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CONSUMER DISCLOSURE IN THE 1990s

Griffith L. Garwood, Robert J. Hobbs,
and Fred H. Miller†

INTRODUCTION

Disclosure has long been a cornerstone of consumer protection. Disclosure is an important component—and even the primary purpose—of numerous federal laws, including the Truth in Lending (TIL), Truth in Savings, Equal Credit Opportunity, Fair Credit Billing, Consumer Leasing, Fair Debt Collection Practices, Electronic Fund Transfers, and Magnuson-Moss Acts and the Federal Trade Commission's Holder in Due Course, Door to Door Solicitation, and Credit Practices Rules. Disclosure is also a feature of state consumer protection laws, although these laws more and more tend not to overlap the federal enactments, and instead focus on substantive regulation such as deceptive practices, the regulation of interest and charges, and matters of that sort.

Although disclosure is by now a well established concept, debate continues whether the concept is working in all contexts, and whether the benefits of disclosure always outweigh the societal costs. This Article reviews the perceived successes and the difficulties of disclosure. It attempts to identify lessons that

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In the preparation of this Article, the remarks of each of the authors at the National Institute on Consumer Financial Services Law in the 1990s, which presentations are the basis of this Symposium, were rearranged and edited and are set forth here in revised format. Accordingly, the discussion as a whole does not necessarily represent the views of any particular author and individual portions may reflect individual views.

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may be learned from looking at disclosure patterns, and to discern future trends and directions for disclosure requirements.

I. CONTEXTS FOR AND TYPES OF CONSUMER DISCLOSURES

Disclosure as a consumer protection device is employed in many contexts, sometimes with different objectives. To illustrate, disclosure may be directed at the general public with the goal of facilitating individual decision making, or it may be designed to generate general public discussion to formulate policy. Obvious examples are the regulation of credit and demand and interest bearing account solicitation advertising, intended to help the public at large with individual shopping decisions, and the statistical data on lending activity required by the Home Mortgage Disclosure Act directed at letting a community assess the performance of an institution in generally serving that community.[1] A more modest aim is disclosure that targets specific groups of individuals. An example is disclosure with respect to credit and charge card solicitations and applications, where those who have been selected for solicitation by the card issuer are provided specific information.[2] Disclosures may be focused more directly at persons already expressing interest in a product. An illustration is the home equity line application disclosures, where disclosures must be given with the application.[3] The narrowest context is the requirement that new customers be afforded disclosure in connection with, for example, the installment sale or loan contract or note and mortgage they are signing or a schedule of fees and charges, interest rates, and terms of a new account they are opening.[4]

Not all disclosures are directed at potential or new customers. For example, existing customers are afforded disclosure on or with the periodic statement in open end credit and with respect

1. See as to the two matters Regulation Z, 12 C.F.R. §§ 226.16, 226.24 (1992) (pursuant to the federal Truth in Lending Act (TIL), 15 U.S.C. § 1601-1700 (1982 & Supp. 1993), *and* 12 U.S.C. § 4302 (Supp. 1992) of the Truth in Savings Act). As to the second point, see the Home Mortgage Disclosure Act, 12 U.S.C. § 2801-11 (1988). *See also* the Community Reinvestment Act, 12 U.S.C. § 2901-05 (1988).

2. Regulation Z, § 226.5a.

3. Regulation Z, § 226.5b.

4. Regulation Z, §§ 226.17, 226.18. Initial disclosures before the first transaction also are required in open end credit. Regulation Z, §§ 226.5, 226.6. As to disclosure of account fees, charges, interest rate, and terms, a schedule must be provided upon request and before a new account is opened. 12 U.S.C. §§ 4303, 4305 (Supp. 1992).

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to their asset accounts.[5] Even former customers may be due disclosure; for example, they may be provided an "adverse action" notice under laws protecting against credit discrimination when accounts are terminated.[6]

Within the above contexts, the types of mandated disclosures may also vary. For example, some disclosures are quite general in describing a product. An illustration is the pamphlet required for home equity lines which discusses the general characteristics of home equity loans rather than any individual plan.[7] A somewhat more specific type of disclosure, that still is not transaction specific, is the preprinted early adjustable rate mortgage (ARM) disclosure where the disclosure is related to the specific type of ARM of interest to the borrower.[8] At the other end of the spectrum are the very specific disclosures required on open end monthly statements[9] and in automatic teller machine (ATM) receipts that reflect individual account activity.[10]

Other types of disclosures are general in nature, but focus to a degree on general policies or terms, as well as on specific product information—for example, the initial disclosure in connection with an electronic fund transfer service.[11] Most disclosures must be prepared for the consumer.[12] A few disclosures, however, really are instructions on how to prepare the information yourself. For example, the ARM disclosures must contain an example of the calculations for a sample $10,000 loan with instructions for the user on how to calculate a possible worst case scenario for an individual loan.[13] One constant, nonetheless, is the complexity of the rules that cover these diverse examples. To make the point, Truth in Lending alone, as embodied in

5. Regulation Z, §§ 226.7, 226.8. Other subsequent disclosures also may be required. *See* Regulation Z, §§ 226.9, 226.20. Account periodic statements are required by 12 U.S.C. § 4307 (Supp. 1992).

6. Regulation B, 12 C.F.R. §§ 202.2(c), 202.9 (1990) (pursuant to the Federal Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691-91F (1988)).

7. Regulation Z, § 226.5b(e).

8. Regulation Z, § 226.19(b). A pamphlet also is required. Regulation Z, § 226.19(b)(1).

9. Regulation Z, §§ 226.7, 226.8.

10. Regulation E, 12 C.F.R. § 205.9(a) (1990) (pursuant to the Federal Electronic Fund Transfers Act, 15 U.S.C. § 1693-93(r) (1988)).

11. Regulation E, § 205.7.

12. For example, Regulation Z, § 226.18, closed end disclosures.

13. Regulation Z, § 226.5b(d)(5).

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Regulation Z and its staff commentary, contains some 125,000 words.

II. BASIC OBSERVATIONS ABOUT THE DISCLOSURE APPROACH

Notwithstanding the diversity of consumer disclosures and the complexity of the rules, some basic observations seem possible as to why disclosure has long been, and is likely to continue to be, a fundamental consumer protection device. We can also identify some prerequisites to effective disclosure.

A. *Policies Behind Disclosure*

All mandated disclosure in whatever context and of whatever type in the consumer financial services provider-consumer relationship reflects two ideas that seem well accepted. First, it recognizes that consumers are less knowledgeable than is the provider about possible or existing terms of the relationship. The disclosure approach is based on the assumption that if appropriate information is provided, the consumer may use the information to avoid deleterious, uninformed, or unwise action, and to obtain better terms—thus making best use of the market mechanism.[14] Both those who see disclosure as necessary to protect the consumer and those who see information as necessary to protect the functioning of the market are likely to support the concept.

B. *Disclosure as an Alternative*

Second, in the United States, disclosure as a consumer protection device is seen as consistent with our form of government, which is premised on an informed electorate. Thus disclosure serves as an attractive alternative to the substantive regulation of agreements and conduct as a method of achieving a balanced relationship between the service provider and the consumer. Consumer agreements normally are forms prepared by the service provider, and thus initially favor that party; the forms are often couched in legal language, absent "plain English" laws. They are often of considerable length. Normal legal principles favor allowing rules and standards to be set by the agreement of the parties rather than by regulation. But, if strictly adhered to,

14. *See, e.g.* 15 U.S.C. § 1601(a), the findings and declaration of purpose for TIL.

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this may allow the provider to prevail unless the consumer reviews and understands the contract before signing. This is impractical. Disclosure can highlight the important terms and present them in intelligible language so that the consumer may quickly understand and bargain for a more balanced relationship—at least in theory. More realistically, the consumer can at least avoid an imbalanced relationship by choosing not to consummate the deal on the basis of the disclosures.

Advance disclosure before the transaction is finalized allows the consumer to shop for advantageous terms and, because it fosters competition, facilitates market regulation of terms. This lessens the need to regulate agreements and practices by law. Evidence of effectiveness of disclosure acting as a market regulator exists, for example, in the Federal Reserve Board's Annual Percentage Rate Demonstration Project (1987), which tested the effect of publication of "shoppers guides" listing creditors' annual percentage rates. The Board found that the dispersion of interest rates declined in the markets with guides, as to some extent did their average level. Some evidence for this idea also exists in the legislative history of the Fair Credit and Charge Card Disclosure Act.[15] The Act requires more information to be provided with credit card solicitations based in part on concerns about the level of credit card interest rates. Its proponents thought that better information would help drive down rates. The Act was supported by many persons as an alternative to federal rate regulation. Finally, one response to the disclosure requirements of Regulation CC[16] may also make the point. Many institutions have chosen to provide prompt availability of funds with limited exceptions, rather than utilizing the more extensive exceptions allowed by the funds availability law.[17]

C. Prerequisites for Effective Disclosure

A third observation is that, for any type of disclosure to serve its purpose, certain prerequisites must exist. These prerequisites include appropriate timing. Thus, disclosure generally should

15. Codified primarily at 15 U.S.C. §§ 1637(c)-(f).
16. 12 C.F.R. §§ 229.15-229.18 (pursuant to the Expedited Funds Availability Act (EFA), 12 U.S.C. § 4001-10 (1988)).
17. Regulation CC, 12 C.F.R. §§ 229.10-229.13.

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come at a time to permit the utilization of alternative sources to obtain the consumer financial services sought. A successful example of this concept in present law is the "advance" disclosure for closed-end residential mortgage transactions subject to the Real Estate Settlement Procedures Act and for ARMs where disclosure must be provided within three days of receipt of an application.[18] This disclosure is obviously more beneficial than the "contract" disclosure permitted for other closed-end transactions where disclosure typically comes at closing.[19]

Another prerequisite of effective disclosure is that it must be uniform and clear. Generally this suggests the need for specified terminology or format to aid comparison. It also requires a format that distinguishes the disclosures from other material, facilitating consumer understanding of the disclosures. Illustrations of these propositions include the required Truth in Lending terminology[20] and the Federal Trade Commission Rule on Preservation of Consumers' Claims and Defenses,[21] which requires specific terminology and type standards for a mandated notice. The rules concerning funds availability are also an example in requiring disclosures to be grouped together, unrelated information to be excluded, disclosures to be highlighted when they appear in another document, and certain phrases to be used.[22] Of course, not all disclosure rules are so specific. Certain Truth in Lending disclosure rules in open end credit do not require segregation,[23] a particular location or type size,[24] or uniform terminology (except as between initial and periodic disclosure).[25]

An additional prerequisite of effective disclosure is that it should avoid "information overload." Generally, to be effective, disclosures must be brief and simple enough to be readily assimilated. This means that certain details must be omitted. The failure to meet this prerequisite risks destroying the utility

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18. Regulation Z, §§ 226.19(a), (b).

19. Regulation Z, § 226.17(b). Of course, early disclosure is encouraged generally under Regulation Z, § 226.17(f). Moreover, advertising under Regulation Z, § 226.24 ameliorates the lack of mandated early disclosure to some degree.

20. Regulation Z, §§ 226.5(a)(2), 226.17(a)(2).

21. 16 C.F.R. § 433 (1992).

22. Regulation CC, § 229.15.

23. Regulation Z, §§ 226.5(a)(1), (2). But this flexibility is subject to the integrated document rule at Regulation Z, §§ 226.5(a)(1) cmt. 2.

24. *But see* Regulation Z, § 226.5(a)(2).

25. *See supra* note 23; Regulation Z, §§ 226.6 cmt. 1.

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of disclosure. A disclosure that is not read at all or is too complex for practical use is no disclosure. Thus, sometimes summary disclosure rather than detailed descriptions are best. An illustration of this concept is the initial disclosure in relation to acquiring an electronic fund transfer service,[26] where only a summary of information is required—such as a summary of the consumer's liability for unauthorized electronic funds transfers, the financial institution's liability for certain failures, and so on. Another illustration is the disclosure concerning the reasons for adverse action taken on credit transactions required under the Equal Credit Opportunity Act.[27] While creditors must give the principal reasons, the staff commentary to Regulation B suggests that giving more than four reasons is not likely to be helpful to applicants.[28] The commentary further takes the position that a creditor need not explain how or why a factor adversely affected an applicant.[29] A final example is rebate disclosure. Under Truth in Lending, a disclosure is required of whether or not the consumer is entitled to a rebate of any finance charge upon prepayment, but not a description of the method of computing the earned or unearned finance charge, which would be unduly complicated.[30]

D. Myths

A final general observation that may be made is that the rhetoric about disclosure often is at least part myth. For example, it is commonly proclaimed that disclosure laws are not substantive limitations and that disclosures don't change products. While this often is accurate, it is not invariably true. Increasingly, disclosure laws and disclosure formulate substantive rules. Two illustrations will suffice: (1) the home equity disclosure law in fact contained numerous limitations on contractual terms for home equity lines,[31] and (2) the necessity

26. Regulation E, § 205.7(a).

27. Regulation B, § 202.9(a)(2).

28. Regulation B, §§ 202.9(b)(2) cmt. 1, cmt. 3.

29. Thus "length of residence" is a permissible disclosure as opposed to "too short a period of residence." *Id.*

30. Regulation Z, §§ 226.18(k)(2), 226.18(k)(2) cmt. 1. *But see* Regulation Z, § 226.18(p) (contract reference).

31. Regulation Z, § 226.5b(f). In contrast, while the Truth in Savings Act generally eschews substantive regulation as to how interest paid should be calculated, it does not do so entirely. *See* 12 U.S.C. § 4306.

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to give detailed ARM disclosures for each variable rate mortgage program offered[32] has undoubtedly limited product variation and offerings.

Another assumption is that we can identify the truth and fully disclose it. Alfred North Whitehead once said that all truths are only half truths. He reasoned that trying to treat half truths as whole truths causes our problems. Many of the problems labored over in the discussions of truth in lending "simplification" reflect this phenomenon.[33] In actual fact, Congress and the Federal Reserve Board have picked certain standards and levels of disclosure, which, although nominally referred to as representing the "truth" and "full disclosure," in fact represent neither.[34] On the other hand, the chosen standards may represent an acceptable balance, for an extreme pursuit of "truth" or full disclosure is probably neither workable nor desirable. If disclosure demands too much complexity, as observed, it is self defeating. Thus, Whitehead's half truths may be the only understandable ones.

III. Inherent Elements of Self Defeat

As suggested above, it can be persuasively argued that the constant pursuit of ever more disclosures may diminish their effectiveness. Moreover, the cost of preparing forms, training personnel, monitoring compliance attempts, and the like for disclosure is not cheap. While effective disclosure allocates resources and produces other benefits that probably justify such expenditures,[35] ineffective disclosure produces little to justify its cost, and may even misallocate resources.

What factors lead to ineffective disclosure? First, disclosure that depends on voluntary action may not be very successful. For example, since credit advertising is not mandatory, detailed advertising rules that are "triggered" by certain statements may either simply suppress advertising or drive it to generalized statements. Voluntary "early" contract disclosure merely raises the risk that two rather than one set of disclosures may be

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32. Regulation Z, § 226.19(b).

33. *See, e.g.*, the more detailed discussion of TIL, *infra* Section IV.

34. *See supra* note 26, for one example; *see also*, RALPH J. ROHNER ET AL., THE LAW OF TRUTH IN LENDING § 3.07 (1984).

35. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

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necessary and that, if misdisclosure occurs, there may be additional risk of liability to noncustomers. Consequently, it is rarely used.

Second, the technical requirements for uniform and clear disclosure, as well as the complexity of the disclosures themselves, tend to produce litigation that in turn may prompt further complexity and "over compliance."[36] The civil liability[37] and restitution[38] rules for TIL disclosure violations encourage zero tolerance for ambiguity and thus prompt evermore complex rules to provide certainty in evermore complex transactions.

A third factor is that as products evolve in more complex permutations and legislative or regulatory focus centers upon them, the inevitable trend is to longer and more complex disclosure. Perhaps the best illustration comes from a comparison of the early and later disclosure requirements for variable rate transactions.[39] As ARM's became more common and complex, a simple three point disclosure (which many felt was ineffective in alerting borrowers to their risk) was broadened into a full blown set of new separate disclosures. Other examples include the disclosures in consumer buy downs and discounted and premium variable rate transactions,[40] which have increased in complexity over the years, and the evolution from simple state disclosures in connection with credit card solicitations and applications to the subsequent broader federal activity in this area.[41]

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36. For example, *see* Jones v. Mid Penn Consumer Discount Co., 79 Bankr. 233 (Bankr. E.D. Pa. 1987) (in a refinancing where the original mortgage is retained, perhaps for lien priority purposes, a violation exists if the rescission notice does not disclose both mortgages). This line of decisions was countered by Regulation Z, § 226.2(a)(25) cmt. 6 (multiple security interests in the same property need not be separately disclosed). *See also* Hendley v. Cameron-Brown Co., 840 F.2d 831 (11th Cir. 1988) (disclosure in a discounted variable rate transaction that indicates the interest rate will increase only if the index increases is a violation since the rate also may increase when the discount expires). This decision is countered to some degree by the subsequent ARM rules of Regulation Z, § 226.19(b), but at the cost of at least as much complexity.

37. 15 U.S.C. § 1640 (1982). Similar rules in EFA, *supra* note 16, have not had the same result so far, nor has this result even occurred under TIL for open end disclosures. Thus, too much of this point should not be made.

38. 15 U.S.C. § 1607(e).

39. *Compare* Regulation Z, §§ 225.5b(d), (e), 226.19(b), mandating extensive variable rate and other disclosures, and even disclosures about disclosures, *with* Regulation Z, §§ 226.6(a)(2) n.12 and 226.18(f)(1) on variable rate disclosures otherwise, which latter rule formerly was the rule for all closed end variable rate transactions.

40. Regulation Z Commentary, §§ 226.17(c)(1)-4 to 10.

41. However, some state disclosures still remain. *See* ROHNER, *supra* note 34, §

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IV. THE TRUTH IN LENDING EXPERIENCE

Perhaps aspects of the above discussion can be highlighted by further examination of the primary federal credit disclosure law, the Truth in Lending Act.

It took the decade of the 1960s to enact TIL and the decade of the 1970s to refine and simplify it. However, in the 1980s as credit products continued to evolve, it became more difficult to simply advise a consumer to shop for the lower APR. In the 1980s, the APRs on two major types of consumer credit sometimes became incomparable. For example, in the automobile finance area, 2.9% or 0% financing provided by dealers who sell their contracts to captive finance companies will not reflect the fact that consumers who choose this financing forego receiving a cash payment from the manufacturer. Legal and practical problems hinder imputing such additional amounts to the credit purchaser's APR. In contrast, third party lender finance charges would all be included in the APR.

The inability of consumers to compare APRs at car dealers and lenders is not the only aspect of the problem today, however. APRs on open end home equity lines of credit (the most rapidly growing type of consumer credit in the 1980s), closed-end second mortgages, and unsecured loans also cannot be compared with confidence because open-end credit APRs are calculated differently than those for closed-end contracts.[42] The gap in comparability of what some might think are "true" APRs on credit cards and personal loans has widened as well, as fees on credit cards have escalated and additional credit insurance products have proliferated for personal loans. Real estate closing costs, credit card annual fees, and credit insurance premiums, in the minds of some, are not part of the "real" APR even though they increase the actual cost of credit. Some believe that one of the primary benefits of TIL, providing a precise measure of the cost of alternative sources of credit, is now somewhat at risk.[43]

14.03[3] (1989 Cum. Supp.).

42. Regulation Z, §§ 226.14, 226.22.

43. Consumer surveys indicated a marked increase in consumer awareness of APRs on typical transactions after TIL was enacted. *See* T. DURKIN AND G.E. ELLIEHAUSEN, 1977 CONSUMER CREDIT SURVEY (Fed. Res. Bull. 1978), which provides the following statistics:

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As a result, some would suggest that changes in the consumer credit market may require a reexamination of the law. The current incomparability of APRs between major types of consumer credit is a troubling problem. As a starting point, the compromises embedded in TIL as exceptions to the general TIL definition of the "finance charge"—both in the beginning and as a result of simplification—might be reexamined if the APR is to regain its full comparability. Some have suggested that inclusion of closing costs, credit insurance, broker's fees, application charges, seller's points, and filing fees in the finance charge might increase the comparability of APRs between transactions and reduce unseemly practices in the credit industry.

Fictitious "cash" down payments are becoming more frequent in the car industry. The result may be consumers' confusion, improvident extensions of credit, and the undermining of the financier's underwriting criteria. Reinclusion of TIL statutory damages for misdisclosure of down payments might put a quick end to this deception. That would benefit consumers and financiers alike.

Home improvement scams are staging a small comeback. A two contract, low-ball scheme is being used to circumvent the homeowners' TIL right to cancel during the three day cooling-off period. The second, higher-priced finance contract that will replace the cheaper contract under which work was begun complies with TIL, but is presented only after work is substantially completed. At this point, courts may require the consumer to tender the value of the work performed to rescind

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Awareness of Typical Credit Rates

	1969	*1970*	*1977*
Closed-end credit	14.5%	38.3%	54.5%
Open-end credit	30.9%	59.5%	68.0%

There also was a comparable increase in the sensitivity of consumers to interest rates and declining loyalty to prior lenders. *See* Fed. Res. Bd. ANNUAL PERCENTAGE RATE DEMONSTRATION PROJECT (Mar. 1987), which shows:

Reasons for Choice of Credit for a Recent Credit Transaction

	1977	*1984-5*
Low interest rate	6.8%	24.3%
Previous experience	53.6%	39.3%
Reference	8.1%	24.3%
Availability of credit	7.3%	10.3%
Convenience	3.7%	7.7%

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that second contract under Truth in Lending. This leaves the homeowner with a rescission right that may involve the obligation to refinance part of the home improvement transaction. This is substantially less protection than a right to cancel before any work is performed. Unfortunately, many of the victims of this scam seem to be particularly vulnerable elderly homeowners on fixed incomes who can ill afford the losses. TIL rescission rules could be tightened to protect against the scam. One idea might be to have a broader rescission right before any work is started; this would provide enough of a cloud on these transactions to make them less likely.

Another potential challenge for TIL in the 1990s could be providing the consumer with better information to evaluate loan consolidations secured by a first or second mortgage on the borrower's home. Increasingly, consumers seeking a small personal loan are being switched into large, often high-rate, consolidation loans. For many consumers a disclosure comparing installments, total of payments, and finance charges between the consolidation loan and the credit to be consolidated might be sufficient to help them avoid improvidently putting their home on the line for an excessive mortgage. Some notice pointing out the effect of loan consolidation might be effective for other consumers.

The 1980s witnessed two important improvements to TIL. The first, early disclosure[44]—presented at the time the consumer may still be shopping for credit terms—was introduced for certain types of credit, e.g., ARMs, credit cards, and home equity lines of credit. As noted earlier, the lateness of other TIL disclosure remains a problem, since most TIL disclosures are presented only after the consumer is psychologically bound to the transaction and the disclosures may be obscured by a sheaf of other documents. Earlier disclosure might enhance competition for other types of credit and the feasibility of this approach on a broader scale could be reevaluated. Unfortunately, early disclosure also means imprecise disclosure, since in many transactions the precise terms are not all known until near closing.

44. Early disclosure now is required by Regulation Z, §§ 226.19(b), 226.5a, 226.5b. Early disclosure previously existed for home acquisition transactions. Regulation Z, § 226.19(a).

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The second enhancement of the 1980s was requiring informational brochures for all ARM and home equity loans.[45] These brochures provide more in-depth information than may be presented in the necessarily simplified disclosures for complex transactions. While the brochures, like the simple disclosures, will not be used by all consumers, they are a step forward in providing greater consumer information at a time useful to consumers. They may well represent a solution to the inherent problem of "truth" versus information overload. If some way could be found to test their effectiveness, additional opportunities to use them profitably might be identified.

The early 1990s would also be an appropriate time to reassess the various TIL disclosure approaches with other consumer testing. The effectiveness of the model payments box,[46] introduced in TIL simplification, should be verified. How well model disclosures (like "This obligation has a demand feature")[47] have worked should be assessed. If the scheme is not working, alternatives could be explored.

The experiment of the Federal Reserve Board with APR shoppers' guides in local newspapers demonstrated that savings may be enjoyed through increased competition spurred by this low-cost device. Part of the Massachusetts and New York consumer education effort for years, credit shoppers' guides list average rates for typical credit transactions in the local market by each credit extender. The Federal Reserve Board study demonstrated that proliferation of shoppers' guides has the potential to save consumers millions of dollars in finance charges each year.[48] Encouraging credit extenders to provide their typical rates in response to a publisher's request could spur an increase in this most effective consumer education mechanism.

Finally, disclosure of credit criteria might be useful. There appear to be no significant financial or demographic differences between finance company and bank borrowers. But finance company borrowers often pay substantially more for the money they borrow. One explanation may be an assumption that a bank's standards for eligibility are higher and a deep seated

45. Regulation Z, §§ 226.19(b)(1), 226.5b.

46. Regulation Z, § 226.18(g) and Model forms H-1 and H-2.

47. Regulation Z, § 226.18(i).

48. Fed. Res. Bd., ANNUAL PERCENTAGE RATE DEMONSTRATION PROJECT (Mar. 1987).

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aversion by a substantial portion of the credit worthy population to having their credit application rejected. However, creditors' eligibility standards are almost universally considered proprietary and secret. Factors that credit scoring models find predictive may be so counter-intuitive that their disclosure would do no more than confuse, and the need for secrecy of the standards is understandable. But as a result, consumers cannot know which eligibility standards they will meet without actually applying and risking rejection. The effect of not making them public may diminish competitiveness in the industry. Some type of early Equal Credit Opportunity Act "reasons for action" notice on the application may encourage some high rate borrowers to increase their credit shopping. Alternatively, a more general disclosure might be considered along the lines of: "Studies have shown that applicants rejected by one creditor are often acceptable to other creditors at the same or lower rates." However, such a disclosure may well lack credibility when dispensed to high- and low-risk applicants alike.

V. CONSUMER DISCLOSURE IN THE 1990S

More disclosure may be inevitable and necessary in the 1990s; we have already seen one major addition in the Truth in Savings Act. But as previously discussed, merely adding more disclosure can amount to less effective disclosure. Adding more detail or volume of information with no change in approach is probably not the answer. What are possible answers? Sometimes imprecise information may serve better than detailed information that is ignored or is not understood because of length or complexity. An illustration may be the limited information[49] now required by TIL about charges for late payments, which is likely to be useful even though a contractual or statutory grace period is not required to be disclosed.[50] Similarly, the required security interest information[51] also is probably useful even if details about after-acquired property and other incidental interests are not permitted to be disclosed.[52] There is evidence, however, that

49. Regulation Z, § 226.18(1).
50. Regulation Z, § 226.17(a)(1) cmt. 5.
51. Regulation Z, § 226.18(m).
52. Regulation Z, § 226.2(a)(25) cmt. 2.

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the need to keep things simple is a lesson that needs to be constantly relearned.[53]

In part, demands for more disclosures are the understandable result of the expanding choice of product variations for consumers. A case in point are mortgages. Once mortgages were of a common type—fixed rate and of 25 to 30 years maturity. Today, there are variable as well as fixed rate mortgages, 15 year maturities, monthly and bi-weekly payment schedules, a wide variety of indices, margins, caps, and shared equity, price adjusted, and other types of mortgages. We also see more variety and options in credit cards and deposit accounts. Following the old path raises the specter of even more complex disclosures as they try to keep up with new products. What this suggests is the need for a variety of new approaches like brochures, early disclosures, and shoppers' guides, each tailored to the particular situation.

A second pressure for more disclosure comes from concern about increased risk for consumers. Variable interest rate transactions are inherently more risky than fixed rate ones in terms of default potential. The popular home equity line places at risk the consumer's principal asset, and the home has a long history of protection in the United States. Many programs, of course, have other built in credit risks, such as "teaser" rates. These risks are not all in the credit context; for example, if deposit insurance coverage is scaled back it might lead to demand for more extensive deposit account and investment disclosures.

A third factor propelling more disclosure is the decline in local relationships between customers and financial institutions. These old relationships often produced informal information. Today, many consumers deal with out-of-state and impersonal creditors as mortgage servicing and credit card portfolios are sold. This had led, for example, to amendments to the Real Estate Settlement Procedures Act that require mortgage lenders to provide disclosures to loan applicants that explain the lender's likelihood of transferring servicing during the life of the loan.

53. An illustration of a return to complexity and perhaps information overload is the disclosure of the historical table for open and closed end ARMs at Regulation Z, §§ 226.5b(d)(12)(xi), 226.19(b)(2)(viii). It is open to question how many consumers actually assimilate this detail, and to so strongly suggest the past may predict the future is a very simple sort of "truth" in lending.

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That law also requires servicers to provide additional disclosures at the time of any subsequent transfer of that servicing.[54]

A fourth factor that might encourage more disclosure is regulatory ideas from abroad. In Europe, for example, variable rates are prohibited in Belgium, mortgages are limited to fifty percent of the purchase price in Italy, and in Holland all consumer credit extensions are registered and the lender is under a duty not to grant credit that would overextend the borrower. These restrictions are not likely to prove acceptable in the United States. But the disclosure alternative may have to be shown to be effective as further world integration occurs, and cross-border transactions raise ideas like these.

In the disclosure context, some European ideas might be feasible. In Belgium, membership in a consumer organization enables the member to select the financial institution that will grant a loan on the most favorable terms, taking into account personal factors such as the number of children, income bracket, tax situation, grants, subsidies, insurance, and so on. In fact, the computer print-out furnished to the member supplies much more information, such as how to spread the loan over both partners in a family, a loan redemption chart, the difference between the "best buy" institution and those rated second, third, fourth, fifth, and so on. Another computer program enables the consumer to work out whether it would be advantageous to replace an existing loan with a new one. If a refinancing is advantageous, the program gives details of the institution at which the transactions should be carried out and how big the annual net benefit would be. This is a disclosure approach that might find wide acceptance in the United States.

Finally, the source of credit may change, and this too may encourage new disclosure rules. In the future, there is likely to be more globalization of financial services. For example, if there now is a Citicorp, South Dakota, doing business with consumers across the country, why not a Citicorp, London or a Citicorp, Paris doing the same thing in the future? The prospect of a developed "European Financial Area" composed of twelve nations and 320 million people competing for American consumers raises some interesting questions that have bearing for Americans that

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54. Cranston-Gonzalez National Affordable Housing Act, amending the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601-17 (1989).

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might be doing business in these markets. These countries have different banking laws with different disclosure and consumer protection requirements. While a "banking directive" has been issued by the European Community to harmonize the essential rules,[55] there still will exist some recognition of local concerns. Although the law of a financial institution's "home" country will generally prevail, the directive still leaves to the consumer's country some latitude as to regulating for the "public good," which rules may be enforced in the European Court of Justice. Should the future see American consumers dealing with European institutions under such a scheme both foreign and domestic law may be applicable. Will it be presumed that U.S. consumers are adequately protected by this structure? It is likely that additional disclosure, concerning at least such "choice of law" problems, may be called for as a condition to entry into United States markets.

Particularly, if all these forces generate any substantial amount of new disclosures in the 1990s, it will be important to focus on eliminating outdated rules. The regulatory and legislative bodies that promulgate disclosure rules have begun to review the rules periodically to determine whether they still are needed and whether they are working appropriately. If not, they should be changed or repealed. A proposal by the Treasury calls for a comprehensive review of existing rules to identify possible places to reduce the burden of compliance.[56] The FFIEC (which coordinates the activities of federal financial institution regulators) has recently completed a review of agency regulations to identify opportunities for burden reduction.[57] It is now working on a subsequent review of the underlying statutes. There is always great inertia attached to eliminating disclosures, but it has been done. The old Regulation Z, section 226.8(o), governing disclosure of discounts for prompt payment, and section 226.11, on the comparative index of credit cost for open end credit, are history. In this regard, one subject for review might include the rule that a minimum finance charge is a

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55. "Second Banking Directive," adopted by the Council of Ministers, July 1989.

56. Section 522 of draft bill accompanying February 1991 report on "Modernizing the Financial System."

57. Federal Financial Institutions Examination Council, *Study on Regulatory Burden*, Dec. 17, 1992, conducted pursuant to § 221 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-204, 105 Stat. 2236, 2305 (1991).

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penalty[58] as no state law treats it as such. If this disclosure concept must be retained, the optional disclosure, that the consumer may be charged a minimum finance charge,[59] may be the preferable formulation. A second candidate certainly is the boiler-plate disclosures about assumptions and spreader clauses.[60] Any review, of course, alternatively may indicate that further disclosures are necessary. An example of this result is the enhanced disclosure for adverse action in business credit.[61] In all of this, it must be kept in mind, however, that change itself can be burdensome—sometimes to the extent that it is not worth the effort.

Another possible trend that may develop in the 1990s is further work to eliminate disclosure complexity generated through litigation in favor of a more orderly regulatory and statutory development of disclosure rules. This trend was inaugurated in the reduction of the kinds of disclosures for which statutory damages can be recovered under TIL.[62] That effort appears to have been a factor in dramatically reduced TIL litigation. This helped to slow the prior trend to increased complexity and over compliance in disclosure. But much remains to be done in this regard. The current remedy scheme under the Fair Debt Collection Practices Act,[63] for example, is not so limited. Here litigation has proliferated. Some would argue that this has resulted in hair splitting reminiscent of the finest (or worst) days—depending on one's perspective—under old TIL.[64]

58. Regulation Z, § 226.18(k)(1) cmt. 1.

59. Regulation Z, § 226.17(a)(1) cmt. 5.

60. Regulation Z, §§ 226.18(m) cmt. 5, 226.18(q) cmt. 1.

61. Regulation B, § 202.9(a)(3).

62. 15 U.S.C. § 1640 (1988).

63. 15 U.S.C. § 1692k (1988).

64. *See, e.g.*, Swanson v. Southern Oregon Credit Serv., 869 F.2d 1222 (9th Cir. 1989) (where the collection notice contained the required statement about debtor verification rights within 30 days but was ruled in violation because the notice also demanded payment in 10 days); Pipiles v. Credit Bureau, 886 F.2d 22 (2d Cir. 1989) (where the debt collector never intended to take legal action because the debt was too small but sent a notice that if payment wasn't made within 48 hours "such action as was necessary and appropriate would be taken"). The court agreed with the debtor that this notice misstated the debt collector's intent. *Id.* On the other hand, the similar scheme under EFA, *supra* note 16, at least so far demonstrates no tendency to produce similar litigation. *Id.* More consideration should be given to the remedy structure, in each context, that produces the optimal balance between private enforcement on the one hand and too much complexity and administrative enforcement on the other. *Id.*

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Reliance on administrative enforcement, except in cases of actual damages, allows the focus to be upon whether the correct disclosure was made, and not on infinite interpretations of disclosure requirements to obtain settlement leverage or damages to offset owed debts. A downside of administrative enforcement, however, is it often is too infrequent to be effective, is only feasible for "mass wrongs," and, at times, may force inappropriate settlement due to inadequate resources on one side.

A final possible trend may stem from the recognition that state disclosures added to federal disclosures sometimes provide very little additional benefit to consumers, and may be lost as attention is focused on the federal information. Some would argue that additional state disclosures can be counterproductive if they detract attention from the federal disclosures that are deemed important as a matter of national consensus, or if they so lengthen the mandated overall material as to diminish its effectiveness.[65] There is evidence that both Congress and the states gradually are arriving at this conclusion. To illustrate, in essence Congress and the Federal Reserve Board have preempted all state disclosure rules relating to funds availability,[66] and the same has occurred under the Fair Credit and Charge Card Disclosure Act.[67]

On the other hand, states sometimes are more aggressive in entering a field. In the absence of Congressional action concerning "credit repair" organizations which charge to provide information about—and may in fact often misrepresent—rights under the Fair Credit Reporting Act,[68] a number of states have acted. Also, in the absence of Congressional action, a number of states have mandated disclosure and other rights concerning "rent-to-own" operations that constitute neither consumer credit sales nor leases under the Consumer Leasing Act.[69] In some

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65. *See, e.g.*, 1974 Uniform Consumer Credit Code, Prefatory Note: Federal Preemption of Disclosure: "[T]his Act evidences the conclusion that the Congress had preempted the field of disclosure and any attempt of States to remain in the field by enacting statues and regulations of their own cause substantially more harm than good."

66. Regulation CC, § 229.20(c) cmt.

67. Regulation Z, § 226.28(d).

68. 15 U.S.C. § 1681-1681t.

69. *See, e.g.*, OKLA. STAT. ANN. tit. 24, §§ 137-147 (West Supp. 1993); OKLA. STAT. ANN. tit 59, §§ 1950-1957 (West Supp. 1993).

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other areas, there is uncertainty as to the most effective disclosure approach. State disclosure schemes can test what is most effective. It may be appropriate for the federal law to set the "floor" for adequate consumer protection standards with the states permitted to experiment with yet better solutions.

CONCLUSION

Disclosure as a consumer protection tool is here to stay. However, for the law to continue to work effectively it is necessary to devote constant attention to its operation and development. We need to be open to ideas about how it can best work with respect to new contexts and products. We also need to assess past performance and decide whether existing rules remain viable.

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