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TRUTH IN LENDING "SIMPLIFIED": SIMPLIFIED?

RALPH J. ROHNER*

Disclosure of credit terms has been viewed as a primary means of protecting consumers from fraud and deception in credit transactions. To enhance the value of disclosure, Congress enacted the Truth in Lending Simplification and Reform Act of 1980. Professor Rohner analyzes this attempt to simplify credit cost disclosures and finds that the new Act is no more likely to increase consumer protection than the original Truth in Lending Act. The new Act does solve some problems, but does nothing about others and even introduces further complexities into credit transactions. Among the difficulties left unaddressed by the new Act are some that are unique to newly developing credit transactions.

INTRODUCTION

It is a truism to say that consumers benefit by having complete and accurate information about the credit transactions they enter. This truism, plus largely anecdotal evidence of deceptive credit pricing practices, produced the federal Truth in Lending Act (TIL) in 1968. In 1980, this Act was overhauled by the optimistically titled Truth in Lending Simplification and Reform Act (Simplification Act). After twelve years’ experience with these mandatory disclosure rules, one might expect reform to include a careful and scientific reassessment of the goals of credit disclosure legislation and an equally careful and precise reformulation of the rules themselves.

Alas, neither is true. The legislative process surrounding the TIL amendments included no systematic attempt to identify and agree on the fundamental goals of the Act. Moreover, the amendments them-

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4 Truth in Lending was originally enacted with a flush of enthusiasm for disclosure’s ability to facilitate credit shopping, see text accompanying notes 19-25 infra, but with little attention to the types of disclosures, if any, capable of effecting this goal or to the problems involved in elaborating the statute to further it. See Landers, Some Reflections on Truth in Lending, 1977 U. Ill. L.F. 669, 671-74. Subsequent efforts to rationalize the Truth in Lending disclosure scheme in light of the Act’s limited transactional impact have questioned the feasibility of this purpose, see, e.g., Landers & Rohner, A Functional Analysis of Truth in Lending, 26 U.C.L.A. L. Rev. 711, 711-37 (1979); Whitford, The Functions of Disclosure Regulation in Consumer
selves—though well-intentioned and often helpful—are likely to fall considerably short of achieving significant reform. Some shortcomings reflect political compromises and other failures of execution; other weaknesses are attributable to the inability of Congress and the interest groups that influence its judgments to analyze the current dynamics and probable growth of the marketplace; still other problems in the amended statute are due to inherent limitations on the capacity of disclosure to cure marketplace ills.

Numerous ironies mark the Simplification Act. Congress has "simplified" credit cost disclosures and the Federal Reserve Board has issued a completely new Regulation Z to implement the amended Act, yet consumer credit contracts are likely to be lengthier than ever before. The Supreme Court finally has established the primacy of Federal Reserve Board staff interpretations, but the Board's staff has chosen to stop writing individualized interpretations. The amended Act's definition of open-end credit reflects the consumerists' distaste for "spurious" open-end credit plans that deny consumers important total cost information, yet this definition may well permit many...
financial institutions to recast their credit offerings to use open-end rather than closed-end disclosures.\(^\text{13}\)

Perhaps the most ironic turnabout is that now that we have streamlined the mechanisms for credit cost disclosure to encourage knowledgeable credit shopping, credit pricing practices may outpace the consumer’s ability to understand, compare, or control those mechanisms. Numerous state legislatures recently have raised or removed interest ceilings;\(^\text{14}\) both state- and federally chartered institutions are now “most favored lenders,” free to use the highest rates available to any creditors;\(^\text{15}\) Congress has preempted state rate ceilings for most categories of residential mortgages\(^\text{16}\) and is considering legislation to preempt all usury laws for consumer credit;\(^\text{17}\) and lenders are increasingly turning to adjustable-rate instruments for home mortgages and other forms of credit.\(^\text{18}\)

The Act itself generates some of these anomalies, although others result from independent market forces and the Act’s failure to respond to them. Together they suggest the Simplification Act will provide no more dramatic consumer protection than did the original statute. Moreover, the reformed disclosure rules are almost certain to create—

\(^{13}\) See text accompanying notes 150-66 infra.


\(^{15}\) Under the National Bank Act, national banks have long been authorized to charge the highest interest rate permitted to any lender in the state. 12 U.S.C. § 85 (Supp. IV 1980); see 12 C.F.R. § 7.7310 (1981); Marquette Nat’l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 313-19 (1978) (national banks authorized to charge to out-of-state customers highest interest rate permitted by state where bank located); United Mo. Bank v. Danforth, 394 F. Supp. 774, 779, 781-82, 784-85 (W.D. Mo. 1975) (national banks have parity with most-favored state lenders; interest rates may exceed those permitted to state banks).

\(^{16}\) Similar authority has now been extended to all federally insured banks, 12 U.S.C. § 1831d (Supp. IV 1980), savings and loan associations, id. § 1730g, and credit unions, id. § 1785(g)(1). In the first major challenge brought under this new legislation, the court upheld most-favored-lender status for federally insured state banks. Equitable Tr. Co. v. Sachs, No. A 60063/120-A/ fol. 713, slip. op. at 35-37 (Md. Cir. Ct. Jan. 28, 1981).


or at least accentuate—problems unique to credit transactions of the 1980's and 1990's. Space does not permit a comprehensive analysis of the Truth in Lending Simplification and Reform Act and the new Regulation Z. This Article, however, may sharpen the reader's appreciation of the Act's many anomalies.

I

BACKGROUND: TOWARD TRUTH IN LENDING SIMPLIFICATION

The discussions surrounding the adoption of the Truth in Lending Act in 1968, and their sanguine assessments of what the Act would or could do, make fascinating reading. There was widespread sentiment that requiring "clear and conspicuous" disclosure of finance charges, annual percentage rates, and their credit terms would eradicate many of the existing abuses in consumer credit transactions—usury, flipping, unauthorized additional charges, and the like. More sophisticated commentators saw the Act as a useful complement to the newly promulgated Uniform Consumer Credit Code (UCCC): the federal law would standardize disclosure while a uniform state law would regulate the substantive terms, including rates, of the credit contract. The most persistent expectation, reflected in

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19 Flipping is a practice of compounding loans in such a way that the borrower ends up paying interest on interest—without necessarily violating state usury laws. See generally J. Spanogle & R. Rohner, Consumer Law 191-96 (1979).


22 Since the UCCC's disclosure requirements were similar to those under federal law, states (the traditional regulators of consumer credit) enacting the UCCC could qualify for exemption from TIL. See 15 U.S.C. § 1633 (1976); Warren, supra note 21, at 212. Only five states—Connecticut, Maine, Massachusetts, Oklahoma, and Wyoming—were "exempted" from TIL disclosure requirements. See [1981] 1 Cons. Cred. Guide (CCH) ¶ 2256. The UCCC, moreover, was
the Act's own declaration of purpose, was that disclosure would enhance "economic stabilization" and "competition among the various financial institutions" through the "informed use of credit." In particular, the Act was to "assure a meaningful disclosure of credit terms" so that in individual transactions consumers could "compare more readily the various credit terms available.")

In the midst of this enthusiasm came two seminal law review articles and the first formal casebook on consumer credit, all from the pen of Professor Homer Kripke. Drawing on his extensive experience as counsel to credit grantors (while being completely forthright about his procreditor bias), Professor Kripke challenged the widespread beliefs about the utility of Truth in Lending. In his view, consumerist support for disclosure was a "put-on"; proponents knew that disclosure could have only a slight effect on the substantive abuses about which they testified and agitated. Disclosure would prove virtually useless in poverty areas where consumers were a captive audience for fraud and deception. Even in middle-class markets, Kripke argued, disclosure would have only marginal value because these more mobile shoppers already understood where credit was cheapest. He was not unsympathetic to reform in general: he supported the UCCC, sided with consumers on the abolition of "holder-in-due-course," and agreed that disclosure of consumer finance charges

subsequently amended to incorporate the requirements of the federal Truth in Lending Act and Regulation Z. See UCC § 3.201 (1974 version).

24 Id. § 1601(a).
25 Id. On the limits of TIL disclosure as a means to affect transactional behavior, see Landers & Rohner, supra note 4, at 715-37; Whitford, supra note 4, at 405-35.
28 Id. at xii; Kripke, Creditor Viewpoint, supra note 26, at 445 n.*, 487.
29 Kripke, Gesture and Reality, supra note 26, at 2-3 & n.6 (quoting Brackman, The Put On, New Yorker, June 24, 1967, at 34).
30 Id. at 4-8.
31 Kripke, Creditor Viewpoint, supra note 26, at 469-67. Kripke also noted that disclosure would not remedy those problems of fraud and deception that occur even in middle-class contexts. Kripke, Gesture and Reality, supra note 26, at 9.
32 Kripke, Gesture and Reality, supra note 26, at 12. Kripke, however, acknowledged that by itself the UCCC would not cure the ills of fraud and deception. See id. at 13 & n.53.
33 Kripke, Creditor Viewpoint, supra note 26, at 471-73. A "holder-in-due-course" (usually a bank or finance company) assuming an installment obligation from a seller remains free from any defenses that the buyer might have against the seller. With reference to consumer credit contracts, Kripke felt that such an insulating doctrine amounted to a contract of adhesion. See id. at 472-73.
should be based on a simple annual percentage rate, rather than a “dollars-per-hundred” formulation.\textsuperscript{34} Despite strong industry sentiment that credit regulation is a matter for state law, Kripke criticized Congress and the Federal Trade Commission for not dealing more thoroughly with the myriad problems of consumer fraud.\textsuperscript{35} Throughout his writings, however, Kripke insisted on recognizing the trade-offs and risks involved in regulating creditor practices, warning that sweeping restrictions could miss their mark by unduly increasing the cost or restricting the availability of credit, especially in poverty areas.\textsuperscript{36} His sobering assessment of the realities of the consumer credit marketplace has contributed significantly to a balanced debate.

Professor Kripke’s prescience on many issues was remarkable.\textsuperscript{37} Truth in Lending has not eliminated consumer fraud and deception or led to the adoption of a national policy on consumer protection in credit transactions.\textsuperscript{38} Moreover, Kripke’s emphasis on creditor response to TIL requirements highlights one major force behind the 1980 Simplification Act. Creditors were increasingly concerned with

\textsuperscript{34} Id. at 459-60.

\textsuperscript{35} Kripke, Gesture and Reality, supra note 26, at 41-44. Kripke pointedly remarked: “The Senate bill . . . never, throughout the years, contained more than truth-in-lending provisions, although the hearings year after year demonstrated that the problem was largely one of fraud and deception, not merely non-disclosure and misunderstanding of the rate of credit charge.” Id. at 9. Although initially the House went beyond mere disclosure, its provisions were “poorly conceived,” id. at 34 n.9, and essentially abandoned in the final Act, id. at 10.

\textsuperscript{36} See, e.g., id. at 6-7, 34-37; Kripke, Creditor Viewpoint, supra note 26, at 479.


On the other hand, whether the UCCC ever became “the touchstone for consideration of all state legislation in the field,” Kripke, Gesture and Reality, supra note 26, at 2, is doubtful. Only 11 states adopted some version of the UCCC. See note 21 supra; cf. note 22 supra (only five states exempted from TIL).

the growing intricacy of the disclosure rules, as well as with case law and agency interpretations that construed TIL inconsistently. The broad potential liability for civil penalties compounded these concerns.³⁹

The original Regulation Z supplemented the disclosure scheme with a number of detailed requirements not specifically called for by the statute.⁴⁰ By 1980, the Federal Reserve had issued more than sixty official Board Interpretations⁴¹ and more than 1500 official and unofficial staff letter interpretations of Regulation Z.⁴² Accompanying this explosion in the interpretation process was inconsistent judicial resolution of numerous questions under the Act and Regulation.⁴³ At times, different federal enforcement agencies themselves

When the National Commission on Consumer Finance issued its report in 1972, National Commission on Consumer Finance, Consumer Credit in the United States (1972), its prescription for broad-scale reform echoed many of Kripke’s conclusions. The Commission’s recommendations included removing barriers to the operation of competitive forces among creditors, combating monopoly and restrictive practices among creditors, curbing market excesses, and creating consumer credit extension programs. See id. at 4.


⁴⁰ Old Regulation Z required terminology not specified by TIL. For example, for credit sales under Old Regulation Z the following phraseology was required: “annual percentage rate,” “total of payments,” “balloon payment,” “cash price,” “cash downpayment,” “trade-in,” “total downpayment,” “unpaid balance of cash price,” “unpaid balance,” “prepaid finance charge,” “required deposit balance,” “amount financed,” “finance charge,” and “deferred payment price.” Old Regulation Z, supra note 8, § 226.8. New Regulation Z drops most of these requirements. See New Regulation Z, supra note 8, at 20,896, 20,902-03 (to be codified in 12 C.F.R. §§ 226.8, 226.18). In addition, Old Regulation Z required disclosure of the aggregate cost of a credit sale, Old Regulation Z, supra note 8, § 226.8(c)(6)(i), and extensive identifications of open-end credit transactions, id. § 226.7(k), and had special rules for “prepaid finance charges” and “required deposit balances,” id. § 226.8(e), and for refinancings, assumptions, and deferrals, id. § 226.8(f), (h), (l).


⁴³ The Supreme Court has recently resolved several such inconsistencies, e.g., whether TIL requires separate disclosure of acceleration and its consequences, Ford Motor Co. v. Milhollin, 444 U.S. 555, 562, 570 (1980) (separate disclosure not required when creditor’s Interest rebate policy was identical under acceleration and voluntary-prepayment options), and whether a creditor’s right to unearned or rebated insurance premiums must be disclosed as a security interest, Anderson Bros. Ford v. Valencia, 101 S. Ct. 2266, 2275-76 (1981) (disclosure not required). But numerous other issues remain subject to mixed court holdings. For a comprehensive review of the cases, see Willenzik & Leymaster, Recent Trends in Truth-In-Lending Litigation, 35 Bus. Law. 1197 (1980); Willenzik & Schmelzer, Truth in Lending Activities During 1980, 36 Bus. Law. 1133, 1134-52 (1981).
seemingly disagreed about what Regulation Z required.\textsuperscript{44} Consumers, meanwhile, were continually challenging particular omissions or inclusions in creditor forms; thousands of lawsuits annually were being reported in the federal courts alone,\textsuperscript{45} with uncounted additional suits in the state courts. Creditors faced the prospect of class action recoveries with a minimum award of $100 per consumer plus costs and attorneys' fees, despite protections added to TIL in 1974 and 1976.\textsuperscript{46}

There was also a strong consumer-based rationale underlying the reform of TIL.\textsuperscript{47} There was a growing sense that the quantity and complexity of required disclosures defeated their utility for credit shopping purposes.\textsuperscript{48} Testimony presented during hearings suggested that consumers could digest only limited amounts of information about a transaction, and that the extensive disclosures under Truth in Lending could result in "information overload" for consumers.\textsuperscript{49} That

\textsuperscript{44} See, e.g., USLIFE Credit Corp. v. FTC, 599 F.2d 1387, 1389 (5th Cir. 1979). Although the Federal Reserve Board has exclusive authority to promulgate regulations implementing TIL, enforcement is parcelled out among numerous federal agencies. 15 U.S.C. § 1607(a) (1976 & Supp. IV 1980). The problem of multiple agency enforcement is discussed in Rohner, Unified Agency Rulemaking, supra note \textsuperscript{38}, at 139-46.

\textsuperscript{45} See Brandel, supra note 41, at 1401 (as of mid-1978, more than 9000 TIL lawsuits had been filed in federal district courts); Willenzik & Leymaster, supra note 43, at 1197 (over 14,000 TIL suits filed in federal courts, 1969-1978; figures based on published data compiled by the Administrative Office of U.S. Courts). Evidently, assertions of TIL violations were becoming a standard weapon in the arsenal available to consumers for settlement or leverage in defaulted or otherwise broken-down transactions. See Landers, supra note 4, at 676-80, 683-86.

\textsuperscript{46} Before 1974, prevailing plaintiffs could recover a minimum of $100 each. 15 U.S.C. § 1640(a)(1) (1970) (amended 1974 & 1976). For class action plaintiffs, there was no cap on creditor liability beyond the size of the plaintiff class. In 1974, TIL was amended to limit a class recovery to the lesser of $100,000 or one percent of the creditor's net worth, and, in determining class action awards, courts were instructed to consider, \textit{inter alia}, the "frequency and persistence" of violations and the extent to which they were "intentional." Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat. 1517. In 1976, the dollar limit was raised to $500,000. Act of Mar. 23, 1976, Pub. L. No. 94-240, § 4, 90 Stat. 257. The Simplification Act extends these limitations to any "series of class actions arising out of the same failures to comply by the same creditor." Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, § 615(a)(1), 94 Stat. 132 (1981) (codified at 15 U.S.C. § 1640(a)(2)(B) (Supp. IV 1980)).

\textsuperscript{47} Simplification was also designed to adjust provisions that experience indicated were ill-designed for the marketplace that existed a decade after the original Act. For example, TIL's coverage of agricultural credit, 15 U.S.C. §§ 1602(h), 1603(e) (1976) (amended 1980), was of dubious value, while the rules on real estate mortgage transactions did not recognize the comparability of transactions involving mobile homes ("manufactured housing"). See S. Rep. No. 73, supra note 39, at 10, [1980] U.S. Code Cong. & Ad. News at 287. Under the Simplification Act, agricultural credit is redefined and exempted from the Act's requirements, 15 U.S.C. §§ 1602(e), 1602(f), 1603(f) (Supp. IV 1980); dwelling is defined to include mobile homes and cooperative units, id. § 1602(v).


\textsuperscript{49} See, e.g., Simplification Hearings, supra note 39, at 111-18 (testimony of Dr. Steven Permut). Referring to that testimony, the Senate report said:

The subcommittee learned that judging from consumer tests in other areas, the typical disclosure statement utilized today by creditors is not an effective communication device.
is, overwhelmed by the sheer mass of information on the disclosure statement, consumers would ignore it all. Thus, for disclosures to be useful, disclosures would have to be few in number and more clearly expressed; they would have to be simpler.\textsuperscript{50}

These factors coalesced to produce the Truth in Lending Simplification and Reform Act.\textsuperscript{51} Like the original TIL, the revised Act has generated, and promises to continue to generate, interesting anomalies.

\section*{II
PROBLEMS OF FAULTY EXECUTION}

The principal goal of the Simplification Act, again, is to reduce both creditor problems in complying with disclosure requirements

Most disclosure statements are lengthy, written in legalistic fine print, and have essential truth in lending disclosures scattered among various contractual terms. The result is a piece of paper which appears to be "just another legal document" instead of the simple, concise disclosure form Congress intended.


Unlike Professor Kripke, see text accompanying note 31 supra, Congress was not skeptical of the utility of disclosure as a shopping tool and, indeed, made clear that facilitating shopping was the major (consumer-based) purpose behind simplification. Thus, changes in the civil penalty provisions were "intended to restrict the scope of creditor civil liability \ldots to only those disclosures which are of material importance in credit shopping."

S. Rep. No. 73, supra note 39, at 17, [1980] U.S. Code Cong. & Ad. News at 294. In addition, Congress believed that eliminating disclosure of itemization of the amount financed would "not diminish the act's usefulness as a shopping tool."

Id. at 16, [1980] U.S. Code Cong. & Ad. News at 294. And allowing the Federal Reserve Board to experiment with distributing guides listing the annual percentage rates charged by creditors in given areas for given types of loans would be "of great benefit \ldots as a shopping tool for consumers."

and consumer problems in reading and understanding what has been disclosed. To this end, the Act has reduced and streamlined the disclosures required in closed-end transactions and made changes in the format these disclosures must take. The Act and New Regulation Z have also modified the definitions of creditor and open-end credit, made changes in the timing of disclosure, and limited somewhat the civil liability of creditors for TIL violations. In general, it is fair to say that these modifications better accomplish the goal of facilitating creditor compliance than that of enhancing consumer understanding, although some creditor-related problems remain.

A. Facilitating Creditor Compliance

1. Inconsistent Interpretations

As noted, creditors have been concerned with both inconsistent and unexpected judicial interpretations of TIL. The question that repeatedly surfaced was what weight courts should give to Federal Reserve Board staff letters. Courts have in fact been willing to depart from the interpretations provided in Board staff letters. When set alongside the considerable volume of staff letters, this

52 Closed-end transactions are fixed-term, one-time transactions between the creditor and borrower. See text accompanying notes 150-51 infra.

53 See section II, B infra.

54 See text accompanying notes 74-103 infra.

55 See section III, B infra. The Act also makes other changes in regard to open-end credit; for example, it provides for a right of rescission in transactions involving a security interest in the consumer's principal dwelling. 15 U.S.C. § 1635(a) (Supp. IV 1980). The actual disclosures required for open-end transactions have been left substantially unchanged.

56 See section III, A infra.


58 Of course, there are other modifications. For instance, the Simplification Act alters TIL's coverage by exempting agricultural credit but including mobile homes. See note 47 supra. It also contains provisions affecting methods of calculation, for example, specifying tolerances in calculating and disclosing annual percentage rates. See 15 U.S.C. § 1606(c) (Supp. IV 1980) (.125% tolerance). Due to limitations of space and scope, these and other changes cannot be discussed here. For an overview of Simplification Act changes, see O'Connor, Truth in Lending Simplification, 36 Bus. Law. 1161 (1981); Replansky & Kauffman, The Truth in Lending Simplification and Reform Act of 1980: A New Deal for the Creditor, 13 U.C.C. L.J. 200 (1981).

59 The Supreme Court established in 1973 that TIL gives the Federal Reserve Board a broad grant of authority to amplify the statute through formal Board regulations. See Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 365-78 (1973).


61 These letters number more than 1500. See FRB Official Staff Commentary, supra note 42, at 50,288.
judicial behavior hindered creditors who in good faith wanted to comply with the law. 62

Although the revised Act addresses this problem only obliquely, 63 the Supreme Court has now established that Federal Reserve Board staff letters are to be given controlling weight by courts considering alleged TIL violations. In 1980, in Ford Motor Credit Co. v. Milhollin, 64 the Supreme Court held that courts should defer to Board staff interpretations unless they are “demonstrably irrational.” 65 This remarkable standard for the weight to be given administrative agency staff letters was appropriate, said the Court, because of the complex nature of Regulation Z, the need for certainty, and the resulting need for a single, dominant interpretive voice. 66 More recently, in Anderson Brothers Ford v. Valencia, 67 the Court again indicated that courts must accept Board staff interpretations unless they reflect “some obvious repugnance to the statute.” 68 The primacy of the Federal Reserve and its staff as interpreters of Regulation Z is now established and lower courts are henceforth admonished to give heed.

But to what? The Board and its staff have concluded that the dangers of an endless flow of staff letters—ad hoc and meticulously hairsplitting, in combination creating a huge and nearly impenetrable sub-body of TIL jurisprudence—outweigh any value such a flow of letters might now have in avoiding inconsistent court holdings. 69 In

62 See S. Rep. No. 73, supra note 39, at 2, [1980] U.S. Code Cong. & Ad. News at 281. In fact, the consumer stake in this issue goes beyond concern for creditor compliance; creditors cannot successfully be sued or prosecuted under the Act if they acted “in good faith in conformity with” a staff interpretation. 15 U.S.C. § 1640(f) (Supp. IV 1980). Indeed, creditors sought out letters “blessing” novel features of their credit plans precisely because of their immunizing effect. See Landers & Rohner, supra note 4, at 712 & n.3. To a significant degree, therefore, creditors brought the problem of complexity upon themselves. See id.

63 The Act reduces the number of disclosures and specifies that only certain misdisclosures will support a consumer’s recovery of the minimum $100 penalty. 15 U.S.C. § 1640(a)(2) (Supp. IV 1980). Thus, by eliminating the inducement to sue for noncompliance, the Act may perforce eliminate or reduce inconsistent or novel interpretations of those less important disclosures.

64 444 U.S. 555 (1980).
65 Id. at 565.
66 Id. at 566-68.
68 Id. at 2274. The basis for decision in Valencia is very curious. Relying principally on the Board’s proposed Official Staff Interpretation FC-0173, 45 Fed. Reg. 63,295 (1980), the Court concluded that a creditor’s right to insurance proceeds or rebated premiums was not a disclosable security interest. 101 S. Ct. at 2270-74. The staff had never adopted that Interpretation, and in fact had postponed further action in deference to the Court’s decision to hear the case. See id. at 2278 & n.6 (Stewart, J., dissenting).
69 In issuing its Proposed Official Staff Commentary to accompany Regulation Z, the Board staff reasoned:

Although originally designed to aid creditors in complying, the long-standing practice of
lieu of interpretation letters, therefore, the Board and its staff will now issue only official textual commentary on Regulation Z. The commentary has the status of an official staff interpretation; it will contain extensive although generalized discussion of how the Regulation is to be construed and applied in various circumstances.

The irony in the situation is evident. No matter how carefully drafted and updated, this commentary cannot be as precise, thorough, or current as individualized advisory letters to creditors. The question, therefore, is whether the Board has cured the problem of complexity only by substituting that of uncertainty. Two scenarios are possible. Courts may create subrules and distinctions to fill interstices in the Regulation-cum-commentary. This situation is likely to reintroduce the problem of inconsistent interpretations of the disclosures TIL requires. Or courts may extrapolate from the Supreme Court's directions in *Milhollin* and *Valencia* and uphold creditor practices as long as they do not obviously run afoul of New Regulation Z as elaborated by the commentary. Such judicial restraint would enhance predictability and certainty and is preferable as a means of facilitating creditor compliance.

2. *Multiple Creditors: Extenders and Arrangers*

One of the most persistent problems under the original Act and Regulation was determining who was a "creditor" subject to disclosure responsibilities. The definition of "creditor" included any person who "regularly extends or arranges for the extension of consumer


70 "No official staff interpretations are expected to be issued other than by means of this commentary." FRB Official Staff Commentary, supra note 42, at 50,289.

71 Thus, good faith compliance with the commentary immunizes creditors from liability under 15 U.S.C. § 1640(f) (Supp. IV 1980). FRB Official Staff Commentary, supra note 42, at 50,289.

72 See FRB Official Staff Commentary, supra note 42, at 50,288.

73 There is an independent reason why the *Valencia* and *Milhollin* decisions may tend to stifle lower court mischievousness. Both opinions accept the philosophy of the Simplification Act that "meaningful disclosure does not mean more disclosure," thus discouraging lower courts from finding new or additional disclosure requirements beyond the black letter of the Regulation. *Valencia*, 101 S. Ct. at 2276 n.21; *Milhollin*, 444 U.S. at 568. Until explicit guidance issues from the Supreme Court, however, it remains uncertain whether the lower courts will adopt this "less disclosure is better" approach to TIL now that the Federal Reserve Board has decided to issue only a staff commentary.
This definition encompassed two categories of creditors: "extenders" (those who actually advance the credit) and "arrangers" (those who "provide or offer to provide consumer credit . . . extended by another person").

Old Regulation Z compounded matters in several ways. In closed-end transactions, the disclosure statement had to identify "the creditor." In addition, if there was more than one creditor in a transaction, each had to be identified and each was responsible for those disclosures "within his knowledge and the purview of his relationship with the customer." Finally, a provision added to the Act in 1974 stipulated that a "subsequent assignee" was not liable for violations unless they were apparent on the face of the credit instrument. It is clear, however, that, in fact, dealers and assignees routinely collaborate to generate consumer paper, and direct lenders depend on referrals from dealers and brokers. Who, here, extends the credit and who arranges it? Who must be identified, and who can be sued for violations?

This situation led to considerable judicial freelancing in deciding what responsibilities rested on whom. For example, one line of cases held that in typical indirect automobile financing, the consumer finance company or bank that bought consumer paper from the dealer was a creditor, not a "subsequent assignee," and thus was subject to identification on the disclosure statement and to liability for any violations. Another line of cases concluded that a dealer who received a commission for referring customers to a direct lender was an arranger, but the opinions diverged on just what disclosures had to

74 Old Regulation Z, supra note 8, § 226.2(s).
75 Id. § 226.2(h). To be an arranger, the person must either have received some consideration for the service, or have helped prepare the documents with knowledge of their terms.
76 Id. § 226.8(a).
77 Id. § 226.6(d).
80 Subsequent cases differed on how explicit the creditor's identification had to be, although the Supreme Court has now resolved this issue. Compare Sharp v. Ford Motor Credit Co., 615 F.2d 423, 425-26 (7th Cir. 1980) (identifying credit companies as "assignees" satisfies TIL and Regulation Z), with Cenance v. Bohn Ford, Inc., 621 F.2d 130, 133-34 (5th Cir. 1980) (Regulation Z requires specific identification of financier as "creditor"), aff'd in part and rev'd in part per curiam sub nom. Ford Motor Credit Co. v. Cenance, 101 S. Ct. 2239, 2240-41 (1981) (financier is creditor under Act; Regulation Z satisfied by identification as "assignee").
be made by the dealer and by the lender. A third line of cases, mostly involving health club membership agreements, concluded that regular discounting of such agreements to financers was evidence that a finance charge was being imposed, bringing both the health club and the financer creditors under the Regulation. Although not often litigated, the question whether real estate brokers who merely assisted customers with mortgage financing were arranger-creditors was the subject of many Federal Reserve staff letters.

The revised Act and New Regulation Z simplify this area by carefully redefining “creditor” so that in virtually all transactions there will be only one creditor. Generally, to be a creditor one must regularly extend consumer credit and be the one “to whom the obligation is initially payable . . . on the face of the note.” In typical indirect financing this will be the dealer; when there is no assignment of consumer paper from dealer to financer it will be the direct lender.

Although Congress’ intent to restrict the definition in this fashion is clear, the language of the Act and Regulation is subject to quibble. In what sense does an auto dealer “extend credit” when all he does is prearrange for the immediate assignment of the consumer’s obligation to a financer? Even though the note or contract initially may be payable to the dealer, theoretically—and as a matter of economics—the party whose money is at risk is the financer. This reading,

82 Compare Hinkle v. Rock Springs Nat’l Bank, 538 F.2d 295, 296-97 (10th Cir. 1976) (“arranger-seller” and lender each required to make disclosures that are within scope of its relationship with consumer), with Manning v. Princeton Consumer Discount Co., 533 F.2d 102, 105-06 (3d Cir.) (when seller arranges credit, only seller is required to make disclosures), cert. denied, 429 U.S. 865 (1976).


87 New Regulation Z, supra note 8, at 20,893 (to be codified in 12 C.F.R. § 226.2(a)(17)(i)).


89 As the Supreme Court observed in describing the typical auto financing pattern that raised the multiple creditor issue under the old Regulation:

The facts negate any suggestion that the dealers anticipated financing any of these transactions. The sales were contingent upon [the financer’s] approval of the credit worthiness of the buyer. The acceptance of the contract and the assignment became operational simulta-
however logical, leads to an absurdity: the dealer is not a creditor because he does not extend credit, but neither is the financer a creditor because he is not the designated payee of the note. To understand the Regulation, one must accept the notion that the dealer actually does extend credit, even if merely temporarily. This conclusion is reinforced by recognizing that the dealer customarily will guarantee the collectibility of the paper through repurchase or recourse arrangements with the financer. Since the dealer is the only Regulation Z creditor, the dealer alone needs to be identified; since the dealer is also the seller, disclosures for a credit sale are required.91

Similarly, when a consumer approaches a direct lender for a loan to buy property the lender alone will be a creditor, even if a dealer or broker helped bring the parties together. The lender both extends the credit and is payee on the obligation; the involvement of the dealer or broker is immaterial to fixing disclosure responsibilities under the new Regulation.92 (The lender of course is free to seek some indemnification arrangement with the dealer for violations attributable to the dealer's handling of paperwork or the like.)

But the dealer or broker in this setting appears to be an arranger of credit and therefore covered by the Regulation, since the new definition does include "arranger" as a subcategory of creditor93 separate from the general extender-payee rule just discussed. In fact, though, the "arranger" plays a very limited role in New Regulation Z. A person is an arranger only if the actual extender of credit is not a professional lender or financer.94 That is, an arranger is one who regularly brokers credit arrangements between consumers and persons who are not themselves creditors.

Apparently, it was expected that application of the arranger-creditor definition would rarely occur, and then solely when a professional intermediary arranged for the placement of loans with private, nonprofessional investors.95 In that case, it was thought, the arranger and the assignment divested the dealer of any risk in the transaction.


91 Credit sale disclosures are necessary when the seller is a creditor. New Regulation Z, supra note 8, at 20,893 (to be codified in 12 C.F.R. § 226.2(a)(16)). The required credit sale disclosures are set out in id. at 20,902-03 (to be codified in 12 C.F.R. § 226.18(j)).

92 The lender must make loan disclosures. Although the loan finances a sale, credit sale disclosures are required only when the seller is the creditor. See note 91 supra.

93 New Regulation Z, supra note 8, at 20,893 (to be codified in 12 C.F.R. § 226.2(a)(17)(ii)).

94 See id. at 20,893 (to be codified in 12 C.F.R. § 226.2(a)(3)(ii)) ("Arranger . . . means a person who regularly arranges for the extension of consumer credit by another person if . . . (2) The person extending the credit is not a creditor.").

95 See FRB Official Staff Commentary, supra note 42, at 50,291 (§ 226.2(a)(3), comment 1).
ranger's expertise about credit transactions would be sufficient to ensure that compliance with Regulation Z would not be burdensome. But think for a moment of the current market for residential real estate. High interest rates and a shortage of mortgage funds have introduced the era of "creative financing," including adjustable rate mortgages, wraparound financing, and other novelties.96 One popular feature of many mortgage deals is the "seller take-back"—the previous homeowner agrees to finance a portion of the sale price, taking a second mortgage as security.97 Realtors and other brokers are obvious intermediaries for these arrangements, helping negotiate the deals, drafting or supplying mortgage forms to the client seller, and so forth. In this context—one likely to occur frequently, not rarely—the realtor is apparently an "arranger" and thus a creditor fully responsible for Truth in Lending disclosures.98 The Federal Reserve Board belatedly acknowledged there could be some difficulty in imposing disclosure responsibilities on realtors and other arrangers, and has proposed to amend New Regulation Z to clarify TIL's coverage.99 Under the proposed rule, to be an arranger a person must both develop or negotiate the credit terms and assist in completing the credit documents.100 This definition presumably would encompass most mortgage loan and real estate brokers.101

In short, except for this "arranger" complication,102 the careful (if strained) redefinition of the term creditor has largely eliminated the confusion surrounding the multiple creditor problem. Occasional questions may arise, but these may be resolved through the Federal Reserve Board staff's commentary or, when necessary, by judicial

96 See Housing Yourself, supra note 18, at 404.
97 See id. at 405-07.
98 See FRB Official Staff Commentary, supra note 42, at 50,291 (§ 226.2(a)(3), comment 1).
100 Id. at 51,920.
101 Id. Since seller financing is increasingly common, and since real estate brokers typically act as intermediaries by negotiating credit terms and assisting in completing credit documents, see id., the Board considered this definition necessary to assure that all meaningful credit terms are disclosed to buyers of dwellings, see id. at 51,921. The Board's proposal also identifies numerous subquestions and suggests possible alternatives to the proposed rule, one being an exemption for real estate brokers. See id. at 51,921-22.
102 The following enigma, raised at a recent meeting of the Federal Reserve Board's Consumer Advisory Council, is indicative of the complexity lurking in the "arranger" concept. Under revised Reg Z, if a professional loan broker gets a consumer a second mortgage from a once-in-a-lifetime lender, if the broker neglects to disclose the right to rescind, and if the consumer decides to rescind after consummation, who gets stuck? Is it the lender, who had no duty to disclose, or is it the broker, who had no mortgage to tear up or payments to refund?

Thus, the anomalies accompanying these revisions are few; the Simplification Act here is basically well-executed.

B. Protecting Consumers: Making Disclosures Clear

The same, unfortunately, cannot be said of the Simplification Act’s efforts to clarify the form and substance of required disclosures. Indeed, the changes made by the Act are, ironically, likely to produce more, not less, opaque credit contracts. This results principally from errors of execution, and creates practical difficulties for creditors and consumers.

Most of the significant TIL changes concern closed-end transactions. These include eliminating disclosure of many items, particularly the computational steps leading up to the “amount financed.” This reduction in disclosure items is the heart of “simplification” in the pure sense of avoiding unnecessary clutter on the statement. To clarify and emphasize the remaining disclosures, the Simplification Act makes two changes in the format of the disclosures. One of these deserves merely a note; disclosure statements must now contain brief explanatory statements about each of five critical disclosure items. For example, “finance charge” must be accompanied by a description such as “the dollar amount the credit will cost you,” and “annual percentage rate” by a description like “the cost of your credit as a yearly rate.” Although these explanations add words to the disclosure statement, the obvious intent, and effect, is to increase consumer understanding.

A more dramatic change is that all the disclosures required for closed-end transactions “shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the [required] disclosures.” Under Old Regulation

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103 The courts may have to resolve the more subtle issues. In the health club cases mentioned above, for example, courts were able to find that a financer’s constant discount rate on installment purchase contracts was a finance charge. See text accompanying note 83 supra. Even though the financer will not be a “creditor” under the narrowed definition in New Regulation Z, it would seem altogether appropriate for a court still to conclude that there is a disclosable finance charge in such transactions.


105 Id. § 1638(a)(8).

106 New Regulation Z, supra note 8, at 20,902-03 (to be codified in 12 C.F.R. § 226.18(d)).

107 Id. (to be codified in 12 C.F.R. § 226.18(e)). Descriptions must also accompany the terms “amount financed,” “total of payments,” and “total sale price.” 15 U.S.C. § 1638(a)(6) (Supp. IV 1980).

108 New Regulation Z, supra note 8, at 20,891 (to be codified in 12 C.F.R. § 226.17(a)).
the disclosures had to be made "together," but this was not understood to mean that they could not be interspersed among other terms on the contract document. The new requirement, though, clearly contemplates total segregation of the required disclosures, either on a separate statement or set apart from other information on the contract document itself. The Federal Reserve Board staff commentary explains that the TIL disclosures may be set off from other contract information by "outlining them in a box," or may be separated with "bold print dividing lines," "a different color background," or "a different type style." A footnote to New Regulation Z makes it crystal clear that only a few limited bits of additional information (acknowledgment of receipt, transaction date, consumer's name, address, and account number) may be included in the "federal" box.

These revisions of disclosure format have implications beyond merely necessitating industry-wide reprinting of forms. Documents that combine the TIL disclosures with the actual credit contract will almost certainly be longer, more verbose, and more redundant than before. This problem, moreover, will be exacerbated by the new rules on preemption of state law. In addition, Congress' effort to salvage some form of mandatory itemization of the amount financed promises to create further trouble for both consumers and creditors. Each of these concerns merits some explanation.

Until now, TIL disclosures typically were integrated into the credit contract. This meant that disclosed terms were part of the contract, and such matters as the cash price, downpayment and trade-in, components of the finance charge, description of the security interest, prepayment penalty, and rebate provisions were stated one time, satisfying both TIL and state contract law requirements. Under the new Regulation, however, only the specified federal disclosures can go in the federal box; all other contract terms and information must appear elsewhere in the document. A number of the terms required for the federal box are merely summary references—for example, the consequences of prepayment, any demand feature, the creditor's assumption policy—and will almost always require further elaboration in the contract. The required disclosure concerning

109 Old Regulation Z, supra note 8, § 226.8 (a).
110 FRB Official Staff Commentary, supra note 42, at 50,322 (§ 226.17(a), comment 2).
111 New Regulation Z, supra note 8, at 20,901 n.37 (to be codified in 12 C.F.R. § 226.17(a) n.1); see FRB Official Staff Commentary, supra note 42, at 50,322 (§ 226.17(a), comment 5).
112 New Regulation Z, supra note 8, at 20,903 (to be codified in 12 C.F.R. § 226.18(l)(k)(q)).
security interests permits identification of collateral “by . . . type,”113 which the Uniform Commercial Code114 does not, necessitating a more detailed description outside the federal box. The box must also contain a statement referring the consumer to the contract for further information about nonpayment, default, acceleration, and prepayment.115 All of this duplication and cross-referencing does not bode well for “simplified” consumer credit contracts.

The new rules on preemption of state law will aggravate the problem of redundancy and contract length. The Simplification Act preempts “inconsistent” state laws,116 which New Regulation Z re-states to mean only state disclosure laws that “contradict the requirements of the federal law.”117 As the Regulation notes, a state law requiring terminology different from that of TIL to describe the same item, or similar to that of TIL to represent a different amount, would be contradictory.118 This, however, does not shed any light on how to evaluate the many state laws calling for disclosures in addition to those that must now appear in the federal box. Read literally, no state disclosure rules would “contradict” Regulation Z because no state law prohibits certain disclosures being set out in a segregated format. Rather, what exists at the state level is a variety of credit disclosure statutes.119 Retail installment sales acts120 commonly call for itemization of cash price, downpayments, taxes, tag and title fees, service policies, and the like. State insurance laws may call for detailed explanations of coverages. Small loan laws121 may require disclosure of disbursements or breakdowns of finance charges. Some of these laws may require the state disclosures to be on the front of the contract, above the consumer’s signature, in a certain type size, or in plain-English.122 A special paradox arises in any state where the

113 Id. at 20,903 (to be codified in 12 C.F.R. § 226.18(m)).
114 U.C.C. § 9-203 requires “a description of the collateral” in the security agreement. Designation of the collateral by “type” is permissible only in the financing statement, under U.C.C. § 9-402(1).
115 New Regulation Z, supra note 8, at 20,903 (to be codified in 12 C.F.R. § 226.18(p)).
117 New Regulation Z, supra note 8, at 20,906 (to be codified in 12 C.F.R. § 226.28(a)).
118 Id.
119 See generally Credit Research Center, Purdue University, Monograph No. 8, A Compilation of Federal and State Laws Regulating Consumer Financial Services (1977).
legislature has adopted the old federal TIL disclosure rules as state law; the state law patterned on the old federal version will continue to require itemizations that the new federal statute and Regulation have displaced. Yet the state law hardly "contradicts" the federal, so the state-required disclosures must still be made.

Thus, until the Federal Reserve Board rules on whether particular state provisions are contradictory and so preempted, creditors can do little else but make all the state-required disclosures (outside the federal box). The Board staff's commentary acknowledges this dilemma and permits creditors to "give state disclosures until the Board formally determines that the state law is inconsistent." This avoids a Catch-22 predicament for creditors who would otherwise have to guess whether particular state laws survived or were preempted. But it also means that closed-end credit contracts will have to be longer, with federal disclosures in a segregated box and the full array of state law disclosures and contract provisions elsewhere in the agreement.

The Simplification Act also contains a matter that is an example of inexpedient legislative compromise. House conferees threatened to

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123 If Congress is truly concerned about "information overload," see text accompanying notes 47-50 supra; note 49 supra, a simplification rule that produces longer and more intricate contracts is counterproductive. For example, the writer has examined two versions of a retail installment contract prepared by a large Midwestern bank, one in compliance with Old Regulation Z, the other a prototype under New Regulation Z (on file at New York University Law Review). The old version measures just under 15 inches in length, printed from top to bottom on both sides. The new version is almost 21 inches long, printed from top to bottom on both sides, with the federal box occupying a little more than a third of the front side. Among the curiosities outside the federal box is a line for the Time Price Differential (a state law pseudonym for finance charge) followed several lines later by a designation of when the finance charge begins to accrue; presumably a consumer will know instinctively that the finance charge and the Time Price Differential are one and the same.
124 FRB Official Staff Commentary, supra note 42, at 50,341 (§ 226.28(a), comment 4). Creditors are not protected, however, if they choose not to give state disclosures, believing them to be inconsistent with TIL, and the Board then determines otherwise. Id.
125 This also is the conclusion reached by the Federal Reserve Board in a regulatory analysis published along with the new Regulation:

[R]eduction in required disclosures and changes in civil liability provisions in the Federal law would not eliminate the necessity of continued compliance with the same requirements under a previously redundant state law. As a result, the change to new Federal requirements would have the effect of increasing the number of required disclosures and adding to the length of forms.

Regulatory Analysis of Revised Regulation Z, 46 Fed. Reg. 20,941, 20,949 app. A (1981). The same analysis concluded that since creditors would be prohibited from making disclosures using any preempted state term or form, "the practical effect would be to make it very difficult to use a combined contract and Federal Truth in Lending disclosure." Id.
hold up the Simplification bill (and thus the entire Depository Institutions Deregulation and Monetary Control Act, of which it was a part) unless the Senate conferees agreed to restore some form of itemization of the amount financed. The result is a provision requiring the creditor to disclose to the consumer that such an itemization is available on request. The clutter and potential format problems created by this disclosure of the right to more disclosure are bad enough. Worse, though, is that the statute requires that these itemization disclosures include prepaid finance charges. In truth, prepaid finance charges simply are not part of the amount financed, and it

157 The story of these maneuverings is related in Climo, Simplification and Reform of the Truth in Lending Act, J. Retail Banking, June 1980, at 55-56. See also note 51 supra.


159 New Regulation Z and the Board staff's commentary help matters in some degree. Creditors may give the itemization automatically, without having to disclose the consumer's optional right to request it. New Regulation Z, supra note 8, at 20,902-03 (to be codified in 12 C.F.R. § 226.18(c)); FRB Official Staff Commentary, supra note 42, at 50,328 (§ 226.18(c), comment 1). The consumer's request apparently may be by check-box despite the statute's requirement that the request be initialed. Compare New Regulation Z, supra note 8, at 20,902 (to be codified in 12 C.F.R. § 226.18(c)(2)), with 15 U.S.C. § 1638(a)(2)(B) (Supp. IV 1980). When creditors do give the itemization, it must be outside the federal box, New Regulation Z, supra note 8, at 20,901 (to be codified in 12 C.F.R. § 226.17(a)(1)), which means that creditors may be able to integrate it into other contract documents. For transactions subject to the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617 (1976), the statement of estimated settlement costs required under that Act will suffice as the itemization of amount financed under Regulation Z. New Regulation Z, supra note 8, at 20,902 n.39 (to be codified in 12 C.F.R. § 226.18(e) n.1).

But problems remain. Must the items constituting the amount financed be disclosed together elsewhere in the contract, or may those items be interspersed with other contract information or with state law disclosures? To what extent does this disclosure preempt only state law itemizations that may be more or less complete? May the creditor indicate mathematical relations among the items constituting the amount financed? This is especially important because with the inclusion of prepaid finance charges, see text accompanying notes 130-32 infra, the "itemization" just does not add up. Indeed, even a congressional staff counsel who worked extensively on the Simplification Act misunderstood the arithmetic. Explaining the itemization requirement, she concludes, "In addition, so that the itemized amounts equal the amount financed, there must also be a disclosure of the total amount of prepaid finance charges." Climo, supra note 127, at 58 (emphasis added).

150 15 U.S.C. § 1638(a)(2)(B)(iv) (Supp. IV 1980) calls for disclosure of "the total amount of any charges described in the preceding subparagraph (A)(iii)." That provision refers to "any charges which are part of the finance charge but which will be paid by the consumer before or at the time of the consummation of the transaction, or have been withheld from the proceeds of the credit." Id. § 1638(a)(2)(A)(iii).

151 The finance charge and the amount financed are mutually exclusive concepts: the finance charge represents the price paid for the use of a certain sum (the amount financed) over time. Prepaid finance charges are merely a subcategory, or component, of the finance charge. Both the revised Act and new Regulation clearly recognize the relationship by specifically requiring that any prepaid finance charge be subtracted from the principal in calculating the amount financed. Id. § 1638(a)(2)(A)(iii); New Regulation Z, supra note 8, at 20,902 (to be codified in 12 C.F.R. § 226.18(b)(3)). For example, if a consumer borrows $100,000 and the creditor charges the consumer two "points," which are withheld from the loan proceeds, the amount financed is $98,000, and the $2,000 worth of points is a prepaid finance charge.
borders on deception to itemize them as such.\textsuperscript{132} Perhaps the Federal Reserve or its staff could rectify this situation—one directly opposed to the spirit of TIL—by merely authorizing creditors to call this listing something other than "itemization of the amount financed," thus reducing the possibility that consumers will be misled. "Transaction disbursements" might be one alternative label, and there are undoubtedly other benign descriptions.

In sum, the original simplification goal of a reduced number of disclosures highlighted in a segregated "federal box" has been considerably diluted. The reforms, in this case, have not been artfully executed. The burden now shifts to the state legislatures to adjust their own disclosure laws to reduce redundancies and duplication. The burden shifts back to Congress, in this writer's view, to delete or amend the required itemization of the amount financed at the earliest opportunity.

III

PROBLEMS OF MARKET DYNAMICS

Some of the anomalies generated by the Simplification Act derive from the limitations inhering in the Act's assumptions about the purpose of disclosure and the nature of the credit market. Certain of the Act's provisions, though, also offer the opportunity to test these assumptions and, perhaps, to refine TIL regulation.

A. Timing of Disclosure

The stated goal of Truth in Lending disclosures is to influence consumer credit shopping behavior,\textsuperscript{133} yet, for closed-end transactions, TIL disclosure comes too late to do so.\textsuperscript{134} Under Truth in Lending, closed-end disclosures need not be given until "consummation" of the transaction.\textsuperscript{135} Because the disclosures are so transaction-

\textsuperscript{132} This writer has spoken to several experienced creditor attorneys who have wondered whether this itemization disclosure is meant to change the rules on computing finance charges and annual percentage rates. If they are uncertain, how will a typical consumer read the statement?

\textsuperscript{133} See text accompanying notes 23-24, 47-50 supra; note 50 supra.

\textsuperscript{134} See Landers & Rohner, supra note 4, at 715-16.

\textsuperscript{135} A credit transaction is consummated when the consumer becomes contractually obligated, Old Regulation Z, supra note 8, §§ 226.2(kk), 226.8(a); New Regulation Z, supra note 8, at 20,893, 20,901 (to be codified in 12 C.F.R. §§ 226.2(a)(13), 226.17(b)). In addition, Old Regulation Z provided for the use of estimates only when absolutely necessary at the last moment when timely disclosures could be made. Old Regulation Z, supra note 8, § 226.6(f).
specific, preparation of the disclosure statement must await the nego-
tiation of all transaction details. By then, however, the consumer is
psychologically committed to the transaction and unlikely to go credit
shopping.\textsuperscript{126}

The new Act and Regulation make some headway against this
problem, although difficulties persist. For one thing, they relax the
rules on credit advertising,\textsuperscript{137} so that creditors may now be more
willing to put specific credit features in their ads. The Act also re-
quires the Federal Reserve Board to experiment with the collection
and publication of annual percentage rates (APRs) for typical loan
transactions in selected standard metropolitan statistical areas.\textsuperscript{138}
These two innovations may increase the early flow of general price-
tag credit information to consumers.

A more significant change is the requirement of early transac-
tional disclosure in certain residential mortgage transactions. For
most such transactions the existing Real Estate Settlement Procedures
Act\textsuperscript{139} (RESPA) already requires the creditor to provide written "good
faith" estimates of settlement costs within three days after receiving a
consumer's application.\textsuperscript{140} Congress reasoned that it would be no
great burden for the creditor to provide estimated credit cost disclo-
sures at the same time,\textsuperscript{141} and TIL now provides for such early disclo-
sures in transactions subject to RESPA.\textsuperscript{142}

For transactions other than residential mortgages, the new Regu-
lation makes a subtle change that may encourage a form of early
disclosure. Although disclosures must still be given no later than con-
summation, creditors may now make estimated disclosures before
then, as long as the disclosures are "based on the best information
reasonably available" and are designated as estimates.\textsuperscript{143} Thus any
creditor is free to make TIL disclosures as soon as it is able to make
reasonable estimates about transaction terms.

\textsuperscript{126} See Landers & Rohner, supra note 4, at 715-16; Federal Reserve Board, Proposal to Revise
\textsuperscript{127} See 15 U.S.C. §§ 1663, 1664(d) (Supp. IV 1980); New Regulation Z, supra note 8, at
20,901, 20,905 (to be codified in 12 C.F.R. §§ 226.16, 226.24).
\textsuperscript{130} 24 C.F.R. § 3500.6(a) (1981).
\textsuperscript{132} 15 U.S.C. § 1638(b)(2) (Supp. IV 1980); see New Regulation Z, supra note 8, at 20,893,
20,903 (to be codified in 12 C.F.R. §§ 226.2(a), 226.19(a)).
\textsuperscript{133} See New Regulation Z, supra note 8, at 20,902 (to be codified in 12 C.F.R. § 226.17(c)(2));
note 148 infra.
An obvious question for both residential mortgages and other transactions is what happens if some of the credit terms change between the time of estimated disclosure and the consummation of the transaction. This is particularly problematic in mortgage transactions in which there may be a considerable delay between application and settlement, and in which the creditor's commitment may be tied to a rate prevailing at the time of settlement. New Regulation Z requires redisclosure in such a case, but only if the disclosed annual percentage rate changes by more than certain specified tolerances. If the APR changes, all changed terms (finance charge, schedule of payments, etc.) must be redisclosed; if only non-APR terms change, no new disclosure is called for.

Since these provisions are new, their impact is uncertain. One potential problem is that despite the "estimate" labels on early disclosures, consumers may rely on those figures and then be unhappily surprised when a higher rate is disclosed at settlement. Moreover, if the change is in non-APR terms, such as the prepayment penalty or the payment schedule, no new disclosure has to be given, and consumers might legitimately complain they were sandbagged by the earlier estimates. Thus, the early disclosures could have a potentially deceptive effect if there are significant changes at consummation.

More constructively, creditors might devise a form of early disclosure that will obviate the need for precise disclosures at consummation. In the first draft of New Regulation Z, the Federal Reserve Board did propose an "alternate shopping disclosure" device that, essentially, would have permitted creditors to comply with TIL by issuing preprinted flyers describing the credit terms for a typical array of transactions. Even though this novel proposal did not reappear explicitly in the second draft or in the final version of the Regulation, the new Regulation Z may implicitly authorize it. Consider this

144 New Regulation Z, supra note 8, at 20,902, 20,903 (to be codified in 12 C.F.R. §§ 226.17(f), 226.19(b)).
145 See FRB Official Staff Commentary, supra note 42, at 50,333 (§ 226.19(b), comment 2).
146 45 Fed. Reg. 29,702, 29,726 (1980) (proposed § 226.11(h)).
147 45 Fed. Reg. 80,648 (1980). The Board noted that the great majority of the comments on the proposal were negative, then added:
In view of these comments, the Board is eliminating the concept of alternate shopping disclosures from the regulation. The Board remains committed to enhancing the credit-shopping function of the act by encouraging early disclosure of credit terms. However, the Board believes that this commitment can be carried out by several less dramatic means, which are reflected in the new proposal. Among the revisions which should encourage early disclosure are the more flexible rules regarding the timing of disclosures and the use of estimates.
Id. at 80,676.
possibility: an auto dealer prepares flyers or brochures showing various balances to be financed and disclosing the APR and other pertinent terms. As soon as a prospective customer indicates the approximate amount to be financed, the dealer hands the customer the flyer that contains all the necessary disclosures for such a transaction. As long as the APR does not vary (and in many cases it will be a constant), the dealer has fully satisfied his Truth in Lending responsibilities even though the consummated deal may be based on a smaller or larger amount financed, or on a different payment schedule.\textsuperscript{148} By using preprinted flyers, the creditor might easily avoid the violations involved in computing specific transactional figures; consumers, meanwhile, would receive early disclosures, accurate in all respects, for transactions approximately like the ones they eventually enter.

From its inception, a basic weakness of Truth in Lending has been that closed-end disclosures come too late to influence consumer shopping in that transaction.\textsuperscript{149} It is doubtful that the changes in the new Regulation can dramatically alter this fact. The combination of mandatory early disclosure for residential mortgage transactions, optional estimated disclosures in other transactions, and the limited requirements for redisclosure, however, may present the first real opportunities to assess TIL's usefulness as a shopping tool. In so doing, it should refine our understanding of the inherent limitations of credit disclosure statutes.

\section*{B. Open-end Credit Redefined}

The distinction between "open-end" and "closed-end"\textsuperscript{150} credit is basic to Truth in Lending; wholly different disclosure rules apply to

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\textsuperscript{148} The Official Staff Commentary lends further support to this possible practice by stressing the creditor's flexibility:

Disclosures may be estimated when the exact information is unknown at the time disclosures are made. Information is unknown if it is not reasonably available to the creditor at the time the disclosures are made. The "reasonably available" standard requires that the creditor, acting in good faith, exercise due diligence in obtaining information . . . . The creditor normally may rely on the representations of other parties in obtaining information. For example, the creditor might look to the consumer for the time of consummation. . . . The creditor may utilize estimates in making disclosures even though the creditor knows that more precise information will be available by the point of consummation.

FRB Official Staff Commentary, supra note 42, at 50,324 (§ 226.17(e)(2), comment 1).

\textsuperscript{149} See generally Landers & Rohner, supra note 4, at 715-37; Whitford, supra note 4, at 405-35.

\textsuperscript{150} Since 1969, Regulation Z has defined only "open-end credit," leaving all other credit arrangements to be called "other than open-end credit." The new Regulation finally dignifies the universally used term "closed-end credit" with its own definition. New Regulation Z, supra note 8, at 20,893 (to be codified in 12 C.F.R. § 226.2(a)(10)).
each. The closed-end rules emphasize aggregate credit costs for a fixed-term, one-time transaction, whereas the open-end disclosures stress the factors that may influence the charges periodically imposed on a continuing, replenishing line of credit.

The original Regulation Z definition of open-end credit focused on the revolving nature of the account: the consumer had to be able to "make purchases or obtain loans, from time to time," and the creditor was permitted to compute a finance charge from time to time on an outstanding unpaid balance. That regulatory definition also added a criterion not specifically required by the statute, namely that the customer "has the privilege of paying the balance in full or in installments." This formulation adequately separated credit-card and related open-end plans from more conventional closed-end financing, and only a few noteworthy issues surfaced.

One issue that did arise was operational: could a creditor characterize an account as open-end but still reverify the customer's credit history before each use of the account? When the Federal Reserve Board staff authorized this practice, many institutional lenders began designating their plans as open-end, providing a maximum line of credit the consumer could draw upon through a simple voucher technique without the need for a formal reapplication or for a formal consolidation or refinancing. Creditors thereby eased their paperwork burdens yet retained control over subsequent advances. The new Act codifies the creditor's ability to verify a customer's credit information from time to time without destroying the open-end character of the account.

A second concern was that certain creditors were offering ostensively open-end lines of credit in circumstances in which continuing or repeated business with the same customers in fact was very doubtful. For example, sellers of pianos, or encyclopedias, or similar "big-ticket" transactions sometimes made open-end disclosures. The Federal Trade Commission urged Congress to prohibit such "spurious" use of open-end plans, since consumers were being deprived of important information about the transaction when creditors made improper open-end disclosures. In particular, the consumer was

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151 Old Regulation Z, supra note 8, § 226.2(x)(1).
152 Id. § 226.2(x)(3).
153 Id. § 226.2(x)(2).
156 Simplification Hearings, supra note 39, at 131-32, 135-36 (statement of Lewis H. Goldfarb).
157 Id. at 132.
not told the total finance charge, the total of payments, or the de-
ferred payment price.\textsuperscript{158}

The result was an amended statutory definition in which credit is
"open-end" if the creditor "reasonably contemplates repeated trans-
actions."\textsuperscript{159} This criterion, emphasizing the creditor's state of mind,
should help eliminate the feigned use of open-end disclosures in trans-
actions that are pretty clearly one-shot deals. Yet this attack on spu-
rious open-end credit plans could leave as many questions unanswered
as it resolves. Congress apparently expected that the new provision
would prohibit open-end disclosures for nonrepetitive, big-ticket pur-
chases like automobiles or home improvements.\textsuperscript{160} The Federal Re-
serve, however, focuses not on individual purchases but on whether
the credit plan is likely to involve repeat business. In some cases the
two approaches lead to the same result, but in others they do not. The
Board's definition is susceptible to a reading that diverges somewhat
from congressional understanding. The revised regulatory definition
emphasizes that an entire credit "plan" may be open-end even though
only portions of it will be reused.\textsuperscript{161} For example, a financial institu-
tion might offer a combined credit plan including a general-purpose
credit card, cash advances, check overdraft privileges, and a credit
line available for automobile credit or other more occasional transac-
tions such as educational loans or even home mortgages. If the credi-
tor "reasonably contemplates" repeat business under one or more of
the subplans, the entire account, including the big-ticket auto and
mortgage loans, could be handled through open-end disclosures.

This opportunity to use open-end disclosures for combined credit
plans is apparently not limited to banks, credit unions, and other
depository institutions. Finance companies regularly anticipate repeat
business through refinancings, consolidations, new advances and the
like, and these companies have recently been expanding their array of
credit services.\textsuperscript{162} There is no reason their plans could not properly be

\textsuperscript{158} Id.

\textsuperscript{159} 15 U.S.C. § 1602(i) (Supp. IV 1980); see New Regulation Z, supra note 8, at 20,893 (to be
codified in 12 C.F.R. § 226.2(a)(20)(i)).

In addition, Congress intended to proscribe open-end disclosures for door-to-door sales and for
purchases away from home—transactions also unlikely to be repeated. Id. But see 124 Cong.
Rec. 13,149 (1978) (remarks of Sen. Schmitt) (Act does not "require retailers to quiz their credit
applicants in order to find out how often they intended to make purchases under the plan.").

\textsuperscript{161} The Board staff's commentary observes: "The creditor must expect repeated dealings with
the consumer under the credit plan as a whole, and need not believe the consumer will reuse a
particular feature of the plan." FRB Official Staff Commentary, supra note 42, at 50,594 (§
226.2(a)(20), comment 3).

open-end. Indeed, even more specialized retailers, such as appliance, furniture, or jewelry stores, may "reasonably" expect to have customers return for accessories, additions, or replacements.\footnotemark[163]

Thus, as institutions broaden their range of services, it is easy to visualize a substantial shifting of credit plans from conventional closed-end arrangements to the more fluid open-end pattern, resulting in a decline of closed-end plans available to consumers. Consumer transactions that Congress expected to be accompanied by closed-end disclosures will therefore require only open-end ones. In this instance, however, the anomaly results from Congress' failure to appreciate fully the changing nature of the credit market. The Federal Reserve Board appears more attuned to the seemingly inevitable shifts that will occur as institutional creditors create more imaginative combinations of financial services, and as banks and other depositories consolidate credit and electronic fund-transfer plans.

As a matter of policy, moreover, the absorption of most traditional closed-end credit transactions into open-end plans is not cause for mourning. Although open-end disclosures lack some of the precision and aggregate totals that closed-end disclosures provide,\footnotemark[164] the recurring nature of open-end disclosures through periodic statements\footnotemark[165] and mandatory change-of-terms notices\footnotemark[166] may provide consumers with a better continuing picture of their credit transactions. This would be particularly true if consumers think of their credit obligations less as a collection of one-time, fixed-term arrangements and more as a stream of variable financial commitments that they can modulate from time to time with the aid of Truth in Lending's open-end disclosures.

163 The Board staff, though, indicates that it would be "more reasonable" for a thrift institution (such as a credit union) to contemplate repeat transactions, and thus to use open-end disclosures, than for an aluminum siding seller to do so. See FRB Official Staff Commentary, supra note 42, at 50,294 (§ 226.2(a)(20), comment 3). Since the statute and Regulation require only that the creditor "reasonably contemplate" repeat business, 15 U.S.C. § 1602(o) (Supp. IV 1980); New Regulation Z, supra note 8, at 20,893 (to be codified in 12 C.F.R. § 226.2(a)(20)(i)), it is unclear why the Board staff introduces relative reasonableness in the commentary. Even if, by inference, it is less reasonable for, say, a piano seller to expect repeat business than it would be for a bank, does that make it unreasonable? What of future needs for a piano bench, piano light, tuning, and sheet music? 164 See text accompanying notes 156-58 supra.


166 Id. at 20,897 (to be codified in 12 C.F.R. § 226.9(c)).
IV

THE LIMITS OF DISCLOSURE: TRUTH IN LENDING AND VARIABLE RATES

The new provisions for early disclosure and open-end credit, though not without their problems, stretch the boundaries of consumer protection somewhat. However, an increasingly important form of credit offering, floating or variable rate transactions, reveals the limits of disclosure reform for consumer protection.

In variable rate lending, instead of a fixed rate and a fixed amortization schedule, the interest rate is adjusted from time to time. As the rate changes, so does the payment schedule, the total of payments, and the overall transaction costs. The rate changes are generally pegged to an independent index not controlled by the lender, and therefore are subject to the volatility of whatever market produces this index. Adjustable rates have thus far been found primarily in home mortgages, although they theoretically could be used in any form of credit transaction, including conventional installment loans or open-end plans.

In the mortgage market, lenders have been successful in getting regulatory agencies to grant them authority to make variable rate loans. As of mid-1981, all national banks and all federal savings and loan associations (plus federal mutual savings banks) are authorized to make a wide range of variable rate mortgages. Federal credit unions now have equivalent authority. State-chartered depository institutions and other mortgage lenders often have comparable variable rate lending authority under state law. Federal legislation preempting state usury ceilings for first-lien residential mortgages has further enhanced financial institutions' ability to offer variable

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167 See note 18 supra.
168 Creditors can see the potential for variable rate lending beyond mortgages. See, e.g., Sale, Floating Rate Installment Loans: An Option for Increased Profitability, J. Retail Banking, Sept. 1980, at 1. New Regulation Z clearly contemplates variable-rate open-end credit. New Regulation Z, supra note 8, at 20,896 n.12 & 15 (to be codified in 12 C.F.R. §§ 226.6(a)(2) n.2, 226.7(d) n.2).
171 The National Credit Union Administration has finalized regulations to authorize adjustable rate lending by federal credit unions. 46 Fed. Reg. 38,669 (1981) (to be codified in 12 C.F.R. § 701.21-6B).
rate loans. The policy debate swirling around these alternatives to conventional mortgages has centered on their general desirability as a response to restricted mortgage funds, and on the need for substantive consumer protections such as limits on the amount of rate changes, as well as on the question of disclosure.

For purchase money mortgages in particular, which have always been structured as closed-end transactions under Truth in Lending, the disclosure paradox is self-evident: How is it possible to disclose specific transactional costs that enable the consumer to compare mortgage offerings when those costs are inherently unknowable and unpredictable? What possible shopping role can Truth in Lending disclosures play in a market increasingly dominated by credit arrangements whose most critical term—the price—is beyond calculation or control?

That the generic description “variable rate” can encompass myriad transaction types provides a further stumbling block for disclo-


176 The dilemma has been more colorfully described:

To understand a variable rate mortgage a consumer would need to take four people to the loan closing—a lawyer to explain the terminology; an accountant to calculate the closing costs; a soothsayer to predict the future; and a holy man to pray that the interest rates do not escalate rapidly.


177 See generally Comptroller General's Report, supra note 174. An earlier regulation of the Federal Home Loan Bank Board (FHLBB), for example, approved mortgage transactions in which, by contract, the rate was adjustable each year by reference to the FHLBB's cost-of-funds index. Federal Home Loan Bank Board, Final Rule on Variable Rate Mortgages, 44 Fed. Reg. 32,199, 32,201 (1979). Renegotiable rate mortgages ("rollovers") also were approved by the FHLBB; these contemplated a short-term obligation (three to five years), but with payments amortized over a full 25- or 30-year mortgage term; as the balloon obligation within each rollover period came due, the lender would refinance that balloon at prevailing rates. Federal Home Loan Bank Board, Final Rule on Renegotiable Rate Mortgage Instruments, 45 Fed. Reg. 24,108 (1980). Each of these approved mortgage forms contained restrictions on the amount and frequency of step increases and the total amount of rate increase over the life of the mortgage. The variable rate mortgage regulation permitted rate changes of no more than one-half of one percent a year, with a maximum net increase of 2.5% over the life of the loan. 44 Fed. Reg. at 32,201. The renegotiable rate mortgage regulation, by contrast, authorized aggregate increases up to five percent over the life of the mortgage. 45 Fed. Reg. at 24,111.

The most recent regulations of the Comptroller of the Currency (OCC) and of the FHLBB have authorized broader and less-restricted forms of variable rate mortgage, including mortgages with negative amortization features. (In negative amortization transactions, the installment payments do not cover the full interest charge for the period. The unpaid interest then is added to the unpaid loan principal. The effect is that the loan balance increases rather than

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sure. Different mortgage offerings may be tied to different indexes and have different rate-change intervals, options for payment-schedule adjustment, conditions for refinancing, minimum or maximum caps on rate changes, base-rate formulas, or rate-adjustment carry-over provisions. Negative amortization features may be explicitly built in, or may merely be contingent on the rate index or on the decreases over time.) The FHLBB’s current regulation on Adjustable Mortgage Loan Instruments imposes no limitations on the amount or frequency of rate changes, and permits unlimited negative amortization as long as payments are rescheduled to pay off the obligation within 40 years. FHLBB Final Rule, supra note 170, at 24,152 (to be codified in 12 C.F.R. § 545.6-4a).

The regulations of the OCC are more restrictive. Rate increases are held to two percent per year, with no single adjustment of more than five percent allowed; there is no cap on the total rate adjustment over the life of the loan, but the regulation does limit the maximum amount of negative amortization. OCC Mortgage Rule, supra note 169, at 18,943-44 (to be codified in 12 C.F.R. § 29.4).

Yet another form of variable rate mortgage recognized in the Federal Reserve Board staff’s commentary on Regulation Z is the “shared appreciation” loan, whereby (in exchange for a reduced contract rate) the consumer agrees to share with the lender some portion of the appreciated value of the home when it is sold. See FRB Official Staff Commentary, supra note 42, at 50,329 (§ 226.18(f), comment 5). Loans with capped monthly payments but a “floating” rate also have been initiated in several areas. The most publicized has been the “Wachovia plan,” initiated by a North Carolina bank in 1980. See Hill, supra note 18, at 20.

The OCC’s regulation stipulates that national banks must use one of three indexes. OCC Mortgage Rule, supra note 169, at 18,943 (to be codified in 12 C.F.R. § 29.4). The Home Loan Bank Board authorizes four specific indexes, but also permits “any interest-rate index” as long as it is “readily verifiable by the borrower and is beyond the control of the association.” FHLBB Final Rule, supra note 170, at 24,152 (to be codified in 12 C.F.R. § 545.6-4a(e)(2)).

National banks may adjust either the amount of installment payments or the rate of amortization, or both, so long as payments are adjusted at least every five years to permit the loan to be fully repaid within a 30-year term. OCC Mortgage Rule, supra note 169, at 18,944 (to be codified in 12 C.F.R. § 29.5(d)). Federal savings and loan associations may implement rate adjustments in any fashion so long as the loan is repayable within 40 years. FHLBB Final Rule, supra note 170, at 24,152 (to be codified in 12 C.F.R. § 545.6-4a(b)(1)).

To facilitate sale of mortgages in the secondary market, lenders want all mortgage loans made during a given period to be subject to rate adjustment at the same time and with reference to the same base rate. This led the Home Loan Bank Board to include in its (now repealed) renegotiable rate mortgage regulation permission to treat all mortgages made within a six-month period as controlled by the index rate at the end of that period. See 45 Fed. Reg. 24,105, 24,111 (1980). This was severely criticized, see, e.g., Letter from Rep. Benjamin S. Rosenthal to Hon. John Dalton, Acting Chairman, FHLBB (Dec. 31, 1980) (on file at New York University Law Review). The current FHLBB and OCC regulations bar the use of a base rate set after loan consummation, but permit lenders to extend the first rate-adjustment date so that mortgages may be “grouped” thereafter. See OCC Mortgage Rule, supra note 169, at 18,937; FHLBB Final Rule, supra note 170, at 24,151.

The OCC’s regulation specifically permits lenders to carry over unused changes in the index into subsequent rate adjustment periods. OCC Mortgage Rule, supra note 169, at 18,943 (to be codified in 12 C.F.R. § 29.5(e)(4)). Because the Bank Board sets no limits on rate adjustments, and lenders are free to decline to impose rate increases when otherwise due, there apparently is an implicit carry-over authorization for federal savings and loan associations. FHLBB Final Rule, supra note 170, at 24,152 (to be codified in 12 C.F.R. § 545.6-4a(c)(1)).

See note 177 supra.
consumer’s election. With all these possible combinations of variables, disclosure to allow side-by-side comparison of alternative mortgages becomes virtually impossible—at least if the goal is to permit consumers to make knowing distinctions among mortgage alternatives, and to choose the mortgage form that best suits them.183

The disclosure rules for variable rate transactions under the new Regulation Z can best be described as tentative or sketchy, perhaps even embryonic. This is somewhat understandable for several reasons. First, the Federal Reserve Board’s earlier attempts to specify variable rate disclosures were extremely limited and clumsy;184 the Truth in Lending statute itself does not even mention variable rates, and thus provides the Board with no statutory guidance. Second, the Board is aware that variable rate loans are new and untested and that the agencies promoting them are seeking “broad flexibility”185 for institutional lenders. These agencies acknowledged that comments from lenders had urged that disclosures be kept simple so as not to inhibit the growth of these types of mortgages.186

For variable rate, closed-end transactions, Regulation Z requires the creditor to disclose: “(1) The circumstances under which the [annual percentage] rate may increase; (2) Any limitations on the in-

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183 Although the possible permutations for variable-rate instruments are virtually unlimited, secondary market investors may impose a measure of standardization on mortgage offerings by their usually cautious investment policies. For example, in May 1981, the Federal Home Loan Mortgage Corporation (FHLMC) announced a “pilot program” to purchase mortgages with rates adjustable annually by at least two percent; but FHLMC will not, under that program, purchase mortgages with negative amortization or extended-term features. See FHLMC Sets Guides on Mortgages, Washington Post, May 29, 1981, § D, at 1, col. 1. The other major secondary market investor, the Federal National Mortgage Association (Fannie Mae) announced in June 1981 that it would soon begin purchasing eight different varieties of adjustable rate mortgages. See U.S. Agency Clears Way for Sale of Adjustable-Rate Mortgages, Washington Post, June 26, 1981, § A, at 1, col. 2.

184 The Board had issued an interpretation calling for the disclosure of any variable rate feature, 34 Fed. Reg. 11,083 (1969) (codified in 12 C.F.R. § 226.810 (1970) (repealed 1977)), before the effective date of Old Regulation Z. Not until 1977 did the Board amend Regulation Z to call for explicit variable rate disclosures, including an example reflecting a hypothetical increase of one-quarter of one percent based on the original amount financed (a most implausible hypothetical!). Old Regulation Z, 12 C.F.R. § 226.8(b)(8) (1981). After the Bank Board issued its regulation on renegotiable rate mortgages, the Federal Reserve Board staff announced that such mortgages could be disclosed either as variable rate mortgages under the disclosure rule just cited, or as balloon obligations subject to the old Regulation, Old Regulation Z, supra note 8, § 226.8(b)(3). Federal Reserve Board Official Staff Interpretation No. FC-0172, [1980] 5 Cons. Cred. Guide (CCH) ¶ 31,875, at 67,050. For further background, see Landers & Chandler, The Truth in Lending Act and Variable-Rate Mortgages and Balloon Notes, 1976 Am. B. Foundation Research J. 35.

185 The Federal Home Loan Bank Board’s words. FHLBB Final Rule, supra note 170, at 24,148.

186 See, e.g., OCC Mortgage Rule, supra note 169, at 18,940 (OCC); FHLBB Final Rule, supra note 170, at 24,150 (FHLBB).
crease; (3) The effect of an increase; and (4) An example of the payment terms that would result from an increase.\textsuperscript{167} The Board staff's commentary explains\textsuperscript{168} that the "circumstances" would include identification of the index to which the rate is tied, plus events that may trigger an increase (time intervals, minimum movement of the index, etc.). "Limitations" refers to caps on periodic increases and on aggregate increases over the term of the loan, but does not include usury ceilings.\textsuperscript{189} The "effect" of an increase would be an adjustment to the number or amount of payments.\textsuperscript{189} The "hypothetical example" may be either general or transaction-specific.\textsuperscript{191} This would allow the creditor to show, for example, either what a presumed increase would do to a hypothetical mortgage, or what it would do to the consumer's specific loan.

But consider the possibly critical information that this rule does \textit{not} require to be disclosed. There is no disclosure of the historical movement of the index used, or any mention of where and how the consumer can verify that index. There is no indication of the base rate from which index fluctuations will be measured, which is not necessarily the same as the contract rate.\textsuperscript{192} The rule does not require new disclosures at or before the time rate changes are implemented to alert the consumer to possible payment schedule changes. Nor is there any explanatory information to warn the consumer that an increase in the number of payments is more costly than an increase in the amount of payments. Consumer proponents have argued vehemently that creditors be required to include a "worst case" hypothetical\textsuperscript{193} to depict the maximum possible increase and its consequences. Regulation \textit{Z}, however, does not require this information, probably in part because of the difficulty of determining what the worst scenario could be for

\textsuperscript{167} New Regulation \textit{Z}, supra note 8, at 20,903 (1981) (to be codified in 12 C.F.R. § 226.18(f)).
\textsuperscript{168} FRB Official Staff Commentary, supra note 42, at 50,330 (§ 226.18(f)(1), comment 1).
\textsuperscript{169} Id. (§ 226.18(f)(3), comment 1).
\textsuperscript{170} Id. (§ 226.18(f)(3), comment 1).
\textsuperscript{171} Id. (§ 226.18(f)(4), comment 1).
\textsuperscript{172} See note 180 supra.
\textsuperscript{189} Id. (§ 226.18(f)(2), comment 1).
\textsuperscript{189} See note 180 supra.
loans with no rate-change cap, or with negative amortization or shared appreciation features.\textsuperscript{104}

Even if all this information were added to the disclosures, it would merely provide a sharper picture of how \textit{that} mortgage works. It would say nothing about other variable rate plans, nor indicate whether that lender offers alternative terms. Furthermore, and all too obviously, even if such comparative data were included, none of it would reveal how the rate index for any of the mortgage alternatives would actually behave in the future.

Recent regulations issued by the Office of the Comptroller of the Currency (OCC) and the Federal Home Loan Bank Board (FHLBB) contain rather extensive disclosure rules of their own.\textsuperscript{105} These rules would supply some of the information suggested above. They may, however, create new problems of synchronization with New Regulation Z. Both agencies require that the consumer be told where the index can be found and verified and require some historical data about its movement.\textsuperscript{106} Both require advance notices before a rate change is implemented.\textsuperscript{107} Both regulations include a model disclosure statement whose use is mandatory in the case of the FHLBB\textsuperscript{108} and optional in the case of the OCC.\textsuperscript{109} Although the regulations differ sharply in the substantive constraints they impose on variable rate transactions, their approaches to disclosure are similar. Problems surface, however, when these disclosure mechanisms are aligned with those of Regulation Z.

\textsuperscript{104} In the first draft proposal for revised Regulation Z, the Federal Reserve Board did not require a hypothetical example. 45 Fed. Reg. 29,702, 29,747-48 (1980) (proposed § 226.11(b)(5)). The second draft proposal reinstated essentially the same language that now appears in the final version, and the Board explained: "In view of the enormous variety in variable rate provisions, the Board does not believe that any specific requirement in the regulation will necessarily reflect the best example for a particular creditor's plan." 45 Fed. Reg. 80,648, 80,681 (1980).

\textsuperscript{105} OCC Mortgage Rule, supra note 169, at 18,944-45 (to be codified in 12 C.F.R. § 29.8) (OCC); FHLBB Final Rule, supra note 170, at 24,152-53 (to be codified in 12 C.F.R. § 545.6-4a(f)) (FHLBB).

\textsuperscript{106} OCC Mortgage Rule, supra note 169, at 18,944 (to be codified in 12 C.F.R. § 29.8(a)) (OCC); FHLBB Final Rule, supra note 170, at 24,152 (1981) (to be codified in 12 C.F.R. § 545.6-4a(c)(2), (e)) (FHLBB).

\textsuperscript{107} OCC Mortgage Rule, supra note 169, at 18,944 (to be codified in 12 C.F.R. § 29.8(b)) (OCC); FHLBB Final Rule, supra note 170, at 24,152 (to be codified in 12 C.F.R. § 545.6-4a(c)(2)) (FHLBB).

\textsuperscript{108} FHLBB Final Rule, supra note 170, at 24,152-53 (to be codified in 12 C.F.R. § 545.6-4a(f)).

\textsuperscript{109} OCC Mortgage Rule, supra note 169, at 18,944, 18,945-46 (1981) (to be codified in 12 C.F.R. § 29.8(a) & app.).
Although Regulation Z specifically says that disclosures made under other agency regulations "may be substituted for" the variable rate disclosures required under Regulation Z, there is some possible friction regarding the timing of these disclosures. TIL disclosures are not required until three days after application (for transactions also subject to the Real Estate Settlement Procedures Act), or until consummation. The OCC's regulation stipulates that its disclosure must be given when the bank supplies a loan application form or other written information concerning mortgage loans; the FHLBB disclosures are due "at the time of receipt of an application, or upon request." Presumably there is no problem if the "substituted" disclosures are given earlier than legally necessary under Regulation Z. But if the OCC or FHLBB disclosures are in fact to substitute for those mandated by Regulation Z, they would probably have to be given separately, yet apparently still be subject to other Regulation Z constraints such as the requirement that any "estimated" disclosure be so designated.

Other problems of format arise. Except for the "hypothetical example," the variable rate disclosure under Regulation Z must be within the federal box. But this is patently impossible if OCC or FHLBB disclosures are given separately at the time of application. Implicitly at least, Regulation Z must authorize placing the substituted disclosures outside the box; otherwise a creditor would have to be prepared to give complete Truth in Lending disclosures at the time it hands out application forms, which is also patently impossible. Further, the OCC and FHLBB disclosures will be lengthy, multipage documents, which seems incompatible with Regulation Z's "clear and conspicuous" requirement. In addition, these disclosures may use terminology inconsistent with that of TIL (e.g., "interest rate" vs. "annual percentage rate"). Do these inconsistencies make a difference? The Federal Reserve Board staff's commentary may need to clarify these issues sooner rather than later.

More startling is the fact that incorrect disclosures under the OCC and FHLBB regulations will apparently carry Truth in Lending

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200 New Regulation Z, supra note 8, at 20,903 n.43 (to be codified in 12 C.F.R. § 226.18(f) n.5).
201 Id. at 20,903 (to be codified in 12 C.F.R. § 226.19(a)); see text accompanying notes 139-42 supra.
202 New Regulation Z, supra note 8, at 20,901-02 (to be codified in 12 C.F.R. § 226.17(b)).
203 OCC Mortgage Rule, supra note 169, at 18,944 (to be codified in 12 C.F.R. § 29.8(a)).
204 FHLBB Final Rule, supra note 170, at 24,152 (to be codified in 12 C.F.R. § 545.6-4a(f)).
205 See text accompanying note 143 supra.
206 New Regulation Z, supra note 8, at 20,901 (to be codified in 12 C.F.R. § 226.17(a)(1)).
penalties. Clearly, failure to give any variable rate disclosure would be a Truth in Lending violation subject to penalty, but what if the substituted disclosure is merely incomplete or inaccurate in some detail? May the affected consumer recover the minimum civil penalties, or may the appropriate supervisory agency seek reimbursement for understated annual percentage rates? The Board staff's commentary indicates that transactions subject to variable rate disclosure rules of other agencies are “exempt” from the Regulation Z variable rate disclosures, but only if the creditor “has complied” with those other rules. A literal construction is that only information fully and properly disclosed under other agency regulations is sufficient to replace the Regulation Z disclosures; anything less constitutes a TIL violation.

In any case, prescinding from the mass of disclosure detail, how much can be expected from disclosure about variable rate transactions? Without giving each consumer a considerable volume of explanatory materials and the aid of an experienced economic forecaster, it is impossible to believe that consumers will grasp more than the rough outlines of the risks a variable loan entails. Even if comparative information about the array of mortgage options in a given market is broadly disseminated on a voluntary basis, consumers will be hard-pressed to compare one lender's offering to another's. Possibilities for substantive abuse will continue: creditors may select particularly favorable indexes, manipulate shared appreciation or negative amortization features to steal the homeowner's equity, or impose payment-schedule adjustments that entail real financial hardship for consumers. Just as Professor Kripke could argue in 1969 that Truth in Lending would not eradicate consumer fraud, so it can be said today that variable rate disclosures cannot solve the problems or avoid the dangers that lurk in variable rate lending in the 1980's. Most certainly, variable rate disclosures will do nothing for the poor and the almost-poor who are excluded from the housing market not by...
variable rates, but simply by high rates. No matter how well wrought, reforms like the Simplification Act cannot overcome the inherent limits of disclosure in the face of the realities of the consumer credit marketplace.

**Conclusion**

For better or worse, Truth in Lending has been simplified. Some disclosure detail has been dropped, some critical terms redefined, some troublesome court interpretations mooted. The Federal Reserve Board’s role as interpreter of Regulation Z has been solidified, but it promises to do less interpretation. Openings may be created for imaginative early disclosure and for the expanded use of open-end plans.

Some of these reforms promise to extend the protection credit disclosure can offer. Others, such as the requirement of segregating disclosures in a federal box, already cry out for further reform. More importantly, perhaps, changes in the credit marketplace—for example, the rise of variable rate transactions—will generate new disclosure problems and, also, further test the utility of disclosure as a tool for facilitating credit shopping.

It should therefore not be surprising if, after a respectable period, a movement to resimplify Truth in Lending gets seriously underway.\(^{212}\) One can only suggest that reform this time proceed on a sounder empirical base and be tailored to a clear view of the purposes of credit disclosure.\(^{213}\)

\(^{212}\) The wait may not be very long. Senator Jake Garn (R.-Utah), present Chairman of the Senate Banking Committee, has indicated his dissatisfaction with the Simplification Act and his desire to “truly simplify truth in lending.” 124 Cong. Rec. 13,152 (1978). True to his word, Senator Garn has introduced a bill containing new Truth in Lending amendments. S. 1720, 97th Cong., 1st Sess. §§ 703-709, 127 Cong. Rec. S11,255, S11,265-69 (daily ed. Oct. 7, 1981). Among other things, the proposed amendments would eliminate the “arranger” concept from the Act altogether, and would substantially expand the scope of the Act’s preemption of state disclosure laws. Id. §§ 703, 704, 127 Cong. Rec. at S11,168.

\(^{213}\) See note 4 supra.