally SEC Adopts Rules for Say-on-Pay and Golden Parachute Compensation as Required Under Dodd-Frank Act*, U.S. Secs. & Exch. Comm'n (Jan. 25, 2011), https://www.sec.gov/news/press/2011/2011-25.htm.

68. Under both the Model Business Corporation Act and the corporate law of all 50 states, including the Delaware General Corporation Law, amending a corporate charter requires both directors' and shareholders' approvals. MODEL BUS. CORP. ACT § 10.03 (AM. BAR. ASS'N 2002); *see, e.g.*, DEL. CODE ANN. tit. 8, § 242(b)(1) (2014).

69. A proxy is a person authorized to act for another. A proxy vote is a ballot cast by one person or firm on behalf of a shareholder of a corporation who may not be able to attend a shareholder meeting, or who otherwise desires not to vote on an issue. *See* Will Kenton, *What Is a Proxy Vote?*, INVESTOPEDIA (Apr. 14, 2020), https://www.investopedia.com/terms/p/proxy-vote.asp; *See* Facilitating Shareholder Director Nominations, Securities and Exchange Commission, Release No. 33-9046 (June 10, 2009) at 9, http://www.sec.gov/rules/proposed/2009/33-9046.pdf; *see generally* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007).

70. Charter amendments require both directors' and shareholders' approval. *See, e.g.*, DEL. CODE ANN. tit. 8, § 242(b)(1) (2020); MODEL BUS. CORP. ACT § 10.03(b) (2016); *cf.* N.Y. BUS. CORP. LAW § 803(a) (2021).

This structure forces a bidder who wants to take over the company and replace its board of directors to wait over a year and win two consecutive proxy contests[71] in order to capture the majority of the board of the target firm.[72] Thus, a staggered board imposes at least a year's delay in gaining control over the company.[73] Such delay is costly for the bidder, and perhaps most importantly, the delay poses a threat of emerging competition from additional bidders.[74] Therefore, a staggered board is a powerful defense against a takeover attempt.[75]

Now, imagine that shareholders are asked by the company's board of directors to vote on the adoption of a staggered board arrangement and change the company's charter accordingly. Can shareholders be trusted to vote in an informed manner? Like consumers, shareholders are unlikely to read the elaborate disclosure schedule explaining the proposed amendment.[76] Even if shareholders were to read the materials, they, like consumers, do not have the means to fully understand the proposal.

Shareholders may not necessarily understand that the proposed charter provision could thwart a potential takeover bid for the company, and essentially insulate board members from removal. Public shareholders – like consumers – suffer from severe information asymmetry, and may not be aware that companies without staggered boards perform better, and that a staggered board could decrease the value of their stock.[77] The

71. A proxy contest refers to the case of a dissident shareholder group that actively solicits proxies to vote on policies, directors or representatives that are different from existing management directives. *See, e.g.*, G.D. Hancock, *Proxy Contests: The Evidence*, 6 J. APP. BUS. RES. 1 (1990).

72. *See* Robert Daines & Michael Klausner, *Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs*, 17 J. L. ECON. & ORG. 83, 87 (2001). Poison pills, also known as shareholder rights plans, are an important antitakeover device. *See* Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 861 (2004).

73. *See* John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301, 1306 (2001) ("[T]he staggered… board… (if properly implemented) imposes a year delay on efforts… to take control of a target's board.").

74. *See* Lucian A. Bebchuk, John C. Coates & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 938 (2002) (reporting that in their sample of hostile bids, from 25% to 32% of the targets were eventually acquired by a third party: a "white knight").

75. An effective staggered board combined with a poison pill provides significant antitakeover protection. *Id.* at 899; *see also* Lucian Arye Bebchuk, Jesse M. Fried & David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 785 (2002) (arguing that since a staggered board makes a hostile takeover more difficult, the power of CEOs tends to be greater if the board is staggered).

76. Charter amendments are proposed to the shareholders in a document called a "proxy statement." SEC Form DEF 14A, which is also known as a "definitive proxy statement," is required under Section 14(a) of the Securities Exchange Act of 1934. The proxy statement allegedly assists shareholders to understand corporate governance practices when they need to cast their votes for the proposed items, but it is a lengthy and complex document. Schedule 14A. Information Required in Proxy Statement, 17 C.F.R. § 240.14a-101 (2022).

77. Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409 (2005) (finding that staggered boards are associated with an economically meaningful reduction in firm value as measured by Tobin's Q). *Cf.* K.J. Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Firm Value, Revisited*, 126 J. FIN. ECON. 422 (2017) (asserting that firms that adopt

challenge that public shareholders face when they are confronted with such a vote is tantamount to the challenge that consumers face, as discussed in Section II. So how can public shareholders overcome this challenge? One pertinent answer lies in the emergence of a new advisory market function that has helped shareholders group together and vote in an informed manner, a lesson that this article wishes to draw for consumers as well.

By the end of the 1980s, before the emergence of the advisory function as a powerful tool, many public companies in the United States easily persuaded their shareholders to vote in favor of a staggered board provision.[78] But twenty years later, Institutional Shareholders Services ("ISS"), a proxy voting advisory firm, intervened and effectively blocked the ability to create new staggered boards.[79] This article discusses momentarily the emergence and importance of the proxy advisory industry, ISS in particular, but for now it suffices to mention that ISS issued a recommendation to vote *against* proposals to stagger the board and to vote *for* proposals to repeal staggered boards and elect all directors annually.[80] Consequently, companies found it difficult to add a staggered board, and eventually companies even started to de-stagger.[81] Today only a minority of the large public companies have a staggered board.[82] The role of so-called "proxy advisors," ISS in particular, was critical in the process.

Next, Part A generalizes from the staggered boards' example and

a staggered board increase in firm value, while de-staggering is associated with a decrease in firm value).

78. Coates, *supra* note 73, at 1306.

79. Michael Klausner, *Institutional Shareholders. Split Personality on Corporate Governance: Active in Proxies, Passive in IPOs*, DIRECTORSHIP NEWSL. 7 (Directorship Search Grp., New York, N.Y.), Jan. 2002, at 7; Michael Klausner, *Institutional Shareholders, Private Equity, and Antitakeover Protection at the IPO Stage*, 152 U. PA. L. REV. 755, 761 (2003) (citing INSTITUTIONAL S'HOLDER SERVS., THE ISS PROXY VOTING MANUAL 6.4 (3d ed. 2003)).

80. *See* INSTITUTIONAL S'HOLDER SERVS., U.S. PROXY VOTING SUMMARY GUIDELINES (2013), http://www.issgovernance.com/files/2013ISSUSSummaryGuidelines1312013.pdf.

81. Since 1990, managers have been unable to add additional antitakeover defenses which require a charter amendment, such as a staggered board provision. Coates, *supra* note 73, at 1302; Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263, 267-78 (2019). This trend received backing from academia. During 2011-2014, a shareholders' rights clinic at Harvard Law School initiated by Professor Bebchuk successfully led to the declassification of 100 S&P 500 and Fortune 500 companies with the goal of improving corporate governance. Lucian Bebchuk, Scott Hirst & June Rhee, *Toward Board Declassification in 100 S&P 500 and Fortune 500 Companies: The SRP's Report for the 2012 and 2013 Proxy Seasons*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 25, 2014), https://corpgov.law.harvard.edu/2014/02/25/toward-board-declassification-in-100-sp-500-and-fortune-500-companies-the-srps-report-for-the-2012-and-2013-proxy-seasons.

82. In 2020, 10.9 percent of S&P 500 companies had a staggered board. Matteo Tonello et al., *Corporate Board Practices in the Russell 3000, S&P 500, and S&P Mid-Cap 400*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 6, 2021), https://corpgov.law.harvard.edu/2021/11/06/corporate-board-practices-in-the-russell-3000-sp-500-and-sp-mid-cap-400; *see also* Spencer Stuart, 2020 U.S. Spencer Stuart Board Index 11, https://www.spencerstuart.com/-/media/2020/december/ssbi2020/us_spencer_stuart_board_index_2020.pdf ("Today, 90% of boards have one-year terms, compared with 72% in 2010. The remaining boards have three-year terms.").

describes the shortcomings of shareholders, which are quite similar to those of consumers. Then, this article describes the emergence of proxy advisors, which has inspired the proposal outlined in Section IV.

A. Shareholders are as Weak as Consumers

Public shareholders are hardly involved in the decision-making process.[83] In theory, shareholders nominate directors to the board of directors and amend the corporate charter, but in practice, public shareholders are by and large left out of this process. Quite like consumers, shareholders face a similar collective action problem.[84] It is nonsensical for any single shareholder to invest the time, energy, and resources necessary to analyze what is best for the corporation and pursue it. Since each investor holds only a small fraction of the company's shares, on their own they are unlikely to affect the vote's outcome. Moreover, the costs of gathering and analyzing the information in order to cast the proper vote usually outweigh the benefit to any given shareholder,[85] due to the small size of her holdings.

As Professor Black has described, "The cost and futility of becoming informed leads shareholders to choose rational apathy: They don't take the time to consider particular proposals, and instead adopt a crude rule of thumb like 'vote with management.'"[86] In other words, shareholders are unlikely to actively oppose management's proposals except in rare cases where the potential gains are likely to be worth the effort. Ultimately, this "paradox of voting" means that the cost of casting an informed vote leads to distorted voting outcomes. Thus, in practice, most shareholders prefer to remain passive or sell their shares if they are dissatisfied.[87]

This passivity that characterizes individual investors also stems from

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83. *See* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 526-29 (1990); PROXYPULSE, 2019 PROXY SEASON REVIEW 4-5 (2019), https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2019-review.pdf (reporting that the results of 4,059 public company annual meetings held between January 1 and June 30, 2019, show that retail shareholders (individuals) voted only 28% of the shares they owned, out of 70% ownership in total).

84. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

85. *See* Lucian A. Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1406 (1989) ("The buyers of stock in a company's initial offering rationally elect not to study and assess fully many aspects of the company's charter.").

86. The phenomenon of individual investors refraining from involvement in the governance of the company, either by not voting or by deferring to management's agenda or relying on activist shareholders, is termed "rational apathy." The corporate literature has long identified investors' rational apathy and has suggested ways to cope with it. *See* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 527, 584 (1990); Kobi Kastiel &Yaron Nili, *In Search of the Absent Shareholders: A New Solution to Retail Investors' Apathy*, 41 DEL. J. CORP. L. 55, 57 (2016).

87. *See* KOBI KASTIEL & YARON NILI, JUST A LITTLE "NUDGE": CURING INVESTORS' RATIONAL APATHY 7-9 (2015), https://www.sec.gov/comments/4-681/4681-2.pdf; Black, *supra* note 83, at 528 ("The shareholder impotence argument has been widely accepted by both academics and regulators.").

the fact that rational shareholders tend to diversify their investment portfolios.[88] As Harry Markowitz, Nobel laureate and one of the fathers of "modern portfolio theory,"[89] nicely phrased it, "diversification is the only free lunch."[90] Investors diversify their capital through many different investments in order to neutralize the specific (idiosyncratic) risk of every single company. As a result, the incentive for shareholders to get involved in the matters of any single company is extremely low.[91] The same is true for consumers, who deal with many different suppliers, each of whom has only a minimal impact on the overall wellbeing of every consumer. However, when millions of consumers are considered together, a provision in the contract of a large supplier can have significant economic value.[92]

B. The Emergence of Proxy-Voting Advisors to Empower Shareholders

One important solution to the challenges facing public shareholders in the context of voting, which is highly relevant to this article, is the emergence of proxy advisors.[93] Proxy advisors are hired by institutional investors to provide them with advice on how to vote, but in practice, all shareholders enjoy their services.[94] Most importantly, proxy advisors have become so powerful that they serve as a medium for collective bargaining with public companies over the content of the "corporate contract," for the benefit of all shareholders. As explained below, proxy advisors are a good analogy for the missing link in the context of

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88. On modern portfolio theory, *see* John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1995).

89. Generally speaking, modern portfolio theory contends that diversification of investment in securities is a pareto optimal strategy, taking away the risk ingrained in investing in any single security. *See e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling fiduciary duty and social conscience: the law and economics of ESG investing by a trustee*, 72 STAN. L. REV. 381, 426-27 (2020).

90. *See, e.g.*, Benjamin Halliburton, *Diversification Is the Only Free Lunch*, FORBES (Oct. 30, 2019), https://books.forbes.com/author-articles/diversification-is-the-only-free-lunch.

91. *See* RICHARD A. BREALEY, STEWART C. MYERS & FRANKLIN ALLEN, PRINCIPLES OF CORPORATE FINANCE 534 (12th ed. 2017).

92. A good question, which lies beyond the scope of this Article, is whether the above analysis still holds when one considers institutional investors such as mutual funds and pension funds. Indeed, institutional investors hold much more stock, but they suffer from their own set of limitations and therefore many scholars, such as Lucian Bebchuk, do not believe they offer a real solution. *See* Lucian A. Bebchuk, Alma Cohen, & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPS. 89 (2017). In any case, small public companies have much less of their shares in the hands of institutional investors, and therefore one cannot always count on institutional investors to determine the vote. *See* Bernard S. Black, *The Value of Institutional Investor Monitoring: The Empirical Evidence*, 39 UCLA L. REV. 895 (1992).

93. The other major "solution" is financial intermediation, i.e., indirect investment in the financial market through the use of "institutional investors" such as mutual funds. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Rise of Agency Capitalism and the Role of Shareholder Activists in Making It Work*, 31 J. APP. CORP. FIN. 8, 8 (2019).

94. *See infra* note 105 and accompanying text.

consumer contracts, as described in Section IV. Similar to a corporate charter, consumer contracts are drafted by a few sophisticated players and influence numerous individuals who cannot invest the time and resources to fully understand them. The contract advisor can serve this purpose on their behalf.

Third-party proxy advisors first appeared in the 1970s when the Investor Responsibility Research Center ("IRRC") was founded.[95] At that time, IRRC provided information analysis services to institutional investors rather than voting recommendations. Since 1974, and more strongly after 1988, the Department of Labor began enforcing a requirement that pension funds act solely in the interest of their beneficiaries, including when they vote their stock.[96] This regulatory push encouraged the emergence of several third-party advisors.[97] This regulatory encouragement contributed to the emergence of entities such as proxy advisors that create a "public good."[98] Section IV of this article explains that a regulatory push is also necessary to kick-start and support the emergence of the contract advisory function that this article advocates.

In 2001, Institutional Shareholder Services ("ISS") (then a unit of Thomson Corp.) merged into its smaller rival (Proxy Monitor, Inc.).[99] Egan-Jones Proxy Services and Glass Lewis & Co. were established in 2003, and Proxy Governance Inc. in 2005.[100] All of these proxy advisors provide institutional investors with subscription-based voting recommendations, but they differ in some aspects regarding their services and their business model.[101] The differences are not particularly important for

95. *See* Cindy R. Alexander et al., *The Role of Advisory Services in Proxy Voting* (Nat'l Bureau of Econ. Rsch., Working Paper No. w15143, 2009), at 7, www.nber.org/papers/w15143.pdf.

96. *See Id.* at 8; Letter from Alan Lebowitz, Deputy Assistant Sec'y of Labor, to Helmuth Fandl, Avon Prods., Inc. (Feb. 23, 1988), 1988 ERISA LEXIS 19. This "Avon Letter" indicated that shareholder voting rights are plan assets under ERISA and that related fiduciary duties thus apply to share voting. *Id.*

97. The first were Proxy Monitor, Inc., founded in 1984, and Institutional Shareholder Services, founded in 1985. *See* Alexander et al., *supra* note 95, at 8.

98. *See infra* Section III Part C.

99. *See* Robin Sidel, *Is Anyone Left to Give Advice After This Deal?*, WALL ST. J. (July 26, 2001), https://www.wsj.com/articles/SB996101356748397352.

100. For a review of all proxy advisors (including small firms), *see* David F. Larcker et al., *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 14, 2018), https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry.

101. *See* Alexander et al. *supra* note 95, at 8 ("For example, ISS and Glass Lewis often host public conference calls at which opposing sides in proxy contests can present their arguments. Also, whereas the largest advisors typically adhere to pre-specified voting policy guidelines . . . , Proxy Governance purports to evaluate . . . on a case-by-case basis."). The different proxy advisors also have different business models. ISS provides advice and related services to corporations to help them assess and improve their corporate governance practices. *Id.* Egan-Jones is affiliated with Egan-Jones Ratings Co., a credit rating agency that issues for-profit debt ratings. These services may result in a conflict of interest in relation to the proxy advisory services. *See e.g.*, Tamara C. Belinfanti, *The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control*, 14 STAN. J.L. BUS. & FIN. 384, 399-400 (2009).

this article's purpose. ISS is the largest and most prominent proxy advisor.[102] ISS has revealed that its coverage extends to 45,000 shareholders' meetings per annum, on behalf of 1500 institutional clients, representing over 5.4 trillion shares.[103] ISS is therefore, without a doubt, the largest and most influential among the proxy advisory firms. Together with Glass Lewis, they control more than 95% of the advisory market.[104] The concentrated nature of the market segment of advisory services is another feature that should be noted for the purpose of this article, and will be further discussed in Section IV.

C. The Role of Proxy-Voting Advisors – From Recommendation to Negotiation

In practice, proxy advisors do much more than issue voting recommendations. As mentioned above, even though ISS, Glass Lewis, and other proxy advisor companies formally provide services to institutional shareholders, in practice many large-cap companies often attach the voting recommendation given by ISS and its counterparts to their schedule 14A disclosures so that the ISS position is available to all shareholders.[105]

The following is a typical example of how a public company, the Cracker Barrel Old Country food chain, boasts of the proxy advisor's positive recommendation,[106] to get shareholder support for the manage-

102. *See* Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality*, 59 EMORY L.J. 869, 871 (2009); Alexander et al., *supra* note 95, at 9.

103. *See* INSTITUTIONAL S'HOLDER SERVS., ISS PROXY VOTING BY THE NUMBERS (at the bottom of the page), https://www.issgovernance.com/solutions/proxy-voting-services [https://perma.cc/M5EU-7KX9] (last visited Mar. 5, 2023); *About ISS*, INSTITUTIONAL S'HOLDER SERVS, https://www.issgovernance.com/about/about-iss [https://perma.cc/R9N4-QZT7] (last visited Mar. 5, 2023).

104. Asaf Eckstein & Sharon Hannes, *A Long/Short Incentive Campaign Scheme for Proxy Advisory Firms*, 53 WAKE FOREST L. REV. 787, 789 (2018).

105. Regarding the inclusion of proxy advisors' recommendations in schedule 14A, recently the SEC has adopted an important amendment to the exemptions from the proxy rules. The new sub-section Rule 14a-2(b)(9) requires (effective November 3, 2020) that proxy advisors provide their reports to the issuers, simultaneously with the distribution to their clients, as well as facilitate the issuer's responses prior to voting. As we saw above, many S&P 500 and large-cap companies already receive pre-publication draft reports from ISS. *See* Adam O. Emmerich, *Initial Perspectives and Implications of SEC Proxy Advisory Reform*, HARV. L. SCH. F. ON CORP. GOVERNANCE *(Aug. 8, 2020),* https://corpgov.law.harvard.edu/2020/08/08/initial-perspectives-and-implications-of-sec-proxy-advisory-reform; *see also* Chester S. Spatt, Chief Economist and Dir., U.S. SEC Off. of Econ. Analysis, Shareholder Voting and Corporate Governance: Economic Perspectives, Address at the Rutgers University Conference on Improving Corporate Governance: Markets vs. Regulation (Apr. 20, 2007), https://www.sec.gov/news/speech/2007/spch042007css.htm.

106. In a similar vein, in another example, a public company, Morgan's Hotel Group, announced that the proxy advisors were against an opponent shareholder in a fight for board nominations: "Michael Gross, CEO of Morgans Hotel Group, said: 'We are pleased that both Glass Lewis and ISS rejected OTK's attempt to take control of the Morgans Board. Like ISS, Glass Lewis correctly identified significant deficiencies in OTK's full slate of nominees that make them unfit to act as an effective Board and incapable of representing the interests of all shareholders. OTK has failed to offer a credible plan to create value for shareholders and address Morgans'

ment's agenda:

> Commenting on the endorsements, Sandra B. Cochran, Cracker Barrel's President and Chief Executive Officer stated: "We are extremely pleased that ISS, Glass Lewis and Egan-Jones have supported our nominees for the Cracker Barrel Board of Directors. . . . *We appreciate the ongoing affirmation* of our strategic approach that *we received from the advisory firms, and urge shareholders to continue to support that strategy* and our strong Board."[107]

Public companies do not only refer to specific recommendations of a proxy advisor, proxy advisors also influence public companies by issuing general guidelines and updating them on an annual basis. Public companies tend to follow these guidelines and recommend that their shareholders follow these guidelines. The following is an example of a report stating that the company complies with ISS guidelines by Callon Petroleum:

> Our proposed stock plan is routine and was designed to be "shareholder friendly." As such it meets all of Institutional Shareholder Services' ("ISS") requirements in terms of number of shares, minimum vesting, prohibiting option repricing, etc.[108]

As will be explained in Section IV, the contract advisor would act in a similar manner – that is, publishing guidelines regarding its general views (for instance about privacy protection) so that suppliers can respond and comply. In many cases, such guidelines would replace (or facilitate) actual engagement and negotiation between the suppliers and the contract advisor.

Companies do not always agree with the proxy advisors, and sometimes try to persuade shareholders to vote against these recommendations. Yet, proxy advisors are so important that public companies must explain their desire to deviate from their recommendations. See, for instance, the following excerpt from Red Robin Gourmet Burgers, Inc.:

> As you may know, both Institutional Shareholder Services, Inc. ("ISS") and Glass, Lewis & Co., LLC ("Glass Lewis") have published reports available to our stockholders. . . . Both organizations have based their recommendations primarily on what they believe to be poor pay . . . .
>
> As we discuss below, we believe their recommendations are based on a flawed peer group analysis and a narrow definition of total shareholder return that fails to credit the rest of the metrics that demonstrate our

significant balance sheet and capital structure challenges.'" Morgans Hotel Grp. Co., Proxy Statement (Schedule 14A) (June 5, 2013), https://www.sec.gov/Archives/edgar/data/1342126/000119312513248066/d550299ddefa14a.htm.

107. Cracker Barrel Old Country Store, Inc., Proxy Statement (Schedule 14A) (Nov. 1, 2013), https://www.sec.gov/Archives/edgar/data/1067294/000119312513423245/d621855ddefa14a.htm.

108. Callon Petrol. Co., Proxy Statement (Schedule 14A) (May 4, 2011), https://www.sec.gov/Archives/edgar/data/928022/000092802211000052/def14a.htm.

> positive performance. . . . In fact, *Proxy Governance, Inc., another proxy advisory service, considers several key metrics and has issued a favorable recommendation* . . . . ***We respectfully ask that, if you rely on ISS or Glass Lewis as your proxy advisor, you consider factors outside their evaluations that we discuss below and vote FOR . . . .***[109]

The lesson is that a public company does not have to agree with the proxy advisor, but the proxy advisor is important enough that the company will have to explain deviations from the advisor's recommendation.

Moreover, public companies are engaging with proxy advisors and essentially negotiate with them for the benefit of public shareholders.[110] Such negotiations take place because it is very important for companies to get the approval of the proxy advisors. Further, negotiations are feasible because the industry is concentrated so it is possible to engage with the few relevant players. Delaware's (former) Chief Justice Leo Strine, Jr., colorfully portrayed the domination of ISS as follows: "[P]owerful CEOs come on bended knee to Rockville, Maryland, where ISS resides, to persuade the managers of ISS of the merits of their views about issues like proposed mergers, executive compensation, and poison pills."[111]

Additionally, it is well-known that management and activist shareholders have frequently lobbied ISS to endorse their positions in proxy fights.[112]

The power of proxy advisors stems from their recognized status, so managements adhere to their issued guidelines. According to Stanford University's proxy advisory survey conducted in 2012, out of 110 large and mid-cap public companies, 72% reviewed the policies of a proxy advisory firm or engaged with a proxy advisory firm to receive feedback and guidance on their proposed executive compensation plan, and 70%

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109. Red Robin Gourmet Burgers, Inc., Proxy Statement (Schedule 14A) (May 22, 2009), https://www.sec.gov/Archives/edgar/data/1171759/000110465909034418/a09-14044_1defa14a.htm.

110. Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649, 655 (2008).

111. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 688 (2005); *see also* ANA M. ALBUQUERQUE, MARY ELLEN CARTER & SUSANNA GALLANI, ARE ISS RECOMMENDATIONS INFORMATIVE? EVIDENCE FROM ASSESSMENTS OF COMPENSATION PRACTICES (2020).

112. Some say that ISS influences management decisions based solely on its perceived power. *See* CTR. ON EXEC. COMP., A CALL FOR CHANGE IN THE PROXY ADVISORY STATUS QUO: THE CASE FOR GREATER ACCOUNTABILITY AND OVERSIGHT 76 (2011) (citing Colin Diamond & Irina Yevmenenko, *Who Is Overseeing the Proxy Advisors?*, 3 BLOOMBERG CORP. L.J. 606, 617 (2008)), https://www.govinfo.gov/content/pkg/CHRG-113hhrg81762/pdf/CHRG-113hhrg81762.pdf ("[I]f most directors believe that ISS has power – as their actions indicate – boards may do what they believe ISS wants them to in order to keep their seats, whether or not their belief is justified.").

reported that their compensation programs were influenced by the proxy advisors or the advisors' policies.[113]

With regard to proxy advisors, their power has grown mainly because of a major "regulatory push." In 2003, the U.S. Securities and Exchange Commission ("SEC") adopted Rule 206(4)-6 under the Investment Advisers Act of 1940, titled "Proxy Voting by Investment Advisers," which aims to ensure that investment advisers vote in the best interest of their clients and provide clients with information on how their proxies are voted.[114] According to this rule, investment advisers may overcome conflict of interest claims if their votes are based upon the recommendations of an independent third party (such as proxy advisors). This rule was later fortified by SEC's No-Action letters to Egan-Jones and ISS affirming the independence of a proxy advisory firm, even when it receives payment from an issuer for providing advice on corporate governance matters.[115] Regulatory approval and support has strengthened the role of proxy advisors. Without regulatory approval, they would have been much less influential than they are today.

Next, Part D considers another group of public investors, bondholders, and then credit rating agencies – the entity that tackles bondholders' weaknesses.

D. Bondholder Protection and Credit Rating Agencies[116]

When it comes to public bondholders, their position is even closer to consumers because like consumers (and unlike shareholders), their rights stem from contractual terms. Bondholders' rights and protections,

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113. David F. Larcker, Allan L. McCall & Brian Tayan, Conf. Bd., 2012 Proxy Advisory Survey 3-4, 6 (2012), https://www.gsb.stanford.edu/faculty-research/publications/2012-proxy-advisory-survey. There is also a vast literature critiquing the growing power of proxy advisors, mainly regarding potential conflicts of interest due to the fact that ISS offers consulting to the same companies it analyzes for its clients. *See, e.g.*, Albuquerque, Carter & Gallani, *supra* note 111; Ted Knutson, *Proxy Advisory Firms Get Shotgun Treatment From Wall Street*, Forbes (Apr. 26, 2018), https://www.forbes.com/sites/tedknutson/2018/04/26/proxy-advisory-firms-get-shotgun-treatment-from-wall-street; Christie Hayne & Marshall Vance, *Information Intermediary or De Facto Standard Setter? Field Evidence on the Indirect and Direct Influence of Proxy Advisors*, 57 J. Acc. Res. 969 (2019); Chester S. Spatt, *Proxy Advisory Firms, Governance, Failure, and Regulation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 25, 2019), https://corpgov.law.harvard.edu/2019/06/25/proxy-advisory-firms-governance-failure-and-regulation.

114. *Final Rule: Proxy Voting by Investment Advisers*, SEC (Mar. 10, 2003) https://www.sec.gov/rules/final/ia-2106.htm (describing 17 C.F.R. § 275.206(4)-6 (2003)).

115. Pickard & Djinis, SEC Staff No-Action Letter (Sept. 15, 2004), https://www.sec.gov/divisions/investment/noaction/iss091504.htm; Egan-Jones Proxy Services, SEC Staff No-Action Letter (May 27, 2004), https://www.sec.gov/divisions/investment/noaction/egan052704.
htm. The two letters were withdrawn in September 2018. *SEC Withdraws Two No-Action Letters Regarding Use of Proxy Advisory Firms – Chairman Clayton Issues Statement Regarding Staff Views*, ROPES & GRAY (Sept. 19, 2018), https://www.ropesgray.com/en/newsroom/alerts/2018/09/SEC-Withdraws-Two-No-Action-Letters-Regarding-Use-of-Proxy-Advisory-Firms-Chairman.

116. *See generally* Hamdi Driss, Nadia Massoud & Gordon S. Roberts, *Are Credit Rating Agencies Still Relevant? Evidence on Certification from Moody's Credit Watches*, 59 J. CORP. FIN. 119 (2019).

including multiple covenants and guarantees, are written in an elaborate document – the "indenture," which sets out the debtor's obligations to bondholders, whose position is quite similar to that of consumers.[117] Here too the bondholders suffer from a collective action problem. They do not take part directly in drafting or negotiating the terms of the indenture, nor can they conduct the analysis required to assess the complex terms associated with their investment. Their protection lies in part in the existence of a special advisory service, credit rating agencies ("CRAs"), as discussed below.

CRAs evaluate the creditworthiness and assign a credit rating to different types of debt instruments, especially debentures (debt securities) issued by corporations. CRAs assess the relative credit risk of specific debt securities and examine, among other things, the issuer's ability to pay back the debt. Large bond issuers uniformly receive ratings from one or two of the big three rating agencies (S&P, Moody's and Fitch).[118]

But CRAs serve another important purpose. CRAs also take part in the negotiations at the time the indenture is written. They are granted a seat at the table at such an important moment because the issuer (the borrowing entity) wishes to receive a favorable rating. Thus, CRAs' views on bondholders' protection end up influencing the contractual terms that govern the debt contract. Hence, the advisory role of the credit agency translates into negotiation power on behalf of debt investors who cannot fend for themselves.

CRA agents advise bond issuers on how to formulate proper contractual provisions and avoid negative provisions, in order to maximize the possible rating.[119] The issuer may offer contractual terms that are harmful, e.g., refraining from a commitment to limit additional bond issuances. Or, may decide to incorporate at an offshore location where it is hard to litigate bondholders' rights. The CRA's task is to assess the impact of such provisions and alert the issuer that they may impair its rating. In turn, and in order to improve the rating, the issuer must forgo terms in the debt contract that are not bondholder friendly.

Unsurprisingly, similar to the proxy advisory industry, the credit rating

117. A typical indenture includes liens, stipulations on financial ratios, provisions regarding early redemption and adjustment of interest. All those require high levels of sophistication to comprehend, so the typical bondholder understands the indenture no more than the consumer understands her contract. For a description of common indenture provisions *see* SUNITA LOUGH & DEBRA KAWECKI, UNDERSTANDING BOND DOCUMENTS (1996), https://www.irs.gov/pub/irs-tege/eotopick96.pdf.

118. *See e.g.*, *Rating Agency*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/fixed-income/rating-agency/ (Dec. 5, 2022).

119. E.g., the issuers of structured products pay rating agencies not only to rate them, but also to advise them on how to structure the indenture. *Id.* Rating agencies offer consulting or other advisory services to issuers it rates. *See* SEC, REPORT ON THE ROLE AND FUNCTION OF CREDIT RATING AGENCIES IN THE OPERATION OF THE SECURITIES MARKETS 23 (2003), https://www.sec.gov/news/studies/credratingreport0103.pdf.

industry is also highly concentrated. The largest three CRAs in the United States (also known as the Big Three) are Standard & Poor's (S&P), Moody's, and Fitch.[120] The Big Three collectively dominate 95% of global rating services,[121] and in the United States, they are registered as the Nationally Recognized Statistical Rating Organizations ("NRSROs").[122] CRAs face criticism as they receive their compensation directly from the issuers they rate. This direct compensation from issuers is the industry's business model.[123] The downside of such a funding model is indeed something that must be taken into account,[124] and Section IV discusses different avenues of funding for the advisory agent for consumer contracts.

It is also important to acknowledge that government intervention played a highly important part in the rise of the credit rating industry. Financial regulators rely on the CRA rating to make sure large financial institutions do not invest in overly risky debt instruments. As described by Professor Partnoy, "the most successful credit rating agencies have benefited from an oligopoly market structure that is reinforced by regulations that depend exclusively on credit ratings issued by NRSROs."[125] Partnoy is critical of such "regulatory license,"[126] but it is important to understand that advisory services create a public good with their ratings, and therefore need some government assistance in order to flourish. By its nature, the funding of a public good is always a challenge, and therefore requires some form of assistance from the public sector.

IV. THE ADVANTAGES OF AN ADVISORY FUNCTION IN CONSUMER MARKETS

Drawing lessons from financial markets, mainly the operation of proxy advisors and credit rating agencies, this Section discusses the introduction of a comparable agent – the contract advisor – in consumer markets. The

120. *Big Three (Credit Rating Agencies)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Big_Three_(credit_rating_agencies) (last visited Dec. 31, 2022).

121. For an explanation of the debt instruments they rate and the rating process and rating outlooks, *see Credit Rating Methodology*, GOV.IL (Aug. 25, 2020), https://www.gov.il/en/Departments/General/credit-rating-methodology ("The rating scale is divided into 'Investment Grade' and 'Speculative Grade,' with both categories divided into three sub-levels. For example, an 'A' rating is divided into: A-, A, A+ by S&P and Fitch, and A3, A2, A1 by Moody's.")

122. NRSROs are supervised by the SEC. *See Updated Investor Bulletin: The ABCs of Credit Ratings*, INVESTOR.GOV (Oct. 12, 2017), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-8.

123. LUCIAN A. BEBCHUK & JESSE M. FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 28 (2004).

124. *See infra* Section IV Part C.

125. Frank Partnoy, *How and Why Credit Rating Agencies are Not Like Other Gatekeepers, in* FINANCIAL GATEKEEPERS: CAN THEY PROTECT INVESTORS? 59, 60 (Yasuyuki Fuchita & Robert E. Litan, eds., 2006), https://ssrn.com/abstract=900257.

126. *Id.* at 82.

basic idea is to facilitate the operation of a new market player,[127] which would mitigate consumer shortcomings by using its power to influence and negotiate the provisions of consumer contracts with large suppliers. As such, this Section explains the advantages of such a putative entity and how it may derive its power.

This Section also discusses the reason why the contract advisory function, quite like proxy advisors and credit rating agencies, should be incentivized by the legal system to achieve real impact. More importantly, the advisory role creates a public good because once the advice becomes public, everyone can enjoy its benefit, which creates a severe free-rider problem and, in turn, a funding challenge. Therefore, Part A discusses the different possibilities for a viable business model for contract advisor services. Once these challenges are met, and armed with the right incentives, as discussed below, contract advisors may become powerful enough to negotiate on behalf of consumers with commercial giants such as the Big Five tech companies.[128] If such a vision were to materialize, it would mean no less than the end of standard-form contracts as we know them.[129]

A. The Proposed New Entity – The Contract Advisor

Consumers today have power that is waiting to be unleashed. When wielded in the right manner, consumers' power has unmatched force that even the largest suppliers cannot withstand.[130] The "WhatsApp privacy

127. For comparison *see* Professor Becher's suggestion to create an organization, the "Fair Contract Approval Organization", which would serve as a (binary) approval agency for consumer constructs. *See* Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, U. MICH. L. L. REF. 747, 753.

128. The big 5 tech companies (Amazon, Apple, Microsoft, Meta and Google) are so large and powerful that they dominate the S&P 500 index and comprise almost 25% of the market value of all companies included therein. *See* Andrew Bary, *Big 5 Tech Stocks Now Account for 23% of the S&P 500*, BARRON'S (July 26, 2021), https://www.barrons.com/articles/big-tech-stocks-sp-500-51627312933.

129. Since the drafters have a bargaining advantage, the common law developed a rule of interpretation against the drafter (the "contra proferentem" doctrine). For its historical development and role in interpreting standard-form contracts, *see* David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 436 (2009).

130. *See* Wayne R. Barnes, *Social Media and the Rise in Consumer Bargaining Power* 14 U. PA. J. BUS. L. 661, 698 (2011) ("The consumer is able to wield potentially much more power over the merchant by his or her use of a social media tool to voice his contractual disappointment. If the video, blog entry, tweet, or Facebook post goes 'viral,' it will rapidly generate exponentially more attention than the consumer's traditional efforts to contact the merchant directly. This can result in enormous pressure on the merchant to rectify the wrong in the court of public opinion."); Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REGUL. 28 313 (2011) ("A decade ago, however, Internet websites, including Hotwire and Priceline, brought the power of contract exchanges directly to consumers, allowing regular people to flex their collective bargaining power to obtain low prices on travel services.").

backlash" serves as a fine example.[131] In February 2021, consumers were outraged over Meta-owned WhatsApp's unilateral notice to its 2 billion global users that the messaging app's privacy terms had changed.[132] Users of the application had no choice but to adopt the new terms, or the software would delete itself in the near future. WhatsApp's privacy change caused millions of consumers around the world to delete WhatsApp and switch to alternative messaging services believed to offer better data and privacy protection.[133] Soon afterward, WhatsApp announced it would delay the implementation of its new privacy terms due to the backlash.[134]

The lesson is that today, at least in theory, it is easier for consumers to collaborate since there are digital platforms that allow them to connect and coordinate their actions. However, the potential of joint consumer action is far from being fulfilled. The formation of a new entity, as described below, may change the odds.

This article's vision is the creation of a new market player, contract advisors, who would eventually communicate with the largest suppliers and improve standard-form contracts on behalf of consumers. If that vision is realized, then major consumer contracts would no longer be dictated by one side of the bargain, but rather be negotiated on behalf of large segments of the consumer body. The new contracts would still be "standard-form" contracts, at least to some extent,[135] but would no longer pose a threat to consumers, given the input of the new market players operating for the benefit of consumers in the pre-contractual stage.[136]

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131. *See* Gary Younge, *Street on fire: How a Decade of Protest Shaped the World*, THE GUARDIAN (Nov. 23, 2019), https://www.theguardian.com/culture/2019/nov/23/decade-of-protest-occupy-wall-street-extinction-rebellion-gary-younge.

132. Manish Singh, *WhatsApp details what will happen to users who don't agree to privacy changes*, TechCrunch (Feb. 19, 2021), https://techcrunch.com/2021/02/19/whatsapp-details-what-will-happen-to-users-who-dont-agree-to-privacy-changes/.

133. Anecdotally, Tesla's Elon Musk tweeted after the privacy backlash "use signal" and his tweet led to unexpected results. Jordan Novet, *Elon Musk Told His Followers to 'Use Signal,' Leading to 1,100% Surge in Unrelated Stock with Similar Name*, CNBC (Jan. 8, 2021), https://www.cnbc.com/2021/01/08/elon-musk-boosts-signal-app-signal-advance-stock-jumps-1100percent.html.

134. This led to a legal challenge in India and various regulatory investigations. *See, e.g.*, Sankalp Phartiyal, *WhatsApp Faces First Legal Challenge in India over Privacy*, REUTERS (Jan. 14, 2021), https://www.reuters.com/world/india/whatsapp-faces-first-legal-challenge-india-over-privacy-2021-01-14.

135. I later discuss the possibility that the contract advisor will facilitate more personalized standard-form contracts, i.e., contracts that include alternative contractual terms (and possibly also prices), each fit for a different segment of the consumer body, based on their individual preferences. *See infra* note 158 and accompanying text.

136. Hence, while they would still be uniform and therefore "standard-form," they would no longer be referred to as contracts of adhesion, because consumers are protected to some extent by their advisors. For the definition of "contracts of adhesion," *see, e.g.*, Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 123–24 (2008) ("Ever since the concept of 'contracts of adhesion' was introduced into the legal vocabulary in the United States in the early 20th century, it has been widely used to refer to the standard contracts or standard-form contracts in which the

In the first phase of their operation, contract advisors will only rate consumer contracts by indicating how consumer-friendly or consumer-unfriendly they are. The interface must be extremely user-friendly. For online transactions, this probably means that the contract advisor's rating for a specific contract would automatically pop up on the screen every time the subscriber enters a supplier's website.[137] The rating itself must be crafted in a way that makes it easier for consumers to comprehend, for example, by using colors, such as green for a highly consumer-favorable contract and red for a consumer contract with many consumer traps. The rating can be either general for the entire consumer contract or aimed at a specific provision of high importance to consumers, such as a privacy clause. A closer look into the details of the rating's design and consumer interface obviously lies beyond the scope of this article. In any case, in order to increase the subscription to its services, the contract advisor would do its best to make its service useful and valuable.

When the contract advisor accumulates enough power among consumers, as did the ISS in relation to shareholders, it will acquire the power to negotiate with commercial entities that will seek its approval for their consumer contracts. This will happen only if a large enough share of consumers follows the advice and rating of the contract advisor. This article explains later how the contract advisor may reach such a position, but recall that such a "miracle" has already happened in the financial market.

Turning back to the examples brought at the beginning of the article, imagine that the contract advisor could negotiate the privacy terms with Facebook. The contract advisor could demand that Facebook commit to not changing the privacy settings unilaterally, but rather require users to approve such changes. In the Uber example, the contract advisor could negotiate with Uber and have them strike out the outrageous mediation clause. Such influence would be worth the support of the legal system.

B. Indirect Legal Incentives for the Proliferation of Contract Advisors

A contract advisor would need to accumulate enough power in order to make it worthwhile for large commercial entities to engage. One way to gain influence with large commercial entities would be if a large enough share of consumers of a particular product or service follows its advice. If contract advisors enjoyed such a market position, a poor rating would lead to a significant reduction in demand, or at least to consumer

terms are drafted and presented by one party on a take-it-or-leave-it basis, and the other party's participation consists of his mere 'adherence' to the terms given. It may not be logical to say that all standard contracts are necessarily adhesive, but all adhesion contracts use standard (or pre-printed) forms.").

137. Other web-based information services, such as price comparison services, operate in a similar manner. *See, e.g.*, PRICE.COM, https://price.com (last visited June 28, 2022).

discontent, and a good rating would lead to consumer satisfaction and increased demand. But the legal system could provide an important shortcut, as contract advisors, much like proxy advisors and credit rating agencies, need the support of the legal system to gain power. Recall that proxy advisors and credit rating agencies enjoyed a significant regulatory push before they gained their current standing.[138] Such a regulatory push made the use of their advisory services more meaningful.

Certainly, the legal system could also provide incentives for the use of the contract advisor services. The idea is to craft legal doctrines that treat standard-form contracts differently once they have been reviewed and received a favorable rating from a well-established contract advisor.[139] Such a lenient approach by the legal system is justified on two grounds. First, once reviewed and vouched for by a worthy contract advisor, the standard-form contract no longer poses the same threat to consumer welfare. Put differently, the review of the contract advisor reduces the need for the legal system to be on guard. Second, a lenient approach by the legal system may empower contract advisors and push large suppliers to engage with them. This is an important reward to suppliers who walk the extra mile to please the contract advisor.

Many legal doctrines are meant to protect consumers from harmful standard-form contracts. One prominent example is *contra proferentem* – "interpretation against the drafter"[140] – the rule requiring courts to interpret terms in standard-form contracts in favor of consumers.[141] Such a doctrine could, and should, be set aside in the face of the operation of effective contract advisors. As mentioned above, once reviewed and approved by the contract advisor, there is much less reason for the courts to be suspicious of standard-form contracts and protective of consumers. A less suspicious approach by the courts would provide an important indirect incentive to the operation of contract advisors, because it would push suppliers into their arms. This will make the life of the contract advisor much easier. In the same vein, all legal doctrines related to "contracts of adhesion" may also become obsolete. The contract advisor will do a better, more nuanced, and swifter job than any court or legal

138. *See supra* notes 115, 125 and accompanying text.

139. The United States currently has no uniform system for interpreting and enforcing consumer contracts. Attempts to create a unified, codified approach have all failed to gain traction. As a result, generalist courts have assumed the role of enforcing online consumer contracts. *See, e.g.*, Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 457 (2013); John M. Norwood, *A Summary of Statutory and Case Law Associated with Contracting in the Electronic Universe*, 4 DEPAUL BUS. & COM. L.J. 415, 449 (2006).

140. *See* Horton, *supra* note 129, at 436, 448 (discussing abandoning the against-the-drafter rule).

141. *See* U.C.C. § 2-302 cmt. 2 (AM. L. INST. & UNIF. L. COMM'N 2003) ("Under this section, the court, in its discretion, may . . . strike any single term or group of terms which are unconscionable…"). For a discussion on how courts replace the struck down unfair terms, *see, e.g.*, Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869 (2010).

doctrine. Additional legal concessions may relate to procedural law. For instance, radical procedural relief may come if courts are unwilling to certify consumer class actions once contract advisors vouch for the underlying consumer contracts.[142] Such a policy would, of course, encourage the proliferation of contract advisors.

C. The Contract Advisors' Funding Challenge

Finding a viable business plan for the contract advisor is a daunting task. The challenge stems from the fact that the services provided by the contract advisor – both contract ratings as well as negotiating with major suppliers – are a notable case of producing a public good.[143] Once the contract advisor rates and improves the terms of a standard-form contract, all consumers will naturally benefit from such services, with no way to exclude those who do not pay for the service. This means that the consumers' subscription to the services of the contract advisor must be free of charge or at least provided at a nominal price. Then, who would invest in providing a service that no one will later pay for?

One possibility is for the contract advisor to collect its fees directly from the suppliers that draft the consumer contract. Indeed, lenient treatment by the legal system for contracts reviewed by an effective contract advisor, as suggested in the previous Part, would make it easier for the contract advisor to collect its fees directly from suppliers that would like to benefit from the preferential legal treatment associated with the service. However, this article stops short of recommending such a fee structure because collecting fees from suppliers raises the concern of biased ratings. This article does not rule out such a business model, but it must be analyzed with caution.

It is worth noting that the current business model of the credit rating industry does indeed rely on fees collected from debt issuers. When the credit rating industry was initially established, CRAs collected fees by selling subscriptions to institutional investors.[144] Soon enough, however, the industry switched to an issuer-pay model, even though the rating is meant to protect the debt investors.[145] Another notable example of an effective "issuer pay" fee structure is the case of underwriters in a securities offering. Like CRAs, underwriters also collect their com-

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142. This assumes, of course, that the cause of action stems from claims against the contractual terms and not, for example, the quality of the goods delivered.

143. A public good has two attributes: non-rivalry (i.e., no additional cost for additional usage) and non-excludable (i.e., impossible to prevent parties from free consumption). *See, e.g.*, Kasper Lippert-Rasmussen, *Public Goods*, *in* INTERNATIONAL ENCYCLOPEDIA OF ETHICS 1 (2013).

144. FINANCIAL GATEKEEPERS: CAN THEY PROTECT INVESTORS? 62–63 (Yasuyuki Fuchita & Robert E. Litan, eds., 2007).

145. Yair Listokin & Benjamin Taibleson, *If You Misrate, Then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation*, 27 YALE J. ON REGUL. 91, 92 (2010).

mission directly from the issuers.[146] Nevertheless, their service of assessing the value of the issuer's stock, as well as vouching for the issuer's prospectus on which they sign, is provided for the benefit of the public investors, based on the underwriter's reputation.[147] Hence, in this article's context as well, and in the absence of an alternative viable business model, a "supplier pay" method may be the second-best solution for the contract advisory industry.

It is important to note that even if suppliers pay for the service, contract advisors must still strive to please and benefit consumers. Unless consumers believe that the contract advisor's rating is reliable, they will not subscribe to its services even for free. A contract advisor that cannot demonstrate that it has many subscribers would not justify preferential treatment by the legal system for the contracts it reviews, which in turn will prevent suppliers from engaging with such an advisor. Such incentives should make the contract advisors protect the interest of consumers, even if the suppliers are the ones paying for their services.

However, given the conflicts of interest that arise in a supplier-pay mode of operation, it is important to explore the possibility for a business model that does not rely on fees from suppliers. Even if subscriptions are free for consumers, a wide base of subscribers may generate income for the contract advisor. One obvious source is to rely, at least in part, on advertising revenue. Price comparison websites and services, such as Price.com, offer their services to consumers free of charge and generate their income from advertisements. Such price comparison services have much in common with the services of contract advisors that this article puts forth. Moreover, it is possible to think of a contract advisor that would join forces with a price comparison service, and provide the two services under the same roof.

Additional income may be generated from a variety of ancillary services that the contract advisor could offer to its subscribers. Finally, in a similar way to Wikipedia,[148] and given the important social function of contract advisors, perhaps their operation can be funded through voluntary donations from their users. The catch with all of these funding methods is that the contract advisor must first have a large community of users before it can earn enough fees through these channels. This means that relying on these methods would require a founder with deep pockets who can cover the costs until the contract advisor reaches a point where it can sustain itself. The next Part considers an entirely different business

146. *See, e.g.*, *In re Pub. Offering Fee Antitrust Litig.,* No. 98 Civ. 7890, Civ. 7804, 2003 WL 21496795, at *1 (S.D.N.Y. June 27, 2003).

147. For the investors' reliance on underwriters' reputation, *see* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 688 (1984).

148. Wikipedia is supported by its readers, with the average donation being about $15. *See Frequently Asked Questions*, WIKIMEDIA FOUND., https://donate.wikimedia.org/wiki/FAQ [https://perma.cc/S7QU-82AV] (last visited Dec. 31, 2022).

model, one that relies on sophisticated government financial support to jump-start the contract advisory industry. Importantly, such government support must be designed in a way that strengthens (and does not hinder, as is often the case with government subsidies) the incentives of contract advisors to perform their role proficiently.

D. An Alternative Funding Scheme - The Voucher System

The nature of the contract advisor's services, as explained above, makes it unlikely that anyone would pay a significant amount for a subscription. The problem is exacerbated by the fact that many consumers do not even understand the dangers inherent in consumer contracts, let alone the necessity of the advisory service. In fact, the contract advisor's mission is not only to improve consumer contracts, but also to raise consumer awareness of the problems posed by standard-form contracts.

The previous Part considered alternative sources of funding that do not involve substantial subscription fees but still rely on the private market. Another way to tackle the problem is to use government funding to encourage the creation and operation of a few contract advisors.[149] A simple straightforward government subsidy, however, may do more harm than good. A direct subsidy means that the government selects and supports the contract advisors. Such government involvement, albeit through outsourcing, seems perhaps even more troubling than consumer contracts drafted one-sidedly by the largest commercial players. Even if government intervention is conducted without any political agenda (which unfortunately is not always the case), it would deprive contract advisors of a market check on the quality of their services. A much more favorable solution is a voucher system, as described below.

A voucher is a certificate of government funding distributed free of charge to consumers who can then use it to acquire certain services in the open market.[150] For instance, a voucher can be used to pay for schooling at a school chosen by the student or the student's parents.[151] The usage of vouchers has two purposes. The first is to encourage consumer choice. A family can choose the school for their child that is better suited to their preference among education providers. The second reason is to increase market competition amongst schools. Similar to the operation of the

149. One option is for the government to impose a special dedicated tax on the largest suppliers, in order to fund the voucher system, if the government believes that the public (through general taxes) should not be the one to carry the burden of the consumer voucher system. However, given that in practice all taxpayers are also consumers, there is a proper justification for the use of general funds of the government.

150. *See, e.g.*, David W. Sears, *The Recreation Voucher System: a Proposal*, 7 J. LEISURE RES. 141 (1975).

151. On the history of the school voucher system (intended to improve public schools' level of education), *See, e.g.*, ALEX MOLNAR, SCHOOL VOUCHERS: THE LAW, THE RESEARCH, AND THE PUBLIC POLICY IMPLICATIONS (2001). Historically vouchers were also used to induce housing. *See* Hanna Sherman, *The Effects of Housing Allowances*, 1 HOUSING EDUCATORS J. 5, 5 (1974).

private market, vouchers make schools more competitive while increasing the educational quality for students.

In the same vein, a voucher system can support and kick-start the contract advisory market. Suppose, for instance, that the federal government acknowledges the benefits of a contract advisory function and decides to allocate,[152] for several years, 20 million dollars each year to create a voucher system that supports the emergence of such services.[153] Under such a system, every citizen over a certain age would have a virtual voucher or token that they could grant to their preferred contract advisor. At the end of the year, each contract advisor will be able to use the vouchers it has received to collect a portion of the allocated budget. As an example, the government support program could declare that the amount allocated will be divided each year between no more than three contract advisors that have received the most vouchers from the public,[154] and each would receive a portion of the pie according to its share of the vouchers collected.

To continue the example, assume that four contract advisors collect the following amount of vouchers from consumers: contract advisor A collects 30 million vouchers, contract advisor B and contract advisor C each collect 15 million vouchers, and contract advisor D collects 9 million vouchers. The government would then pay contract advisor A 10 million dollars, while contract advisors B and C would receive 5 million dollars each, and contract advisor D would receive nothing.[155]

Such a voucher-based incentive scheme would encourage private actors to invest in the creation of contract advisors who would then compete among themselves over the quality of their services to attract the

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152. The federal government is mindful of consumer protection. *See, e.g.*, Hilary Smith, *The Federal Trade Commission and Online Consumer Contracts*, 2016 COLUM. BUS. L. REV. 512, 534 (2016) (discussing the FTC's broad authority under Section 5 of the FTC Act and specific consumer protection statutes that also empower the Commission, including the Equal Credit Opportunity Act, Truth-in-Lending Act, and Cigarette Labeling Act); *see also A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (May 2021). In the same vein, the federal government should also have an interest in minimizing the effect of standard-form contracts on consumers.

153. Such public spending should raise no eyebrows. The federal government spends trillions of dollars on creation of public goods. For instance, federal spending on preservation and development of national parks in 2020 was $3.1 billion. Helen Stoilas, *President Biden's Budget Includes Funding Boost for National Park Heritage*, THE ART NEWSPAPER (July 6, 2021), https://www.theartnewspaper.com/news/biden-s-boost-for-national-park-heritage (reporting that under Biden's administration NPS funding would increase to $3.5 billion per annum); *see also National Park Visitor Spending Contributed $28.6 Billion to U.S. Economy in 2020*, NAT'L PARK SERV., https://www.nps.gov/orgs/1207/vse2020.htm (June 10, 2021).

154. In Section IV(G) below, I explain why it is important to have but a few contract advisors, quite similar to the proxy advisory industry or credit rating agencies, which have only 2-3 major players each.

155. Since contract advisor A collected 30 million out of 60 million total vouchers considered (out of the highest three), he will be entitled to half of the $20 million dollar fund ($10 million dollars). Contract advisors B and C collected 15 million each out of 60 million total vouchers considered, which accounts for one fourth of the $20 million dollar fund ($5 million dollars).

attention of consumers. Assuming that two or three contract advisors flourish under this support program, they could become quite influential. Indeed, their services (or at least their basic services) would be provided to consumers free of charge, but they would have to compete to attract consumers in order to collect the vouchers. To do so, they will have to offer meaningful services and publicize their actions. For example, they will have to show that they have managed to change material contract terms in favor of the consumer body and have done so in a conspicuous and convincing manner. This is necessary because their nonpaying subscribers would have to heed the advice of the contract advisor, and not just give it their voucher. Without real backing from many consumers, major suppliers would have no reason to cooperate with the contract advisor and modify their contracts according to the contract advisor's recommendations.

Put differently, the contract advisor must be vocal and effective in order to attract consumer attention to its purposes – (a) to convince consumers to tender their vouchers, and (b) to cause consumers to react to the rating system and follow the contract advisor's advice, which means to vote with their feet against suppliers with consumer contracts that receive poor ratings.

One can therefore imagine that occasionally the contract advisor will have to flex its muscles and wage a visible battle with a strong commercial supplier, in order to draw consumers' attention to the pitfalls of a particular contractual arrangement. A dramatic campaign, and perhaps a well-publicized consumer boycott or protest, could attest to the power of the contract advisor, which would have two significant effects. First, it would cause suppliers to cooperate with the contract advisor in the future. Second, but no less important for the contract advisor, it would draw more attention and increase the number of vouchers and followers.

While the voucher system provides important and perhaps vital support for the rapid emergence of effective advisory services, it is not crucial for the ongoing operation of the contract advisory industry in the long run. Once contract advisors gain enough influence and followers, they may generate advertising revenue or offer their free-of-charge subscribers some premium services, enjoying economies of scale. Such premium services could include information about the products or services they wish to purchase from a trustworthy source, and more interestingly, the option of a personalized contract tailored to match the tendencies and preferences of the consumer. Such possible avenues of improvement will next be discussed in Part E.

E. Contract Advisors and (More) Personalized Contracts

Professors Porat and Ben-Shahar explain that using mandatory rules in consumer contracts guarantees a minimum bundle of rights that cannot be

circumvented by suppliers.[156] But they also explain that mandatory terms have harsh consequences – they may lead to higher prices, shrink markets, and impose regressive cross-subsidies.[157] They propose an innovative idea, namely to use personalization when designing the contractual mandatory terms.[158] Similar to personalized marketing that uses big data to discover consumer preferences and interests, they suggest that legal protection could be personalized to correspond to the predicted protective needs of different contracting parties.[159]

Interestingly, the contract advisor could facilitate personalized consumer contracts. The idea here has much in common with what Porat and Ben-Shahar had in mind, but the government is left out of the equation. To start, the contract advisor would have to collect data about consumer personal preferences and needs. This could be achieved in an old-fashioned way through a questionnaire that the contract advisor would draft and then ask its subscribers to fill out. Alternatively, the contract advisor could ask its subscribers for permission to access their shopping records and any other relevant data, and then use an algorithm to predict consumers' needs and preferences.

Equipped with the personalized database, when the contract advisor negotiates with a major supplier, it will encourage the supplier to offer a slightly different contract for different consumers. For example, the contract advisor may decide, based on the analyzed data, to divide its subscribers into three groups in terms of their sensitivity to privacy concerns. Such variable sensitivity may be based on different preferences or different needs of different consumers. The contract advisor would then encourage relevant suppliers to offer three different contracts.[160] Whenever a consumer who subscribes to a contract advisor purchases a service from the relevant supplier, they will automatically receive an

156. Omri Ben-Shahar & Ariel Porat, *Personalizing Mandatory Rules in Contract Law*, 86 U. CHI. L. REV. 255, 256 (2019).

157. *Id.*

158. *Id*. Ben-Shahar and Porat have elaborated their idea in a recent book. *See* OMRI BEN-SHAHAR & ARIEL PORAT, PERSONALIZED LAW: DIFFERENT RULES FOR DIFFERENT PEOPLE (2021); *see also generally* Porat & Strahilevitz, *supra* note 19.

159. For example, some laws offer a seventy-two-hour cooling-off period to allow consumers an opportunity to cancel the deal and receive their money back. A personalized protection regime would change that. Some consumers need longer periods to reevaluate the deal; others can do with shorter. A seventy-two-hour right to withdraw from a loan contract may be useless to the weakest of consumers, who are often the neediest and are also the recipients of the most risky and complicated loan deals. Ben-Shahar & Porat, *supra* note 156, at 257; *see also* Shirly Levy, The Illusory Promise of Money Back Guarantees: Comparative Research, Economic and Behavioral Analysis & A Reform Proposal (2015) (Ph.D. dissertation, Tel Aviv University) (on file with author).

160. This means that suppliers must also enjoy the benefits of personalized contracts, by sharing the surplus created by personalization, or else they will not play along and cooperate with the contract advisor for this purpose. Alternatively, the social planner (i.e., the legislator or regulator) may force such cooperation.

agreement that fits their needs and desires.[161] Perhaps the more privacy-sensitive contracts would be more expensive because the supplier cannot benefit from the data it usually collects, but they would nevertheless be optimal.

This outcome is close to the vision of Porat and Ben-Shahar, but personalization here is not a product of government intervention but rather of market forces. Unlike mandatory personalization by the government, no one makes a consumer subscribe to the personalization services provided by the contract advisor. This means that there is an important market check on the said services. In order to attract subscriptions, the contract advisor must provide a benefit to consumers. This is true whether or not it engages in the personalization of consumer contracts.

F. The Contract Advisor's Power

Naturally, the contract advisor cannot engage with each and every supplier in order to negotiate the terms of its consumer contract. This kind of operation would necessitate a huge team. Most attention would naturally be accorded to the most oft-used agreements – such as those of Apple, Facebook, etc. Here, engagement between the contract advisor and the supplier that is tantamount to negotiation is expected.

Many other consumer contracts would be reviewed but not negotiated. The AI-augmented world is already here. In the near future, the contract advisor could employ AI technologies to root out the most harmful contract terms and target the relevant suppliers that were filtered by the technology. AI will allow the contract advisor to use a small team, but still, zero in on unfair contract terms for consumers. As technology today makes it possible to search the full text of agreements, AI-powered contract management software makes it easy to centralize, store, search and review agreements across the entire economy. AI-powered software can automatically extract key terms or clauses across the supplier's contracts and highlight nonstandard or non-friendly terms.

Another way for the contract advisor to influence suppliers across the board is by publishing general guidelines for consumer contracts. The suppliers could thereby learn the advisor's policy regarding common stipulations in consumer contracts in various contexts. This will allow suppliers to reevaluate and adjust their contract, and they would actually have to negotiate with the contract advisor only in cases of special circumstances that justify the supplier's deviation from the guidelines, or in situations that the guidelines do not cover. The major proxy advisors in

161. This means that the supplier would receive a signal from the contract advisor to use a certain contract type for the specific client. This is of course relatively easy to do with online shopping and contracting.

the financial market, ISS and Glass Lewis, use this method and publish guidelines with their views on many issues which are highly influential in practice.[162] One example is ISS's guidelines for director "overboarding" (i.e., having the position of director in too many companies, which can affect the director's ability to properly carry out her oversight duty).[163] In a similar manner, the contract advisor could publish guidelines that help suppliers understand its position on major issues, for example, about the reasonable use of private consumer information. Finally, another way for the contract advisor to operate without exerting much effort is to rely on consumer feedback. If enough complaints accumulate, then the contract advisor can start targeting the relevant supplier and zoom in on its contractual terms.

G. The Importance of a Concentrated Market Structure for Advisory Services

Another lesson that can be learned from the proxy advisors and CRAs in the financial market is that the advisory market must be concentrated so that each player will be highly influential in its own right. Such influence will make it worthwhile for suppliers to engage and negotiate with the contract advisor and consider its views. Put differently, each contract advisor must represent a large enough chunk of the consumer population for suppliers to pay attention to its advice. Also, relatedly, it is impractical to negotiate the terms of a single contract with too many different parties, each with its own stance on consumer welfare. Obviously, no supplier can negotiate its contracts with ten contract advisors.

Recall that as discussed in Section II, proxy advisory services in the financial market are concentrated in the hands of two major players (ISS and Glass Lewis), and the market for CRAs is also highly concentrated – with the Big Three (S&P, Moody's, and Fitch) dominating. The contract advisory industry would and should be similarly concentrated.

Still, it is quite important to have more than one player. In the proxy advisory industry, there are concerns that ISS has become too powerful. Proxy advisors do not own equity in the companies they provide voting advice to, nor do they have any fiduciary duties to the shareholders of those companies. Without real competition, it is doubtful that they have enough incentive to perform well. Having more than one large player can alleviate some of the concerns. The same applies to the contract advisor.

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162. For the advantages of publishing guidelines, *see* Asaf Eckstein, *The Rise of Corporate Guidelines in the United States, 2005-2021: Theory and Evidence*, 98 IND. L.J. (forthcoming 2023).

163. *See* INSTITUTIONAL S'HOLDER SERVS., UNITED STATES PROXY VOTING GUIDELINES: BENCHMARK POLICY RECOMMENDATIONS 11 (2021), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf (recommending to "generally vote against or withhold from individual directors who sit on more than five public company boards").

Recall that the contract advisor aims to attract consumers to subscribe to its services. In the face of competition, the contract advisor will have to fight for consumer welfare.

V. CONCLUSION

Standard-form contracts are here to stay, raising concerns for consumer welfare given the many flaws identified by the literature. This article aims to mitigate consumers' shortcomings by drawing lessons from third-party advisors that operate in the financial market. Such an intermediary – a proxy advisor or credit rating agency – can mitigate investor weaknesses, by proposing a centralized mechanism for engagement with the issuer. Therefore, this article advocates for the introduction of third-party contract advisory services to serve in a similar role in consumer markets. Such contract advisors may help unleash the latent power in consumer crowds in order to overcome buyer-side weaknesses.

Contract advisors would engage with large suppliers and negotiate standard-form contracts on behalf of their consumer subscribers. They would also use AI technology to scan various other contracts, publish guidelines (after they accumulate enough power so that suppliers will listen and implement them), and lastly, rely on consumer complaints and feedback (or perform random checks) in order to initiate a review of additional contracts. Metaphorically, this would mark the end of standard-form contracts as we know, and fear, them today.