

Nova Law Review

Volume 8, Issue 1

1983

Article 7

The Truth in Lending Simplification and Reform Act of 1980: Is “Simplification” Better for Both Consumer and Creditor?

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Abstract

The Truth in Lending Simplification and Reform Act of 1980 became effective October 1, 1982.

KEYWORDS: reform, creditor, consumer

The Truth in Lending Simplification and Reform Act of 1980: Is "Simplification" Better for Both Consumer and Creditor?

I. Introduction

The Truth in Lending Simplification and Reform Act of 1980 became effective October 1, 1982.¹ The purpose of the Act was to make the statute and regulation governing all credit disclosures simpler.² The changes were designed to ease creditor compliance and to help consumers shop more intelligently for their credit transactions.³ The Act has aided in deregulating the credit industry, but the question remains whether the consumer is being adequately protected, especially in the area of residential mortgage loans.

Deregulation has created a more complex real estate market than has ever existed before. It is ironic that when the consumer most needs to receive adequate information about the available mortgages, he may not be receiving that information because of the recent simplification of Truth in Lending. The paramount problem that faces today's residential mortgagor is one of timing. The mortgagor needs information about all his alternatives before he obligates himself on a contract to purchase or mortgage his home. Neither the old Truth in Lending statute nor the new Truth in Lending Simplification and Reform Act adequately addresses the issue of what type of information the consumer should receive. A related issue is when should the consumer receive the needed information. The final question to be resolved is who should be responsible for giving the consumer the necessary information when he needs it.

To answer these questions, this note will first illustrate the com-

1. 15 U.S.C. § 1602 (Supp. V 1981). The Truth in Lending Simplification and Reform Act of 1980 is Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 STAT. 132. The Depository Institutions Deregulation and Monetary Control Act of 1980 includes other legislation to deregulate the credit industry.

2. 1980 U.S. CODE CONG. & AD. NEWS at 251, Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980. [Hereinafter referred to as DIDMCA of 1980].

3. *Id.*

plexity facing today's mortgagor by briefly examining some of the various new mortgages. Second, this note will focus on the changes made to the disclosure laws by the new Truth in Lending Simplification and Reform Act as they pertain to what information is necessary to the residential mortgagor and how the new laws could be improved. Third, the effect of the Truth in Lending Simplification and Reform Act on the requirements of when disclosure is made is examined. Alternatives to the new laws will also be discussed. Finally, the problem of who should be responsible for disclosure is discussed with an emphasis on the available alternatives.

II. Changing Market Conditions

Since the Depression, the fixed rate mortgage has been the mainstay for residential mortgagors.⁴ The mortgage market had been relatively stable until the recent deregulation. Now, the fixed rate mortgage is less popular with both lenders and consumers. A combination of market and regulatory changes introduced a myriad of new types of mortgages from which the residential mortgagor may select.

A. Reasons for the changes

In the traditional mortgage market, thrift lenders lend long and borrow short⁵ from savings depositors. In a relatively stable inflation-free economy, this practice works.⁶ However, when there is persistent inflation, the process fails. As market interest rates rise in response to inflation, lenders are forced into charging higher rates to compensate for the below-market mortgages kept in their portfolios.⁷ To add to the problem, many states have maximum usury ceilings which prevent lending at market rates.⁸ When disintermediation⁹ is added to the mar-

4. Guttman, *Types of Adjustable Rate Mortgages and Their Lien Priority*, 55 FLA. B.J. 552 (1981).

5. Landers and Chandler, *The Truth-in-Lending Act and Variable-Rate Mortgages and Balloon Notes*, 1976 AM. FOUND. RESEARCH J. 35, 38.

6. Walleser, *Balancing the Interest: The Changing Complexion of Home Mortgage Financing in America*, 31 DRAKE L. REV. 1, 3 (1981-1982).

7. L. VIDGER, BORROWING AND LENDING ON RESIDENTIAL PROPERTY 226 (1981).

8. Landers and Chandler, *supra* note 5, at 39.

9. *Id.* Disintermediation is defined as "[w]hen free market interest rates exceed the regulated interest ceiling for time deposits, some depositors withdraw their funds

ket, the lender is faced with lending at higher, unattractive rates to protect itself.

While the market was operating under the burden of inflation in the 1970s,¹⁰ lenders looked for alternative mortgages they could offer to compensate for the inherent shortcomings of the fixed rate mortgage. In the past, the thrift lenders were not authorized to offer mortgages where the monthly payment rates changed.¹¹ The Federal Home Loan Bank Board, which regulates the thrift lenders, asked Congress twice to change the regulation so that a variable rate mortgage could be offered.¹² Finally in 1978, the Federal Home Loan Bank Board authorized the lending of variable rate mortgage.¹³

Since 1978, there has been a flood of measures enacted to further deregulation of the credit industry: *April 1981*: The Federal Home Loan Bank Board permitted federally chartered savings and loan associations to offer a variety of adjustable rate mortgage loans;¹⁴ *July 1981*: The National Credit Union Administration permitted credit unions to make adjustable rate mortgages;¹⁵ *July 1981*: The Federal Home Loan Bank Board amended the adjustable rate mortgage regulation so that a graduated payment feature could be offered with the available loans;¹⁶ *August 1982*: The Federal Home Loan Bank Board replaced the various existing regulations with one that broadly authorized federally chartered savings and loan associations to make a variety of mortgage loans;¹⁷ *October 1982*: The Garn-St. Germain Depository Institutions Act of 1982 authorized state chartered lenders to make similar alternative mortgage loans that federally chartered institutions were already authorized to make;¹⁸ *December 1982*: The Office of the

and invest them elsewhere at a higher interest rate." BLACK'S LAW DICTIONARY 421 (5th ed. 1979).

10. Wallerer, *supra* note 6, at 2.

11. Hyer and Kearl, *Legal Impediments to Mortgage Innovation*, 6 REAL EST. L.J. 211, 214 n.10 (1978). The thrift lenders could not make variable mortgages according to an interpretation of a regulation governing them.

12. *Id.*

13. 12 C.F.R. § 545.6-2(a), (c) (1979). Variable rate mortgage was defined as a mortgage which had an "interest rate . . . tied to a reference index; thus, actual future payments are not known at the time of loan origination." *Id.* This was an attempt by Congress to alleviate the credit industry of the problem created by persistent inflation.

14. 46 Fed. Reg. 24,148 (1981) (codified in 12 C.F.R. § 545.6-4 (1982)).

15. 46 Fed. Reg. 38,669 (1981) (codified in 12 C.F.R. § 701.21-6B (1982)).

16. 46 Fed. Reg. 37,625 (1981) (codified in 12 C.F.R. § 545.6-4B (1982)).

17. 47 Fed. Reg. 36,612 (1982) (codified in 12 C.F.R. § 545.6 (1983)).

18. Garn-St. Germain Depository Institutions Act of 1982, Title VIII, Pub. L.

Comptroller of the Currency made the adjustable rate mortgage regulations apply to state chartered banks by amending 12 C.F.R. section 29;¹⁹ and *March 1983*: 12 C.F.R. section 29 was further revised allowing national banks greater flexibility in the provisions of adjustable rate mortgage. The revised regulation eliminates limits on the frequency of interest rate and payment adjustments, limits on the magnitude of the interest rate adjustment, and the cap on negative amortization.²⁰ The requirement that the monthly payments be reset to a level sufficient to amortize the outstanding principal balance at least once every five years to no later than during the twenty-first year of the mortgage was also modified.²¹

More flexibility results from these recent changes. It is now possible to obtain a completely individualized mortgage. The mortgage market has become a grocery store of different mortgage instruments, which tends to create confusion in the minds of consumers.²² A survey conducted by the Federal National Mortgage Association in March and April 1982 found that "most of the consumers who are aware of the newer types of mortgages do not understand how these instruments work."²³ Today's borrower must be educated not only as to what is available, but also as to how his selection will affect his future ability to purchase and to resell his home.

B. Alternative Mortgage Loans

Besides the traditional fixed rate mortgage, the residential mortgagor can, as a result of the steps described above, choose from another group of mortgages: alternative mortgage loans. An alternative mortgage loan is defined as "a single, long-term obligation on which the interest rate may be adjusted over the life of the loan in accordance with an interest rate index agreed on in advance by the borrower and lender and specified in the loan document."²⁴ The residential mortgagor

No. 97-320.

19. 47 Fed. Reg. 55,911 (1982) (codified in 12 C.F.R. § 29.11 (1983)).

20. 48 Fed. Reg. 9,506 (1983) (to be codified at 12 C.F.R. § 29).

21. *Id.*

22. Werthan, *Alternative Mortgages and Truth-in-Lending*, 69 FED. RESERVE BULL., 327 (1983).

23. *Id.*

24. Browne, *The Development and Practical Application of the Adjustable Rate Mortgage Loan: The Federal Home Loan Mortgage Corporation's Adjustable Rate Mortgage Loan Purchase Program and Mortgage Loan Instruments*, 47 MO. L. REV.

is confronted with a myriad of different mortgages, each with its own acronym. A brief examination of some of the available alternative mortgage loans illustrates the variety and complexity that faces the consumer.

1. *Adjustable Rate Mortgage (ARM)*

One of the most common alternative mortgage loans offered is the ARM, generally sponsored by national banks. An ARM is defined as "any loan made to finance or refinance the purchase of and secured by a lien on a one- to four-family dwelling . . . , where such loan is made pursuant to an agreement intended to enable the lender to adjust the rate of interest from time to time."²⁵

The interest rate of an ARM consists of two components: a margin and an index. The margin is generally a percentage point or points added to the index to increase the lender's yield or profit. The margin varies according to the borrower.²⁶ The second factor comprising the interest rate is the index. An index is "a ratio or other number derived from a series of observations and used as an indicator or measure."²⁷ To be a valid index for interest rate purposes, it must meet two criteria before it can be used: 1) it must be beyond the lender's control, and 2) it must be ascertainable by the mortgagor.²⁸ There are a vast number of indices available that fulfill the two requirements. Some common indices are: 1) the Federal Home Loan Bank Board's index of national average contract interest rate on the purchase of previously occupied dwellings,²⁹ 2) the weekly or monthly average auction rates on the United States Treasury bills,³⁰ and 3) the weekly or monthly average yields on United States Treasury securities.³¹ To be fully informed about the type of mortgage he is choosing, the consumer needs to know

179, 184 (1982).

25. 12 C.F.R. § 29.2 (1983).

26. For example, one of the ARM plans offered by the Federal National Mortgage Association adds 2.9 percentage points to the index for the investor mortgagor. The margin varies daily. To obtain the margin for a particular day, one would have to call the Federal National Mortgage Association for a specific plan. FNMA ARM plan 6a as of June 10, 1983.

27. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 427 (1967).

28. 48 Fed. Reg. 9,512 (1983) (to be codified at 12 C.F.R. § 29.3).

29. 12 C.F.R. § 29.4(a) (1983).

30. 12 C.F.R. § 29.4(c) (1983).

31. 12 C.F.R. § 29.4(b) (1983).

where to obtain information on the potential indices and, more importantly, the historical trends for each index. The historical trends will show the volatility or stability of the selected index. Knowledge about the index is imperative to accurately evaluate which index is better for the consumer's needs, especially when the consumer is offered a number of loans that appear to be similar.³²

Once the index is selected, the next question to be addressed is the effect of an interest rate change. A change in the interest rate can affect the outstanding principal balance, the monthly payment, or a combination of the two.³³ Negative amortization will occur if the rate changes but the payment rate and the maturity date remain constant. This could seriously jeopardize the homeowner's equity if negative amortization continues for a lengthy period of time.³⁴

Since these adjustments are negotiable, the borrower must know the options and the ramifications of his choice. To be adequately informed, the borrower must know at least: 1) how the interest rate is determined, 2) how adjustments are made if the interest rate changes, 3) how any resulting change may affect his payments, and 4) how any resulting change will affect him if he resells.

There are advantages to ARMs, both for the lender and the consumer. ARMs provide more diversity to the mortgage market³⁵ while allowing more mortgage money to be available because lenders will have a "hedge" on inflation. Lenders and borrowers receive the advantage of potentially lower initial interest rates because the lender does not have to compensate for the low fixed rate mortgages in his portfolio by charging higher rates.³⁶

Because of the existence of ARMs, borrowers may find it relatively easier to obtain financing through ARMs when interest rates are changing or money is tight.³⁷ Lenders will not have to exercise a due-on-sale clause to increase the interest rate to market rates when the home is sold because an interest rate change is part of the mortgage

32. Walleser, *supra* note 6, at 33.

33. 12 C.F.R. § 29.2, 29.5(4) (1983).

34. For example, if a borrower made a \$50,000, 30-year loan at 12% but was making monthly payments at an effective rate of 4.9% with annual adjustments for a period of ten years, at the tenth year the borrower would owe \$57,697.10. Negative amortization, therefore, would increase the principal by \$7,697.10.

35. Walleser, *supra* note 6, at 17.

36. *Id.* at 18, (quoting Cowan and Foley, *New Trends in Residential Mortgage Finance*, 13 REAL PROP. PROB. & TR. J. 1075, 1081 (1978)).

37. *Id.*

contract. An ARM borrower may encounter fewer difficulties in selling his home because a qualified buyer will find it easier to assume the loan than a comparable fixed rate mortgage.³⁸ Most ARMs do not have a prepayment penalty, facilitating resell or refinance.³⁹ Also, borrowers will be able to take advantage of declining interest rates without refinancing,⁴⁰ if rates go down.

2. *Graduated Payment Mortgage (GPM)*

This mortgage begins with initial payments lower than that necessary to fully amortize the loan by the maturity date. The payments gradually increase at designated intervals until the level necessary to amortize the loan is reached.⁴¹ A graduated payment feature can be used with any loan. A graduated payment feature is attractive because qualification is based on a lower, more affordable payment.⁴² However, the borrower faces a negatively amortized mortgage since his beginning payments are lower than is required to fully amortize the mortgage.

3. *Growing Equity Mortgage (GEM)*

This mortgage has a fixed interest rate but there are scheduled annual increases in the monthly payment which allow the final maturity to be shortened considerably than a comparable fixed rate mortgage.⁴³

4. *Reverse Annuity Mortgage (RAM)*

The borrower benefits with this mortgage because he receives monthly payments from the lender instead of having to pay them. The borrower essentially purchases an annuity⁴⁴ with a loan against the ac-

38. *Id.* at 17.

39. 12 C.F.R. § 29.6 (1983).

40. Scheurman, *Adjustable Rate Mortgages: Fundamental New Directions in Residential Mortgage Lending, Part II*, 55 FLA. B.J. 737, 740 (1981).

41. Marcis, *The Shakeout in Alternative Mortgage Instruments*, REAL EST. REV., Spring 1983, at 29, 30.

42. Werthan, *supra* note 22, at 327.

43. Marcis, *supra* note 41, at 30.

44. Annuity is defined as "[a] fixed sum payable to a person at specified intervals for a specified period of time or for life." BLACK'S LAW DICTIONARY 82 (5th ed. 1979).

cumulated equity in his home.⁴⁵ Reverse annuity mortgages are advantageous to the mortgagor with a large accumulation of equity in his home.

5. *Pledged Account Loan (PAL)*

This plan requires the borrower to place his down payment into an interest-bearing escrow account with the lender.⁴⁶ The borrower makes lower monthly payments while the lender supplements these payments with funds from the borrower's pledged savings account.⁴⁷ The borrower essentially subsidizes himself with the help of the lender.

6. *Reserve account mortgage*

This mortgage is similar to the Pledged Account Loan and has just been introduced by the Federal National Mortgage Association.⁴⁸ It also requires that the down payment be placed in an interest-bearing escrow account with the lender.⁴⁹ However, the funds are contributed by someone other than the borrower, such as the builder, seller, or some third party.⁵⁰

There are potential advantages for all involved with this plan. First, the borrower purchases the property with no money down.⁵¹ Second, the lender is secure in the event of foreclosure because it has temporary control over the down payment.⁵² Finally, the funds will be returned to the contributor as early as three years from the date of the sale.⁵³

However, the reserve account mortgage illustrates the dangers facing the uninformed borrower. The interest rate of this mortgage is tied to the Federal National Mortgage Association's three- and five-year ARMs.⁵⁴ The lender has made it extremely difficult for the borrower to

45. *Id.*

46. Iezman, *Alternative Mortgage Instruments: Their Effect on Residential Financing*, 10 REAL EST. L.J. 3, 18 (1981).

47. *Id.*

48. The Miami Herald, Sept. 25, 1983, at 18H, col. 1.

49. *Id.* at col. 2.

50. *Id.*

51. *Id.* at col. 3.

52. *Id.* at col. 2.

53. *Id.*

54. *Id.* at col. 3.

determine the make-up of his interest rate since it is based on an index which is itself based on an index. The borrower must determine which index or indices the underlying three- and five-year ARMs are tied to. Also, the lender receives double profits because it has added a margin to both the underlying ARM interest rate, which serves as an index, and the reserve account mortgage.

Because of the potential pitfalls, as shown by the brief introduction into the reserve account mortgage and other types of alternative mortgages, today's residential mortgagor must be armed with sufficient information to understand and evaluate the alternatives without being overwhelmed by the complexity and variety inherent in the new mortgages.⁵⁵ This is the designated task of the disclosure laws.

III. Disclosure Laws

A. The Truth in Lending Act: Background & Problems

The legislation governing disclosure requirements for all credit transactions, including residential mortgage loans, is commonly referred to as the Truth in Lending Act⁵⁶ and its implementing regulation as Regulation Z (referred to as Reg. Z).⁵⁷ The Truth in Lending Act is considered as one of Congress' most ambitious consumer protection efforts to date.⁵⁸ The purpose of the Truth in Lending Act is to provide consumers with "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. . . ."⁵⁹ It was Congress' hope that credit competition and economic stability would be a by-product of Truth in Lending.⁶⁰

55. The specific plans mentioned in the note are not an exhaustive list. For example, there are rollover mortgages (ROM), shared appreciation mortgage (SAM), dual rate variable rate mortgages (DRVRM), and constant payment factor variable rate mortgages (CPFVRM), to name a few. An in-depth discussion of all the alternative mortgages available is beyond the scope of this note. See Iezman, *supra* note 46 and Marcis, *supra* note 41 for discussion of the different mortgages.

56. The Truth in Lending Act, 82 STAT. 146 (1968) (codified as amended in 15 U.S.C. § 1601-1693(r) (1976 and Supp. V 1981)).

57. 12 C.F.R. § 226.1-226.29 (1983).

58. Landers & Chandler, *supra* note 5, at 60.

59. 15 U.S.C. § 1601(a) (1976).

60. *Id.*

The Truth in Lending Act has had a number of problems that Congress has tried to resolve over the years. One problem resulted from ambiguous drafting of the original act.⁶¹ The poor drafting led to conflicting results in the courts and the Federal Reserve Board, which governs Reg. Z.⁶² Since courts required strict compliance with the technical requirements of the Truth in Lending Act,⁶³ lenders were forced to constantly update disclosure forms to comply with new court rulings or Federal Reserve Board advisory opinions. The constant revision of disclosure forms increased the chance that the disclosure given would not be in compliance with the law.⁶⁴ The cost of creditor compliance and operational inefficiency, though never evaluated,⁶⁵ had to be phenomenal.

The consumer did not escape from the impact of the complexity of the Truth in Lending Act. The general feeling is that the consumer has suffered from an "information overload" under the old Truth in Lending Act.⁶⁶ "Too often implementation of the Act's provisions resulted not in a better informed, credit conscious consumer, but in an overwhelmed consumer who ignored all disclosures and failed to attempt to digest the information provided."⁶⁷ There is evidence, for example, that consumer awareness of the prevailing annual percentage rate has increased,⁶⁸ but there have been no studies to measure specifically whether consumers understood the significance of the annual percent-

61. Woocher & Geltzer, *Legislative Background to Truth in Lending Simplification and Reform Act*, 54 N.Y. St. B.J. 506, 508 (1982).

62. *Id.* 46 Fed. Reg. 20,942 (1981) citing Administrative Office of the U.S. Courts. The Truth in Lending cases represent 2% of the federal civil caseload. By 1980, Reg. Z had been interpreted more than 1,500 times and there had been more than 13,000 lawsuits filed. *Id.*

63. *Id.* at 509.

64. *Id.*

65. 46 Fed. Reg. 20,944 (1981).

66. Woocher & Geltzer, *supra* note 61, at 508.

67. *Id.* at 509.

68. S. Rep. No. 368, 96th Cong., 2d Sess. 16, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 236, 252.

age rate and whether they actually used it when mortgage shopping.⁶⁹

B. Trend Toward Simplification: The New Truth in Lending Act

With Congress' growing awareness of the inherent problems, it became apparent that the Truth in Lending Act needed to be modified.⁷⁰ It was not until the enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980⁷¹ that Congress "simplified" the Truth in Lending Act. As part of the simplification process, the Federal Reserve Board was instructed to redraft Reg. Z.⁷² Until October 1982, creditors had the option of complying with the old Truth in Lending Act or the new Truth in Lending Simplification and Reform Act of 1980.⁷³

The Simplification Act was enacted with both the consumer and the creditor in mind. For the consumer, Congress decreased the possibility of information overload by reducing the number of required items for disclosure.⁷⁴ Clarity, economy, and simplification became the standard instead of the former lengthy, detailed disclosure statements.⁷⁵ However, the changes made in the disclosure laws by the Simplification Act are decidedly in favor of the creditor. One of its main goals was to make creditor compliance easier.⁷⁶ The decrease in the number of required disclosure items and an increase in the tolerances for numerical errors were perceived to facilitate creditor compliance.⁷⁷ Reg. Z's redraft included model forms which aid creditors⁷⁸ and increase standardization in the market. A commentary has been added to Reg. Z,

69. Werthan, *supra* note 22, at 329.

70. 46 Fed. Reg. 20,942 (1981).

71. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat. 132) 252. The Truth in Lending Simplification & Reform Act of 1980 is Title V of this Act.

72. Woocher & Geltzer, *supra* note 61, at 536.

73. International Banking Facility Deposit Insurance Act, title III, 95 Stat. 1513, 1515 (1981) (*amending* DIDMCA of 1980, *supra* note 2, § 625(a)). Creditor compliance became effective October 1, 1982.

74. Woocher & Geltzer, *supra* note 61, at 537.

75. Boyd, *The Truth-in-Lending Simplification and Reform Act-A Much-Needed Revision Whose Time Has Finally Come-Part I*, 23 ARIZ. L. REV. 1, 5 (1981).

76. DIDMCA of 1980, *supra* note 2, at 251.

77. 46 Fed. Reg. 20,942 (1981).

78. 15 U.S.C. § 1604 (1981); 12 C.F.R. § 226 (Appendix H, 1983).

replacing the formal and informal advisory opinions issued by the Federal Reserve Board.⁷⁹ Any amendments or interpretations that require form changes will become effective October first of each year with at least six months' notice to the creditors.⁸⁰ Congress estimates that the Simplification Act "could result in a one year savings of \$600 million by creditors and substantial additional savings from anticipated decreases in litigation."⁸¹

Besides making creditor compliance easier, the Simplification Act and the new Reg. Z have weakened sanctions for creditors' violations relating to certain material disclosure items.⁸² Enforcement of creditor compliance has been shifted from the private sector to administrative agencies.⁸³ Creditors are required to reimburse borrowers for certain types of disclosure errors.⁸⁴ Creditors may substitute state and/or other federal agencies' disclosure in alternative mortgages for that required by the Simplification Act and the new Reg. Z when the forms chosen offer greater protection.⁸⁵

The Simplification Act and the new Reg. Z have been criticized from their inception. The harshest criticism emanates from the fact that Congress made no "systematic attempt to identify and agree on the fundamental goals of the Act."⁸⁶ Congress did not adequately analyze the current mortgage market when it redrafted the statute.⁸⁷ Critics note faulty execution, political compromise, and the inability of the statute to cure the marketplace ills.⁸⁸

C. Specific Changes in the Simplification Act and Regulation Z

The Simplification Act and the new Reg. Z are designed to give residential mortgagors a basic outline of certain material credit infor-

79. 12 C.F.R. § 226 (Supp. I, 1983). The commentary is incorporated in what is referred to as a supplement of Reg. Z.

80. 46 Fed. Reg. 20,942 to 20,943 (1981).

81. DIDMCA of 1980, *supra* note 2, at 271.

82. 46 Fed. Reg. 20,943 (1981). See *supra* text accompanying notes 93-126 for discussion of material items.

83. *Id.*

84. *Id.*

85. 12 C.F.R. § 226.18(f) n.43 (1983).

86. Rohner, *Truth in Lending "Simplified": Simplified?*, 56 N.Y.U. L. REV. 999 (1981).

87. *Id.* at 1000.

88. *Id.*

mation. Material terms are the annual percentage rate, finance charge, the method and balance which the finance charge is computed, amount financed, total of payments, and payment schedule.⁸⁹ Material terms must be disclosed "clearly and conspicuously."⁹⁰ Certain items, such as annual percentage rate, finance charge, amount financed, and total of payments must be segregated from non-related information.⁹¹ A brief examination into the new requirements for the items disclosed in the Federal Box⁹² illustrates the need for further refinement in the disclosure laws. Suggestions for further modification in the legislation will be advanced.

1. *Annual Percentage Rate (APR)*

Annual percentage rate was designed as a tool for credit shopping.⁹³ Reg. Z defines APR as "a measure of the cost of credit, expressed as a yearly rate, that relates the amount and timing of value received by the consumer to the amount and timing of the payments made."⁹⁴ The descriptive explanation of APR is "the cost of your credit as a yearly rate."⁹⁵

The rules for computing APR are more easily stated than applied. APR computations have been labeled as complex and mysterious for both the creditor and the consumer.⁹⁶ The Simplification Act revised the rules and equations for APR,⁹⁷ but they remain as complicated as before. There are two basic methods for determining APR: 1) the actuarial method, and 2) the United States Rule method.⁹⁸ The appendix to Reg. Z contains examples for both methods.⁹⁹ The same results will be obtained under either method when the payments are at equal intervals

89. 15 U.S.C. § 1602(u) (Supp. V 1981).

90. 15 U.S.C. § 1632(a) (Supp. V 1981).

91. 12 C.F.R. §§ 226.17(a)(1), (2) (1983).

92. J. GLAZIER, *RMIC'S GUIDE TO THE FEDERAL RESERVE BOARD'S NEW TRUTH IN LENDING REQUIREMENTS* 23 (1982). Some lenders refer to this segregation as the "Federal Box" since the information is generally enclosed in a box. The items in the Federal Box must also have a descriptive explanation for each term. 15 U.S.C. § 1638(a)(8) (Supp. V 1981).

93. DIDMCA of 1980, *supra* note 2, at 252.

94. 12 C.F.R. § 226.22(a) (1983).

95. 12 C.F.R. § 226.18(e) (1983).

96. Boyd, *supra* note 75, at 56.

97. 12 C.F.R. § 226.22 (Appendix J 1983).

98. 12 C.F.R. § 226.22(a) (1983).

99. 12 C.F.R. § 226.22 (Appendix J 1983).

or for regular loans.¹⁰⁰ However, when computing APR for payments made for irregular loans, such as an alternative mortgage loan, the two methods will produce different results.¹⁰¹ The Federal Reserve Board has two volumes of APR tables to aid creditors in APR calculations. If the creditor uses these tables, it is deemed in compliance with the statute and regulation even though the result obtained by using the Federal Reserve Board tables will be different from the two methods specified in Reg. Z.¹⁰² This tolerance for discrepancies undermines the credibility of using APR as a valid shopping tool since the consumer cannot be assured of its accuracy.

Reg. Z is not only tolerant of variances that result from using different methods of computing APR, but it is also tolerant of the degree of accuracy with which the calculations are made. The Simplification Act now requires that the APR be disclosed within $\frac{1}{8}$ of 1% of the actual rates for regular loans¹⁰³ instead of the previous $\frac{1}{4}$ of 1%. For irregular loans, the acceptable variance is even larger: $\frac{1}{4}$ of 1% of the actual rate.¹⁰⁴ To allow the lender to disclose at different margins of error depending on the type of loan robs the borrower of an effective method for comparing a fixed rate mortgage to an alternative mortgage.

As credit information is disseminated today, the consumer may still not understand what APR means. A frequently asked question by a borrower at closing is what is his simple or note rate. The question indicates that the borrower does not understand the significance of the APR disclosure or may be confused by assuming that the APR affects the amount of his monthly payment. To alleviate this confusion, the simple or note interest rate should be disclosed with the APR to give the borrower a basis for comparison.

The disclosure of APR is deceptive as it is used now. APR expresses the cost of credit as a yearly rate. However, a number of items that make up APR are paid only at closing and are not part of the yearly credit cost. If Congress wanted to give consumers helpful information, it would require that the APR be disclosed at two different time periods. First, consumers would receive an APR based on the maturity date of the mortgage, which is the method presently used. The

100. 12 C.F.R. § 226.22(a) (Supp. I 1983).

101. *Id.*

102. 12 C.F.R. § 226.22(b) (1983).

103. 12 C.F.R. § 226.22(a)(2) (1983).

104. 12 C.F.R. § 226.22(a)(3) (1983).

second APR would be the yield if the consumer sold the house within five years from the date of purchase. The second figure would be a more accurate standard for measuring the cost of credit for the consumer as the average home is owned for that period.¹⁰⁵

If Congress modifies the Simplification Act to implement these proposals, arguably creditors will object to disclosing the simple interest rate or the second APR. Creditors will probably be concerned that disclosing the actual cost to the consumer during the first five years of the mortgage, which is very high, will scare borrowers away from buying houses. This is the same line of reasoning lenders used when the Truth in Lending Act was first enacted. First mortgage loans were exempt from disclosure of the total of payments because creditors were afraid that disclosure of the high cost of a dwelling over the life of the loan would frighten the borrower.¹⁰⁶ However, there seems to be little effect on the market since lenders began giving disclosure of the total of payments.

2. *Finance Charge*

The descriptive explanation given by the new Reg. Z for the finance charge is "the dollar amount the credit will cost you."¹⁰⁷ Finance charge includes any cost charged to the borrower which he would not pay if he had paid cash for the dwelling.¹⁰⁸ Costs such as late charges, seller's points, and fees for title examination, abstract, survey, title insurance, credit reports, and escrow deposits are not included in the finance charge.¹⁰⁹

3. *Amount Financed*

Amount financed is defined as "[t]he net amount of credit extended"¹¹⁰ to the borrower. The descriptive explanation provided in the Federal Box is "the amount of credit provided to you or on your behalf."¹¹¹

105. Landers & Chandler, *supra* note 5, at 62.

106. *Id.* at 63.

107. 12 C.F.R. § 226.18(d) (1983). The amount financed and finance charge are needed to calculate the APR.

108. 12 C.F.R. § 226.4(a) (1983).

109. 12 C.F.R. §§ 226.4(c)(1) to (8), 226.4(d) (1983).

110. 12 C.F.R. § 226.18(b)(1) (Supp. I 1983).

111. 12 C.F.R. § 226.18(b) (1983).

Creditors are not required to itemize the amount financed,¹¹² as they were under the old the Truth in Lending Act. The creditor may inform the borrower that an itemization of the amount financed can be obtained upon written request or give the "itemization as a matter of course."¹¹³ If the loan comes under the Real Estate Settlement Procedures Act,¹¹⁴ which requires a "good faith estimate," then the creditor is exempt from complying with the itemization requirement of Reg. Z.¹¹⁵ This exemption is applicable even when the "good faith estimate" discloses different items and the timing for disclosure is different from that under the Simplification Act and Reg. Z.¹¹⁶ Congress felt that eliminating itemization of amount financed would give consumers more meaningful disclosure while easing the potential for "information overload."¹¹⁷

However, an explanation of the amount financed to the borrower will frequently prompt the question of what is the loan amount. This question indicates that the borrower is confusing the term amount financed with loan amount. To prevent this confusion, the loan amount should be included when disclosure is given. The inclusion of this item may prompt the borrower to request an itemization of amount financed to determine what, if any, is different between the loan amount and amount financed.

4. *Total of Payments and Other Disclosure Items*

The descriptive explanation of the total of payments is "the amount you will have paid when you have made all scheduled payments."¹¹⁸ It is calculated by adding together the amount financed and the finance charge.¹¹⁹

There are additional required disclosure items which do not have to be segregated and disclosed conspicuously as is required of those in the Federal Box.¹²⁰ The balance of the items for disclosure consists of: 1) the name of the creditor, 2) reference to variable rate feature, if

112. 12 C.F.R. § 226.18(c)(2) (1983).

113. 12 C.F.R. § 226.18(c) (Supp. I 1983).

114. 12 U.S.C. §§ 2601-2617. The Real Estate Settlement Act is referred to as RESPA.

115. 12 C.F.R. § 226.18(c) n.39 (1983) and (Supp. I 1983).

116. 12 C.F.R. § 226.18(c) (Supp. I 1983).

117. DIDMCA of 1980, *supra* note 2, at 266.

118. 12 C.F.R. § 226.18(h) (1983).

119. 15 U.S.C. § 1638(a)(5) (Supp. V 1981).

120. 12 C.F.R. § 226.17(a) (1983).

applicable, 3) payment schedule, 4) demand feature, if applicable, 5) prepayment options, 6) late payments, 7) security interest, 8) insurance information, if applicable, 9) certain security interest charges, 10) contract reference, 11) information on the assumption policy, and 12) required deposits, if applicable.¹²¹ For residential mortgage loans, the creditor must disclose whether the mortgage loan is assumable.¹²² This information is very helpful to the borrower as it is a major consideration when credit shopping.

The Simplification Act and Reg. Z allows creditors, at their option, to disclose the entire monthly payment, including escrow deposits.¹²³ However, creditors often will list only the principal and interest and the monthly mortgage insurance premiums, if applicable, when disclosing the monthly payment.¹²⁴ This practice is misleading since the consumer's natural tendency is to think that the payment disclosed is his entire monthly payment. This is incorrect. Generally, the consumer must also pay escrow deposits monthly. This problem can be easily remedied by requiring the creditor to make some reference to the fact that escrow deposits need be added to the principal and interest payment to obtain the monthly payment, or list the monthly payment with a notation that the figure includes escrow deposits that may vary over the life of the loan.

Besides the required items, the creditor can add items "as applicable."¹²⁵ The "applicable" terms may be combined or listed separately.¹²⁶ Having the flexibility to add other terms will make it easier for the creditor to comply with the Simplification Act and Reg. Z as well as with state and other Federal agency regulations.

D. Timing of Disclosure

1. *Traditional or Transactional Method*

The old Truth in Lending Act required that disclosure be given "before the credit [was] extended. . . ."¹²⁷ The old Reg. Z determined that disclosure was required when there was a "creation of a contrac-

121. 12 C.F.R. § 226.18(a) to (r) (1983).

122. 12 C.F.R. § 226.18(g) (Supp. I 1983).

123. RMIC, *supra* note 92, at 26.

124. 12 C.F.R. § 226.18(q) (1983).

125. 12 C.F.R. § 226.18(1) (Supp. I 1983).

126. *Id.*

127. 15 U.S.C. § 1638(b)(1976).

tual relationship, a matter normally determined by reference to state law."¹²⁸ When the Simplification Act was enacted and Reg. Z re-drafted, consummation of the credit transaction determined the time of disclosure.¹²⁹ This is a major shift away from the test of economic suffering or payment of a non-refundable fee requirements to that of whether there is a contractual obligation.¹³⁰

There is an inherent problem in using consummation as the focal point for determining when disclosure should be given because disclosure made at consummation is too late. By the time of consummation of the credit contract, the borrower has already negotiated the details of the purchase of his home and is "psychologically committed to the transaction and unlikely to go credit shopping."¹³¹ Yet, encouraging credit shopping is one of the primary purposes of the Simplification Act and Reg. Z disclosure.¹³² The borrower needs disclosure prior to being obligated on the sales contract. Alternatives to the traditional method of disclosure are examined in the following sections with suggestions for changes to solve the consumer's problem.

2. Early Disclosure

There was no special provision for early disclosure under the old Truth in Lending Act and Reg. Z.¹³³ The Simplification Act and the new Reg. Z add a provision requiring that certain residential mortgage transactions give early disclosure.¹³⁴ To come within the early disclosure requirement, the loan must be both a "residential mortgage transaction" under the Simplification Act and Reg. Z¹³⁵ and be a federally related mortgage under the provisions of RESPA.¹³⁶

If the residential mortgage transaction meets the two-part test,

128. 12 C.F.R. § 226.2(a)(13)(1) (Supp. I 1983).

129. 12 C.F.R. § 226.2(13) (1983). Consummation is defined as "the time that a consumer becomes contractually obligated on a credit transaction." *Id.*

130. *Id.*

131. Rohner, *supra* note 86, at 1021.

132. 15 U.S.C. § 1601 (1976); 12 C.F.R. § 226.1(b) (1983).

133. 46 Fed. Reg. 20,881 (1981).

134. 15 U.S.C. § 1638(b)(2) (Supp. V 1981); 12 C.F.R. § 226.19 (1983).

135. Residential mortgage transaction is defined as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w) (Supp. V 1981).

136. 12 U.S.C. § 2602(1) (1976).

then initial disclosure must be made within three days of receipt of the written application by the lender.¹³⁷ The initial disclosure is made by giving the RESPA "good faith estimate," which now complies with the provisions of the Simplification Act.¹³⁸ Estimates used in the "good faith estimate" must be disclosed as such.¹³⁹

If subsequent events create a situation where the APR is no longer within the tolerable rate for variances, new disclosures must be made no later than consummation.¹⁴⁰ The creditor can comply by either redoing the entire disclosure statement or only the affected portion.¹⁴¹ However, if a term other than the APR changes, such as the assumption policy,¹⁴² redisclosure is not required. Arguably, the Simplification Act and Reg. Z should be modified so that any change of the information required on the Truth in Lending disclosure statement would necessitate redisclosure for those loans requiring early disclosure.

Problems occur when the consumer relies on the estimates he received when early disclosure is required, only to discover at settlement that the estimates were dramatically different from reality. The consumer in this situation may find himself without a remedy since there is no liability for a creditor when it uses estimates if the information necessary to make accurate disclosure is not available at the time disclosure was given.¹⁴³

3. *Alternative Methods of Disclosure*

A proposed solution to the consumer's need for early information was considered by the Federal Reserve Board when Reg. Z was being redrafted. The Federal Reserve Board suggested that an "alternative shopping disclosure"¹⁴⁴ be used to provide consumers with credit information at a time when they were more likely to be credit shopping.

137. 12 C.F.R. § 226.19(a) (1983).

138. *Id.*

139. 12 C.F.R. § 226.17(c)(2) (Supp. I 1983).

140. 12 C.F.R. § 226.17(f) (1983).

141. 12 C.F.R. § 226.17(f)(3) (Supp. I 1983).

142. Assumption is defined as "[t]he undertaking or adoption of a debt or obligation primarily resting upon another, as where the purchaser of real estate 'assumes' a mortgage resting upon it, in which case he adopts the mortgage debt as his own and becomes personally liable for its payment." BLACK'S LAW DICTIONARY 133 (5th ed. 1979).

143. 12 C.F.R. § 226.17(e) (1983).

144. 45 Fed. Reg. 29,703 (1981).

Basically, the creditor would have chosen to disclose either by the transactional or traditional method or by the alternative shopping disclosure.¹⁴⁵ If the creditor chose the alternative shopping disclosure, then disclosure could be done by using preprinted forms with general credit information for typical mortgage plans being offered.¹⁴⁶

Disclosure made with the alternative shopping disclosure could be done at the time of application or as soon as possible thereafter.¹⁴⁷ If a subsequent change rendered the APR inaccurate, redisclosure would be required¹⁴⁸ as it presently is for RESPA mortgages. However, the proposal received a number of unfavorable responses from creditors, and the idea was dropped.¹⁴⁹

The alternative shopping disclosure could easily have been, in the Federal Reserve Board's words, "the single most effective mechanism for achieving the statutory goal of fostering the informed use of credit."¹⁵⁰ It is still possible for the alternative shopping disclosure to be used without changing the existing regulation or statute. If the consumer received disclosure of the available mortgage plans when he began shopping for his home, the lender could comply with the statute and regulation by using the early RESPA disclosure provisions,¹⁵¹ while providing the consumer with the information when he needs it.

E. Disclosure Laws for Alternative Mortgage Loans

There are two periods when a mortgagor making an alternative mortgage needs disclosure of certain information: 1) prior to deciding which alternative mortgage loan, if any, to choose and, 2) after the loan is made, but prior to a payment change.¹⁵² The consumer needs the disclosure information at each of these times to evaluate his options intelligently. For pre-loan disclosure, lenders are required to disclose either: 1) no later than when the loan application is made or at the borrower's request, under the Federal Home Loan Bank Board's regulations,¹⁵³ or 2) no later than three days after loan application as re-

145. 45 Fed. Reg. 29,724 (1980).

146. *Id.* at 29,722.

147. *Id.*

148. *Id.* at 29,723.

149. 45 Fed. Reg. 80,676 (1980).

150. *Id.* at 29,702.

151. 12 C.F.R. § 226.19(a) (1983). *See also* Rohner, *supra* note 86, at 1022.

152. Walleser, *supra* note 6, at 23.

153. 12 C.F.R. § 545.6-4(g) (1982).

quired by the RESPA for the new Reg. Z.¹⁵⁴

Under the new Reg. Z, a lender making an alternative mortgage loan is required to disclose the following: 1) the circumstances surrounding a rate change, 2) "the limitations on the increase," if any, 3) "the effect of an increase," and 4) an example of what the payment would be if there is an increase.¹⁵⁵

However, the pre-loan disclosure requirements are inadequate for the consumer in a number of ways. First, the consumer receives the information after he has become contractually obligated to the seller, which is too late for him to evaluate his choices. Second, the borrower obtaining an alternative mortgage needs to know what the comparable costs are for both the loan he is making and a fixed rate mortgage.¹⁵⁶ The consumer needs to know such information as the alternative mortgage's "potential cost; the cost of a comparable SMI [standard mortgage instrument] securing the same principal; minimum and maximum rates of interest charge permitted; frequency of rate change; and available methods for implementing the rate change."¹⁵⁷ The lender is not required to give a " 'worst case' example of rate and payment increases" or to give a historical trend of the index selected.¹⁵⁸ Yet, without the disclosure of this information the consumer cannot shop intelligently.

After the loan is closed, but prior to a change in the monthly payment, the consumer needs disclosure of the new payment rate and the outstanding principal balance in sufficient time for the borrower to budget for the impending change or to consider the possibility of refinancing. The new Reg. Z is silent as to what constitutes adequate notice for imminent payment changes, though the Office of the Comptroller of the Currency has promulgated regulations which require national banks to give the borrower notice "[a]t least 30 days and no more than 45 days before any interest rate change. . . ."¹⁵⁹ Since the laws governing alternative mortgages are not uniform, the borrower must be sensitive to this factor when deciding on which mortgage plan is best

154. 12 C.F.R. § 226.19(a) (1983).

155. 12 C.F.R. § 226.18(f)(1) through (4) (1983).

156. Wallester, *supra* note 6, at 23.

157. *Id.*

158. Scheuerman, *Adjustable Rate Mortgages: Fundamental New Directions in Residential Mortgage Lending, Part I*, 55 FLA. B.J. 649, 653 (1981).

159. 12 C.F.R. § 29.8(b) (1983).

for him.

IV. Responsibility of Disclosure: On Whom it Should Rest

A. Real Estate Brokers and Agents

The disclosure laws have been modified to make compliance easier for the creditor and to avoid information overload by the consumer, yet the Simplification Act fails to adequately address the basic question of who should be required to give disclosure. Congress must examine the issue and determine whether the law should be changed to require someone other than the lender to give disclosure, such as the real estate broker or a mortgage information broker, or whether existing requirements for disclosure by the creditor should be stricter. An examination into this issue and suggestions for changes follow.

The logical person to be responsible for the pre-loan disclosure is the real estate broker or agent. In today's market, most buyers use realtors to help them find homes. During their time together, the buyer and realtor develop a relationship of trust; the realtor is the buyer's "agent" in many respects. It is only natural for the buyer to turn to the realtor for financial advice. The realtor is in the best position to help the buyer grapple with the complexity of today's real estate market. There is a growing trend toward recognizing the realtor as an agent for the buyer. Traditionally, the principal of *caveat emptor* applied and the buyer was strictly on his own.¹⁶⁰ Now, the realtor generally owes the buyer a duty of honesty and good faith.¹⁶¹ In California, Florida, Louisiana and Connecticut, the courts have adopted a "public interest" approach¹⁶² when dealing with the realtor's duty to the buyer. The essence of the public interest approach is that, because realtors deal with the public and their function is "affected with the public interest . . . , [it is] proper to impose a duty on brokers in favor of purchasers and prospective purchasers which would not exist under the traditional rules of agency,"¹⁶³ thus giving a realtor a duty to the public that

160. Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343, 1345 (1972).

161. Currier, *Finding the Broker's Place in the Typical Residential Real Estate Transaction*, 23 U. FLA. L. REV. 655, 665 (1981).

162. Sinclair, *The Duty of The Broker to Purchasers and Prospective Purchasers of Real Property in Illinois*, 69 ILL. B.J. 260, 266 (1981).

163. *Id.*

would not be found in traditional agency laws.¹⁶⁴

Another theory that the courts have developed to protect the buyer, but avoid problems with agency law, is the malpractice approach.¹⁶⁵ Under this theory, "the broker owes all persons a duty of disclosure and explanation as to the implications and consequences of certain legal documents, while he owes his principal [the seller] even more. . . ."¹⁶⁶

To more effectively deal with the problem, other solutions have been proposed such as "alternative brokers"¹⁶⁷ or "buyer's brokers." The buyer's broker works for the buyer for a flat fee or on an hourly basis.¹⁶⁸ Part of the broker's duty to his client is "[n]egotiating the terms of the purchase, providing the buyer with appropriate protections in the contract, and selecting the best financing alternative[s]. . . ."¹⁶⁹ One of the advantages of having a buyer's broker is that the broker will closely advise the buyer in two key areas: 1) pre-loan disclosures, and 2) the types of mortgages available.¹⁷⁰ Another is that the possibility of a conflict of interest disappears when the concept of the buyer's broker is used.¹⁷¹ Also, the broker would have an incentive to show all property, including that for sale by owner, since he would be working in the buyer's interest.¹⁷²

The relationship between the buyer and his broker would have to be made very clear. Generally, the law recognizes the broker as the seller's agent.¹⁷³ To implement the idea of a buyer's broker, existing multiple listing agreements will have to be rewritten deleting the section making a cooperative broker the subagent of the seller.¹⁷⁴ Even if

164. *Id.*

165. Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767, 790 (1978). Arizona allows real estate brokers to prepare certain legal documents in connection with the closing. *Id.* at 767.

166. *Id.* at 792.

167. Comment, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict*, 12 GOLDEN GATE U.L. REV. 379, 382 n.20 (1982).

168. *Id.*

169. Levine, *Does The Home Buyer Need His Own Broker?*, 13 REAL EST. REV. 98, 100 (1983).

170. Comment, *supra* note 167, at 381.

171. Levine, *supra* note 169, at 99.

172. *Id.*

173. Currier, *supra* note 161, at 660. An in-depth discussion of agency law and its effects on the broker-buyer-seller relationship in real estate transactions is beyond the scope of this note.

174. Comment, *supra* note 167, at 399.

the common law and custom changed to permit the buyer's broker concept, there would be obstacles to be removed before it could be required that realtors give disclosure. There would be a natural resistance on the realtor's part to the increase in his duties and liabilities. Also, an affirmative obligation would be imposed on realtors to remain current on all changes in the disclosure laws, a process cumbersome even for creditors.

B. Mortgage Information Broker

Since it appears that requiring realtors to give disclosure may not be a viable solution from a practical standpoint, another possible answer is to have a mortgage information broker. The borrower could go to the mortgage information broker before he begins to shop for his new home. The information broker would be responsible for being up-to-date on all the various mortgage plans. With this information, the information broker would analyze the buyer's liabilities and assets to determine which type of mortgage would be most suitable for him. The information broker could advise the buyer which of the various complex financing plans would be best not only for him, but also for the seller.¹⁷⁵ This information is necessary for the consumer, not only to shop adequately for credit, but to negotiate the best contract with the seller.

Arguably, there are problems with using a mortgage information broker to disclose information to the consumer. First, the mortgage information broker must be paid by the buyer, which increases the cost of obtaining financing. Second, the mortgage information broker may have a difficult time keeping current information on all the available plans offered by all of the mortgage companies. Unless the mortgage companies were required by statute to provide this information, the mortgage information broker could disclose only the information he could obtain. Finally, there is the possibility that a mortgage information broker may direct all of his business to a particular lender, thus frustrating the Truth in Lending Act's goals of promoting credit competition.

175. For example, the mortgage information broker could indicate which plans take the least amount of time to process or incur the least amount of cost in such items as discount points.

C. Creditors

If the real estate broker or the mortgage information broker is not the best alternative for disclosing the needed credit information to the consumer, then who is? The creditor is the logical choice and it should retain responsibility for the disclosure.

The creditor has received tremendous benefits from the Simplification Act. The disclosure procedure has been simplified, with the creditor obviously in mind. To be fair, the creditor should be responsible for giving disclosure of the necessary information to the borrower when he needs it, when the consumer is credit shopping. The creditor should be required to analyze the consumer's needs and provide him with information on the best plans offered by that mortgage company. Then the borrower can shop for credit intelligently by going to as many mortgage companies as he wishes and obtaining information on their plans and how they differ from their competitors before he signs his sales contract. Then disclosure would be simple for the creditor and fair to the consumer.

V. Conclusion

The old Truth in Lending Act and Reg. Z received the substantial overhaul they needed. The Simplification Act and Reg. Z are now simpler both for the residential borrower and the creditor. However, while creditor compliance has been made easier, there has not been great strides towards protecting borrowers. The content of disclosure needs to be modified to protect the residential mortgagor adequately. The mortgagor needs to know his simple interest rate and the rate he pays in five years, as well as the annual percentage rate. The amount financed means nothing to the borrower without knowing the loan amount. The borrower receives some disclosure now, but it is still not adequate. The residential mortgagor is still inadequately protected, especially in the area of timing of disclosure. The professed purpose of the Simplification Act and Reg. Z is to give borrowers the necessary information so they can shop for credit intelligently.¹⁷⁶ To shop intelligently, the credit information must come before the borrower is obligated on the sales contract, not the credit contract.

Disclosure could be made by the real estate broker, a mortgage information broker, or the creditor. There are problems of requiring

176. 15 U.S.C. § 1601(a) (1976); 12 C.F.R. § 226.1(b) (1983).

any of these to give disclosure. However, the logical choice is the creditor. It is only fair that the creditor, who has received so many benefits from the recent simplification of the Truth in Lending Act, should be required to disclose the information needed by the borrower and the Simplification Act should be amended accordingly.

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