

# EMPIRICAL AND BEHAVIORAL CRITIQUES OF MANDATORY DISCLOSURE: SOCIO-ECONOMICS AND THE QUEST FOR TRUTH IN LENDING

*Matthew A. Edwards*<sup>†</sup>

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<sup>†</sup> Assistant Professor, Department of Law, Zicklin School of Business, Baruch College (CUNY). J.D., 1993, NYU School of Law. Kenneth Dreifach, Patricia McCoy, Jonathan Nash, Eric Posner, Elizabeth Renuart, and Jeff Sovern provided many valuable comments on earlier drafts of this article. Patricia McCoy, who was particularly generous with her time, deserves a special expression of gratitude. All errors are my own.

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## INTRODUCTION

Anyone who has used a credit card, taken out a mortgage or a home equity loan, or borrowed money to purchase a car knows one simple fact about U.S. consumer law: mandatory disclosure has become the primary Federal mechanism for regulating the consumer credit market.<sup>1</sup> The physical evidence can be found across the country—our desk drawers, file cabinets, and garbage cans<sup>2</sup> overflow with unread, prolix explanations of our legal rights and contractual obligations as consumer credit borrowers. This preference for regulating through disclosure might be seen as either desirable public policy or evidence of pathology in the U.S. political system.<sup>3</sup> In either case, this regulatory approach embodies the acceptance of a view of consumer law and credit markets influenced by the economics of information. From this perspective, government

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<sup>1</sup> See Thomas A. Durkin & Gregory Elliehausen, *Disclosure as a Consumer Protection*, in THE IMPACT OF PUBLIC POLICY ON CONSUMER CREDIT 109, 110 (Thomas A. Durkin & Michael E. Staten, eds., 2002) (observing that “mandatory disclosure has become the main financial consumer-protection approach in the United States at the federal government level”); Griffith L. Garwood, Robert J. Hobbs, & Fred H. Miller, *Consumer Disclosure in the 1990’s*, 9 GA. ST. L. REV. 777, 777 (1993) (noting the pervasiveness of disclosure in consumer protection law). For several examples, see *infra* notes 17, 49.

Of course, there are other areas of law where the disclosure approach is utilized heavily, most notably, securities regulation. See Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023, 1023 (2000) (“Mandatory disclosure is a — if not the — defining characteristic of U.S. securities regulation.”); Troy Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 421 n. 11 (2003) (noting that literature on mandatory disclosure in securities law is “voluminous” and collecting leading works on the subject); Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity*, 2004 U. ILL. L. REV. 1, 11 (2004).

<sup>2</sup> See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 234 (2002) (“One need look no further than the credit cards within one’s wallet and dig up the documentation that corresponds to each credit card, either in a file or garbage can somewhere, to discover that one has entered into a contract without knowing *all* of the terms.”).

<sup>3</sup> See Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 814-15 (2003) (“[C]onsumer activists complain the industry uses meaningless disclosure rules to deflect legislative pressure for more substantive consumer protections such as interest rate caps and generous bankruptcy discharge provisions.”) (citing Kathleen E. Keest, *Whither Now? Truth in Lending in Transition — Again*, 49 CONSUMER FIN. L. Q. REP. 360, 360 (1995)); Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 234-35 (1991) (“Our penchant for disclosure laws is in part a political compromise and in part a collective neurosis, but it is also an artifact of the current methodology of statutory design.”).

regulators are responding to a form of market failure<sup>4</sup> that economists refer to as an information asymmetry—a severe imbalance of information between parties to an exchange.<sup>5</sup> In response to such purported market failures,<sup>6</sup> the government mandates the disclosure of information to reduce asymmetries and restore competitive balance (however defined) to the marketplace. Thus, mandatory disclosure laws implicitly accept the power of markets to satisfy consumer desires, while reflecting the legislative understanding<sup>7</sup> that forces of many kinds may impede the efficient or competitive operation of the market for a particular good. Such solutions comport with the teachings of law and economics scholars who long have expressed a preference for informational remedies to informa-

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<sup>4</sup> See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 44-47 (4th ed. 2004) (describing four sources of market failure: monopoly and market power, externalities, public goods, and severe informational asymmetries). Professor Viscusi explains the concept of market failure as follows:

In idealized market situations, the unconstrained choices of consumers, coupled with the provision of goods in the marketplace by competitive firms, lead to efficient outcomes as consumers select the bundle of goods they most prefer. There may be, however, many departures from the idealized world. These departures are described as various forms of market failure, where “market failure” simply means a failure of market transactions in the real world to live up to the idealized assumptions hypothesized by economists.

W. Kip Viscusi, *Using Warnings to Extend the Boundaries of Consumer Sovereignty*, 23 HARV. J. L. & PUB. POLICY 211, 212 (1999) (footnote omitted); see also John O. Ledyard, *Market Failure*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 326-29 (John Eatwell et al. eds. 1987); Richard O. Zerbe, Jr. & Howard E. McCurdy, *The Failure of Market Failure*, 18 J. OF POL’Y ANALYSIS AND MANAGEMENT 558 (1999) (criticizing the concept of market failure).

<sup>5</sup> See COOTER & ULEN, *supra* note 4, at 47 (“[S]evere asymmetries can disrupt markets so much that a social optimum cannot be achieved by voluntary exchange.”); Andrew Postlewaite, *Asymmetric Information*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 133-35 (John Eatwell et al. eds. 1987).

<sup>6</sup> Economic theory suggests that in some cases sellers will voluntarily provide the required information to buyers to gain a competitive edge in the marketplace. See Michael J. Fishman & Kathleen M. Hagerty, *Mandatory Versus Voluntary Disclosure in Markets with Informed and Uninformed Customers*, 19 J. L. ECON. & ORG. 45, 46 (2003) (“A key result in the early literature on disclosure is that a privately informed seller will voluntarily disclose all information that can be costlessly verified.”); Richard Hynes & Eric A. Posner, *The Law and Economics of Consumer Finance*, 4 AM. LAW & ECON. REV. 168, 173, 194 (2002); Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 74 n. 245 (1993); Sherrill Shaffer, *Rethinking Disclosure Requirements*, BUS. REV. 15, (May/June 1995) (“[M]andatory disclosure may be redundant, since under certain conditions firms will voluntarily and truthfully disclose all relevant information about their financial condition or product quality.”).

<sup>7</sup> For the purposes of this discussion, I am not questioning either whether legislators actually believe that market failures or information asymmetries exist or whether they think that mandatory disclosure is the most appropriate remedy for such problems. For an example of the public choice scholarship in the field, see Peter V. Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587 (1995) (analyzing the regulation of coercive collection powers of consumer lenders).

tion asymmetries in the marketplace<sup>8</sup> and great suspicion of more direct forms of consumer credit regulation, such as usury laws that set maximum interest rates.<sup>9</sup>

A quintessential example of mandatory disclosure regulation is the Truth in Lending Act ("TILA"),<sup>10</sup> a landmark consumer law<sup>11</sup> that com-

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<sup>8</sup> See Paul H. Rubin, *Information Regulation (Including Regulation of Advertising)*, in ENCYCLOPEDIA OF LAW AND ECONOMICS 271, 272 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) ("[I]f one believes that there is some market failure caused by a lack of information, then the preferred solution is to provide the missing information, rather than regulate the market directly."); Howard Beales, Richard Craswell, & Steven Salop, *The Efficient Regulation of Consumer Information*, 24 J. OF L. & ECON. 491, 513 (1981) (arguing "where inefficient outcomes are the result of inadequate consumer information, information remedies will usually be the preferable solution"); Howard Beales, Richard Craswell, & Steven Salop, *Information Remedies for Consumer Protection*, 71 AM. ECON. REV. 410, 411 (May 1981) ("Information strategies tend to be more compatible with incentives, less rigid, and do not require regulators to compromise diverse consumer preferences to a single standard."); *id.* at 413 ("Information remedies are most likely to be the most effective solution to information problems. They deal with the cause of the problem rather than with its symptoms, and leave the market maximum flexibility."); Peterson, *supra* note 3, at 882-83 (explaining why disclosure remedies appeal to those operating from an economically-minded perspective).

<sup>9</sup> See Durkin & Elliehausen, *supra* note 1, at 110 ("It is well known . . . that direct financial-market interventions like regulation of interest rates and contract terms for credit produce their own set of problems: they reduce consumers' choices, create shortages in the marketplace, stifle innovation, and cause other disruptions.") (citing Thomas A. Durkin, *An Economic Perspective on Interest Rate Limitations*, 9 GEO. ST. L. REV. 821 (1993)); Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 659 (2000) ("The most frequently articulated view of usury laws from today's dominant economic perspective posits a negative role for usury laws — they interfere with matters best left to 'The Market.'"); Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1314 (2002) ("Ultimately, price controls are counterproductive. They restrict the flow of credit, thereby hurting the very individuals they are designed to serve."); Hynes & Posner, *supra* note 6, at 179 ("Usury laws are simply price controls and can be predicted to have many of the same effects: queuing, unsatisfied demand, and an illegal market, loansharking."); James J. White, *The Usury Trompe L'Oeil*, 51 S.C. L. REV. 445, 465-66 (2000) (stating that "the economic literature . . . treats the usury laws as crude and misguided devices").

<sup>10</sup> 15 U.S.C. §§ 1601-1667e (2003). For detailed information on the Truth in Lending Act, see *infra* Part I.C.

<sup>11</sup> See ELIZABETH RENUART & KATHLEEN E. KEEST, TRUTH IN LENDING § 1.2.1 (4th ed. 1999) (noting that TILA was "landmark legislation" whose "enactment marked the birth of modern consumer legislative activism"); RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING 3 (Robert A. Cook et al., eds., 2000) (referring to TILA as "pioneering legislation"); Durkin & Elliehausen, *supra* note 1, at 111 (stating that TILA is "arguably the most important of the federal information protections in the financial area"); Jonathan Landers, *Some Reflections on Truth in Lending*, 1977 ILL. L. F. 669, 670 ("No comparable legislation had ever been seriously considered, let alone enacted, on the federal level."); Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-In-Lending Act*, 80 GEO. L.J. 233, 234 (1991) (noting that TILA "was the first modern consumer protection statute"); Elizabeth J. Keeler, Note, *The Truth in Lending Simplification and Reform Act of 1980: Is "Simplification" Better for Both Consumer and Creditor*, 8 NOVA L.J. 175, 183 (1983) ("The Truth in Lending Act is considered as one of Congress' most ambitious consumer protection efforts to date.") (citing

pels the disclosure of specified information in connection with consumer credit transactions.<sup>12</sup> More than thirty-five years after its initial passage,<sup>13</sup> and almost twenty-five years after its reconstitution,<sup>14</sup> TILA remains one of the most important pieces of Federal consumer protection legislation for two main reasons. First, TILA has enormously wide application; the Act applies to nearly every consumer credit transaction in the United States, including, *inter alia*, mortgages, car loans, and credit card purchases.<sup>15</sup> Few Federal laws apply to such a greater number of financial transactions. Second, TILA has significant symbolic importance because Congress explicitly chose to use *disclosure*, rather than direct, substantive regulation of the market as the primary, though not sole, mechanism for achieving TILA's various goals.<sup>16</sup> TILA's influence cannot be doubted: since the Act's initial passage in 1968, wisely or not, Congress has followed TILA's approach by attempting to resolve many other consumer law issues by using mandatory disclosure mechanisms.<sup>17</sup>

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Jonathan M. Landers & Cathleen Chandler, *The Truth-in-Lending Act and Variable-Rate Mortgages and Balloon Notes*, 1976 AM. BAR FOUND. RESEARCH J. 35, 38 (1976).

<sup>12</sup> See *infra* notes 50, 75-78, 86-92 and accompanying text.

<sup>13</sup> See Pub. L. No. 90-321 (1968) (currently 15 U.S.C. §§ 1601-1667e (2003)); see also *infra* notes 45-61 and accompanying text for more on the legislative history of TILA.

<sup>14</sup> See *infra* note 101.

<sup>15</sup> See ROHNER & MILLER, *supra* note 11, ¶ 1.01, at 3 (noting that TILA applies to "virtually every form of consumer credit transaction — from home mortgages to small loans to credit cards plans to even pawn transactions"); Board of Governors of the Federal Reserve System and U.S. Dept. of Housing and Urban Development, *Joint Report to Congress Concerning Reform to the Truth in Lending Act and the Real Estate Settlement Procedures Act* at I n. 5 (1998) ("TILA governs all types of consumer credit transactions, including credit cards and other lines of credit, unsecured installment loans, and home secured loans.") (hereinafter "FRB/HUD Report").

<sup>16</sup> See HOWARD J. ALPERIN & ROLAND F. CHASE, 1 CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION § 311, at 517 (1986) (noting that TILA "is primarily a disclosure law" although there are a few non-disclosure aspects to the Act); Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1071-72 (1996) (explaining that TILA has elements of both "market perfection" and "market control," though "[m]arket control strategies in TILA . . . usually target isolated loan transactions and are overshadowed by TILA's typical reliance on disclosures").

TILA's non-disclosure provisions will not be addressed in this Article. The most notable of these provisions gives borrowers the power to rescind certain transactions in which their homes are used as collateral. See 15 U.S.C. § 1635 (2003); RENUART & KEEST, *supra* note 11, §§ 6.1-6.15, at 337-414; ROHNER & MILLER, *supra* note 11, at 597-655; see also Beach v. Ocwen Federal Bank, 523 U.S. 410, 412-13 (1998) (discussing right of rescission under TILA for borrower whose loan is secured with his principal dwelling); Elwin Griffith, *Truth in Lending: The Right of Rescission, Disclosure of the Finance Charge, and Itemization of the Amount Financed in Closed-End Transactions*, 6 GEO. MASON L. REV. 191 (1998); Daniel J. Morgan, *The Right of Rescission, Still Controversial After All These Years*, 49 CONSUMER FIN. L. Q. REP. 177 (1995).

<sup>17</sup> See Rubin, *supra* note 3, at 234 (explaining that TILA "serves as the template for virtually all subsequent legislation in the consumer credit area"). Examples of other federal

Despite the elegance of TILA's often-emulated approach to government regulation, the Act's disclosure model has generated significant criticism. Most of these criticisms are instrumental in nature.<sup>18</sup> Critics have questioned the efficacy of TILA's mandatory disclosure regime based on both empirical evidence and theories regarding consumer behavior. Some of these critiques emphasize deficiencies in the disclosures themselves, while others focus on the ability or likelihood of consumers to utilize the disclosures.<sup>19</sup> Put bluntly, many critics simply do not think that disclosure works. They doubt that TILA has achieved its purpose of reducing information asymmetries and facilitating comparison-shopping for credit, and ultimately stimulating a more competitive credit market. Specifically, such critics point to particular problem areas within the consumer credit market, such as the much-analyzed issue of predatory lending,<sup>20</sup> as proof of the limits of disclosure remedies.<sup>21</sup> By doing so, they seek to cast doubt on the economic model of mandatory disclosure, perhaps without suggesting that disclosure is futile in all regulatory contexts.<sup>22</sup>

Despite the rhetorical force of the TILA criticisms, recent legislative efforts demonstrate that there is little doubt that Congress will continue to regulate the consumer credit market through mandatory disclosure.<sup>23</sup> It makes sense, therefore, for regulators to employ normatively just and empirically sound methods for structuring and evaluating the elements of any mandatory disclosure regime. Socioeconomics, a critical, multidisciplinary approach to legal regulation and practice<sup>24</sup> can help inform this process. By empirically and theoretically questioning and refining the neoclassical economic assumptions that underlie TILA's disclosure re-

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laws with significant disclosure provisions are the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-17 (2004), the Truth in Savings Act, 12 U.S.C. §§ 4301-13 (2003), and the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (2003).

<sup>18</sup> See *infra* Part II.B.

<sup>19</sup> See *infra* notes 102-107, 112-117 and accompanying text.

<sup>20</sup> The literature on predatory lending has expanded greatly in the past few years. See, e.g., Drysdale & Keest, *supra* note 9; Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1 (2002); Engel & McCoy, *supra* note 9; Margot Saunders, *The Increase in Predatory Lending and Appropriate Remedial Actions*, 6 N.C. BANKING INST. 111 (2002); Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518 (2004); Abraham B. Putney, Note, *Rules, Standards, and Suitability: Finding the Correct Approach to Predatory Lending*, 71 FORDHAM L. REV. 2101 (2003). For a recent book-length treatment of the subject, see WHY THE POOR PAY MORE: HOW TO STOP PREDATORY LENDING (Gregory D. Squires, ed. 2004).

<sup>21</sup> See *infra* Part II.B.3.

<sup>22</sup> See *infra* notes 232-41 and accompanying text.

<sup>23</sup> See *infra* notes 212-217 and accompanying text.

<sup>24</sup> See *infra* Part III.A.

gime,<sup>25</sup> socioeconomics can focus attention squarely on the efficacy of particular disclosures and help us determine the contexts in which mandatory disclosure is likely or unlikely to succeed.

The Article proceeds as follows. Part I provides an economic model of the consumer credit market, followed by a brief review of TILA's history and a survey of the Federal Truth in Lending regime's primary disclosure elements. Part II reviews and examines the instrumental critiques of TILA, with emphasis on the empirical claims that TILA's mandatory disclosure regime has not reduced information asymmetries and achieved its credit-shopping goals. Part III first provides a basic introduction to law and socioeconomics, and then demonstrates how the socioeconomic approach can help us to evaluate and improve our existing method of regulating the consumer credit market through mandatory disclosure regulatory mechanisms.

## I. THE FUNDAMENTALS OF TRUTH IN LENDING LAW

### A. THE BASIC ECONOMIC MODEL OF CONSUMER CREDIT SHOPPING

It is helpful to frame the discussion of Federal truth-in-lending law with a basic economic model of consumer credit shopping.<sup>26</sup> A consumer who is contemplating a purchase initially must decide whether to postpone or forgo consumption. If she goes forward with the purchase, the consumer must choose whether to use cash, a cash equivalent, or credit. If she chooses credit, she must determine which of the competing types and sources of credit best suit her needs. Rational<sup>27</sup> consumers likely wish to borrow money for the lowest price available.<sup>28</sup> The price in this case equals the contract interest rate, plus any other fees or costs associated with borrowing money,<sup>29</sup> and "[i]n a perfectly efficient financial market, the price of a loan is a function of its risk."<sup>30</sup> If the credit

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<sup>25</sup> See *infra* Part III.B.

<sup>26</sup> This discussion was inspired by a model elaborated in Hynes & Posner, *supra* note 6, at 170-71; see also Jinkook Lee & Jeanne M. Hogarth, *The Price of Money: Consumers' Understanding of APRs and Contract Interest Rates*, 18 J. OF PUB. POL'Y & MARKETING 66, 66-67 (1999).

<sup>27</sup> I am equating rationality with a desire for wealth maximization here. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1066 (2000) (stating basic assumption that individuals seek to maximize wealth); see also Russell Korobkin, *A Multi-Disciplinary Approach to Legal Scholarship: Economics, Behavioral Economics, and Evolutionary Psychology*, 41 JURIMETRICS J. 319, 321-22 (2001).

<sup>28</sup> See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979) ("The competitive price is the lowest price a market can sustain, and all consumers would, other things equal, prefer to purchase at the lowest price.").

<sup>29</sup> See Lee & Hogarth, *supra* note 26, at 66.

<sup>30</sup> See Lee & Hogarth, *supra* note 26, at 66.

market is competitive, therefore, "the interest rate will reflect the time value of money, inflation, and the risk of default,"<sup>31</sup> the consumer will accept the loan if "the transformation of future wealth into current consumption, exceeds the interest rate,"<sup>32</sup> though sometimes the costs of additional comparison-shopping<sup>33</sup> for the lowest interest rate may exceed the benefits of further shopping.<sup>34</sup> Economists believe that consumers require full information regarding available credit terms from competing providers to choose rationally among sources of credit,<sup>35</sup> and that asymmetric information between borrowers and lenders<sup>36</sup> is one factor<sup>37</sup> that may cause price inefficiency in the credit market.<sup>38</sup>

## B. A BRIEF HISTORY OF THE TRUTH IN LENDING ACT

The basic economic model described above illuminates the history of Federal truth-in-lending law.<sup>39</sup> The tale begins in the decades follow-

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<sup>31</sup> Hynes & Posner, *supra* note 6, at 170.

<sup>32</sup> *Id.*

<sup>33</sup> See Jinkook Lee & Jeanne M. Hogarth, *Relationships Among Information Search Activities When Shopping for a Credit Card*, 34 J. CONSUMER AFF. 330, 333 (Winter 2000) ("The search costs include the opportunity cost of time (lost wages) and physical and mental efforts spent in the search process.").

<sup>34</sup> See Jonathan M. Landers and Ralph J. Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711, 717-721 (1979) (discussing cost-benefit analysis of additional credit shopping); Peterson, *supra* note 3, at 893 (in the context of high-cost credit, arguing that "[a]t some point shopping costs will outweigh any uncertain benefits of reduced prices which might be gained from shopping, making it irrational for many if not most or all consumers to do pre-transactional shopping"); William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 422 ("If the amount borrowed is not large, often the amount to be saved by obtaining the lowest available interest rate is not sufficient to justify the inconvenience and costs of comparative shopping.").

<sup>35</sup> See Lee & Hogarth, *supra* note 26, at 66 ("According to classical economic theory, this situation [perfect competition] exists when consumers have equal access to full information about the costs and benefits of competing loans from a variety of sellers.").

<sup>36</sup> This Article will not address situations where it is the creditors, rather than the debtors, who lack the relevant information to guarantee a competitive market, though such situations surely do exist. See Hynes & Posner, *supra* note 6, at 194; Lee & Hogarth, *supra* note 26, at 66; see also Michael Klausner, *Market Failure and Community Investment: A Market-Oriented Alternative to the Community Reinvestment Act*, 143 U. PA. L. REV. 1561, 1566 (1995) ("Asymmetric information is inherent in credit relationships. Not only do borrowers often know more about their own risk of default than do lenders, they can increase their riskiness after a loan has been made."). At least in the area of consumer finance, experts and commentators often proceed under the assumption that consumers are less knowledgeable than credit providers regarding the terms of the lending relationship. See Garwood, Hobbs & Miller, *supra* note 1, at 780.

<sup>37</sup> Non-informational sources of market inefficiency or failure will not be discussed here.

<sup>38</sup> See Beales, Craswell & Salop, *Information Remedies for Consumer Protection*, *supra* note 8, at 411 (describing deleterious effects of consumers' information problems on product markets); Hynes & Posner, *supra* note 6, at 172-73; Lee & Hogarth, *supra* note 26, at 66 (noting that complexity and variety of price and terms of credit may impair a consumers' ability to shop effectively for credit, thus acting as a barrier to price efficiency).

<sup>39</sup> State truth-in-lending laws are beyond the scope of this Article. For general background on such laws, see ALPERIN & CHASE, *supra* note 16, §§ 273-74, at 477-80; RENUART &



ing World War II,<sup>40</sup> when the consumer credit market in the United States expanded greatly.<sup>41</sup> At the time, there was no uniformly accepted measure for the cost of credit,<sup>42</sup> thus making it difficult for consumers to comparison shop for consumer credit or to determine, in the first instance, whether the use of credit was prudent.<sup>43</sup> As one scholar explains:

Throughout history there has been no common terminology used in credit contracts. After the explosion of mainstream moderately priced consumer credit use following World War II, the different meanings that lenders ascribed to terms became more noticeable than at any other time in human history. Even the most basic contractual terms such as interest rates had no commonly shared definition. The result was that consumers neither

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KEEST, *supra* note 11, § 2.5, at 77-79; *see also* Schiltz, *supra* note 20 (surveying state regulation of consumer credit).

<sup>40</sup> For historical accounts of the pre-WWII development of consumer credit in the United States, *see* LENDOL CALDER, *FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT* (1999); Peterson, *supra* note 3, at 845-63.

<sup>41</sup> *See* ALPERIN & CHASE, *supra* note 16, at 475 n. 3 (“[T]he volume of consumer credit mushroomed after World War II. Between 1950 and 1971, consumer credit outstanding rose from \$21.5 billion to \$137.2 billion, a five-fold increase.”) (citing NATIONAL COMMISSION ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE UNITED STATES* 5 (1972) [hereinafter “NCCF Report”]); CALDER *supra* note 40, at 291-303; DAVID CAPLOVITZ, *THE POOR PAY MORE* xvi (1967) (noting that consumer debt had grown so rapidly in the post-WWII period that the word “explosion”—albeit a cliché describing rapid change—is a “particularly apt description” of the changes in consumer credit trends); Peterson, *supra* note 3, at 864-65; *see also* Mourning v. Family Publications Service, Inc., 411 U.S. 356, 363 (1973) (noting that the use of consumer credit increased from \$5.6 billion to \$95.9 billion from the end of World War II through 1967, “a rate of growth more than 4 1/2 times as great as that of the economy”) (citing H.R. REP. NO. 90-1040, at 10-11 (1967)); S. REP. NO. 90-392 (1967).

Note that when the National Commission on Consumer Finance released the report that Alperin and Chase cite above, Federal Reserve Board data did not include owner-occupied mortgages as a form of consumer credit. *See* NCCF Report, *supra* note 41, at 7. TILA does, however, apply to mortgages in addition to other forms of consumer credit. *See* ROHNER & MILLER, *supra* note 15, ¶ 1.01, at 3; Joseph K. Heselton, James A. McCaffrey & Fred H. Miller, *Truth in Lending Disclosure in Open and Closed End Credit*, 9 OKLA. CITY U. L. REV. 17, 22 (1984) (observing that TILA does not “follow the traditional industry conception of consumer credit that excludes real estate transaction”).

<sup>42</sup> *See* Peterson, *supra* note 3, at 875-76.

<sup>43</sup> As the Supreme Court explained, despite the enormous growth of consumer credit in the post-WWII period, Congressional hearings showed that:

[C]onsumers remained remarkably ignorant of the nature of their credit obligations and of the costs of deferring payment. Because of the divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them, many consumers were prevented from shopping for the best terms available and, at times, were prompted to assume liabilities they could not meet.

*Mourning*, 411 U.S. at 363 (footnotes omitted) (citing H.R. REP. NO. 90-1040, at 13 (1967); S. REP. NO. 90-392, at 1-3 (1967)); *see also* NCCF Report, *supra* note 41, at 169-70 (1972); John M. Drain, Jr., Note, *Truth in Lending: The Impossible Dream*, 22 CASE W. RES. L. REV. 89, 90, 92-94 (1970) (addressing consumer confusion over costs of credit).

shopped for cheap credit nor even understood how much they were actually paying for the credit to which they agreed.<sup>44</sup>

In light of these conditions,<sup>45</sup> a group of lawmakers, led by Senator Paul Douglas of Illinois,<sup>46</sup> mounted a zealous effort to create a Federal consumer credit disclosure regime. Robert Shay and William Brandt explained the basic idea, echoing the economic model discussed above: "The Truth in Lending Act was predicated on two assumptions: (1) consumers were not knowledgeable about APRs and finance charges, and (2) the availability of such information would lead to more informed

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<sup>44</sup> Peterson, *supra* note 3, at 875-76. See also H.R. REP. NO. 90-1040 at 13 (1967) (noting multiplicity of computation methods used by creditors in pre-TILA era); RENUART & KEEST, *supra* note 11, at 81; Barry A. Abbott & John W. Campbell, *The Truth in Lending Act After 15 Years: Its Goals and Its Limitations*, 9 OKLA. CITY U. L. REV. 1, 2 (1984).

<sup>45</sup> This concern about the inability of consumers to accurately assess and compare the costs of credit must be viewed with the broader social and legal climate of the times in mind. During the 1960s, the U.S. saw the rise of a consumers' rights movement whose followers rallied against the purported exploitation of consumers at the hands of business interests. At the same time, advocates for the poor, who were dubious about the ability of the marketplace to protect the interests of the downtrodden, sought greater government intervention on behalf of their constituencies. Thus, the consumer rights movement overlapped with the efforts of anti-poverty advocates, and both groups were aided by liberal scholars, jurists, and legislators who were reconsidering traditional laissez-faire approaches to contract law. For more general background on the consumer rights movement of the 1960s and early 1970's, the following texts are good starting points: GARY CROSS, *AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA* 145-169 (2000) (discussing emerging critiques of U.S. consumerism and tracing the consumer rights movement from the 1960s to early 1970s); ROBERT N. MAYER, *THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE* 25-58 (1989); MARK V. NADEL, *THE POLITICS OF CONSUMER PROTECTION* (1971); MICHAEL PERTSCHUK, *REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT* 5-45 (1982) (an insider's perspective from a controversial former chairman of the Federal Trade Commission).

<sup>46</sup> Even though Senator Douglas departed from the U.S. Senate before TILA was passed, he is credited with being the driving force behind the federal truth in lending movement. See Rubin, *supra* note 3, at 242-53, 263-64 (describing Douglas's role in great detail); see also Ndiva Kofele-Kale, *The Impact of Truth-in-Lending Disclosures on Consumer Market Behavior: A Critique of the Critics of Truth-in-Lending Law*, 9 OKLA. CITY U. L. REV. 117, 119 n. 10 (1984) ("The Act was the brainchild of Senator Paul Douglas of Illinois who introduced the first truth-in-lending bill in the Senate in 1960 and kept the legislation alive through the early 1960s until 1966 when he failed in his re-election bid.") (citing Jonathan Landers, *Some Reflections on Truth in Lending*, 1977 ILL. L. J. 669); Peterson, *supra* note 3, at 877; H.R. REP. 90-1040 at 116 (1967) (supplemental views of Hon. Leonore K. Sullivan) (praising Senator Douglas for his "imaginative development" of the truth-in-lending concept and the "indefatigable and patient and effective effort he devoted to its promotion"). Senator Douglas's own views on the truth-in-lending movement can be found in PAUL H. DOUGLAS, *IN OUR TIME* 94-122 (1968). After Douglas departed from the Senate, Senator William Proxmire (D. Wis.) shepherded TILA through the Senate, while the "leading proponent" in the House of Representatives was Congresswoman Leonore K. Sullivan (D. Mo.). See ROHNER & MILLER, *supra* note 15, ¶ 1.02[1], at 11; Peterson, *supra* note 3, at 879.

credit decisions by facilitating the identification and comparison of shopping terms.”<sup>47</sup>

After an intense legislative battle<sup>48</sup> lasting through most of the 1960s, Congress finally passed the Truth in Lending Act (“TILA”) in 1968.<sup>49</sup> TILA’s passage reflected a monumental shift in the regulation of the U.S. consumer-credit market. The Act began the process of establishing, for the first time in U.S. history, a mandatory, uniform disclosure approach at a national level for virtually all consumer credit transactions.<sup>50</sup>

Despite the economic model and brief history outlined above, it would be somewhat misleading to suggest that this “credit shopping” view of TILA is beyond dispute.<sup>51</sup> In fact, a plethora of other goals have

<sup>47</sup> Robert P. Shay & William K. Brandt, *Public Regulation of Financial Services: The Truth in Lending Act*, in REGULATION OF CONSUMER FINANCIAL SERVICES 199 (Arnold A. Heggestad ed., 1981); see also Wesley A. Magat, *Information Regulation*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 307, 309 (1998) (discussing basic economic premises of information disclosure regulation).

<sup>48</sup> The details of this legislative struggle will not be recounted here. For an excellent, in-depth legislative history of the original version of the Truth in Lending Act, see Rubin, *supra* note 3, at 242-63; see also Peterson, *supra* note 3, at 877-80; ROHNER & MILLER, *supra* note 15, ¶ 1.02[1]; MARK V. NADEL, THE POLITICS OF CONSUMER PROTECTION 130-37 (1971).

<sup>49</sup> See Pub. L. No. 90-321 (1968) (codified in relevant part at 15 U.S.C. §§ 1601-1667e (2003)). The Truth in Lending Act was the central element of a larger piece of federal consumer law legislation—the Consumer Credit Protection Act (“CCPA”). At the time of its passage in 1968, the CCPA also included a title that restricted the garnishment of wages. See Pub. L. No. 90-321, §§ 301-307 (1968) (codified in relevant part at 15 U.S.C. §§ 1671-77 (2003)). The CCPA was later amended to include (1) the Fair Credit Reporting Act, 15 U.S.C. § 1681 (2003); (2) the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691e (2003); (3) the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (2003); (4) the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r (2003); and (5) the Fair Credit Billing Act, 15 U.S.C. § 1637 (2003).

<sup>50</sup> See Landers, *supra* note 11, at 686 (“Perhaps the most enduring quality of TIL is the greater standardization of the terminology of credit transactions and the increasing use of annual percentage rate and finance charge in variable transactions.”); see also Ralph J. Rohner, *Whither Truth in Lending?*, 50 CONSUMER FIN. L. Q. REP. 114, 117 (1996). A leading treatise explains that TILA has produced, since its enactment:

[A] more standardized vocabulary for credit transactions; compliance headaches for creditors seeking to fathom the intricate rules and subrules of the TIL Act and its attendant regulations, commentary, and judicial constructions; thousands of lawsuits; and probably some real increases in consumer sophistication about the credit transactions they enter.

ROHNER & MILLER, *supra* note 11, ¶ 1.01, at 3-4.

<sup>51</sup> See Durkin & Elliehausen, *supra* note 1, at 112-15; Kofele-Kale, *supra* note 46, at 126-27; Landers & Chandler, *supra* note 11, at 63-65; Landers, *supra* note 11, at 671-74 (discussing shifting purposes of TILA in the pre-Simplification era); Ralph J. Rohner, *Truth in Lending “Simplified”: Simplified?* 56 N.Y.U. L. REV. 999, 1002-1004 (1981); Rubin, *supra* note 3, at 235-36, 283-85; Whitford, *supra* note 34, at 404; Patrick E. Hoog, Note, *Acceleration Clause Disclosure: A Truth in Lending Policy Analysis*, 53 IND. L. J. 97, 111 (1977) (discussing Congressional imprecision in setting forth the goals of TILA).

been ascribed to the Act,<sup>52</sup> including the goal of economic stabilization, which is mentioned in the text of the statute.<sup>53</sup> Still, the credit shopping view of TILA is dominant. To start, the Act itself states:

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. *It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . .*<sup>54</sup>

This basic concept, that TILA was “Congress’s effort to guarantee the accurate and meaningful disclosure of the costs of consumer credit and thereby to enable consumers to make informed choices in the credit marketplace,”<sup>55</sup> has been echoed in law reviews, social science litera-

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<sup>52</sup> To illustrate the extent of the debate over the purposes of TILA, two experts compiled a list of no less than thirty-eight goals that have been advanced for truth-in-lending law, which they grouped into the following six categories: (1) credit market goals, (2) buyer behavior goals, (3) general philosophical and educational goals, (4) macroeconomic goals, (5) institutional control goals, and (6) market protection goals. *See* Durkin & Elliehausen, *supra* note 1, at 114 (tbl. 1). Durkin and Elliehausen warn of the dangers inherent in trying to evaluate the success of a statute based upon one evaluative criterion, especially when so many varied goals have been put forth in support of TILA and so little of the empirical evidence directly assesses these goals. *Id.* at 112-13. Moreover, it could be argued that reducing information asymmetries and encouraging credit shopping are not goals in and of themselves, but rather that they are best viewed as instrumentalities or means for achieving further social ends such as increased market efficiency.

<sup>53</sup> *See* 15 U.S.C. § 1601(a). The macroeconomic goal of economic stabilization is rarely invoked as a justification for TILA in current policy debates. *See* Rubin, *supra* note 3, at 235 (discussing the goal of economic stabilization and concluding: “Whether the proponents of Truth-in-Lending ever intended this argument to be taken seriously is an interesting question, and one that seems fated to remain a mystery.”).

<sup>54</sup> 15 U.S.C. § 1601(a) (2003) (emphasis added). A clause regarding credit billing later was added to section 1601(a), as part of the Fair Credit Billing Act. *See* Pub. L. 93-495, § 302 (1974) (adding that a purpose of TILA is “to protect the consumer against inaccurate and unfair credit billing and credit card practices”).

<sup>55</sup> RENUART & KEEST, *supra* note 11, § 1.1.1, at 33.

ture,<sup>56</sup> treatises,<sup>57</sup> administrative regulations,<sup>58</sup> Supreme Court opinions,<sup>59</sup> and a variety of other prominent sources regarding TILA.<sup>60</sup> Thus, this Article will proceed cautiously under the assumption that TILA's purpose was to reduce information asymmetries and facilitate credit shopping with the ultimate goal of increasing market efficiency or competitiveness.

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<sup>56</sup> See Hynes & Posner, *supra* note 6, at 192-93 ("The stated goals of the Truth in Lending Act are to increase economic stability, to enhance the ability of consumers to shop for attractive loan terms, and to prevent inaccurate and unfair billing."); Keest, *supra* note 3, at 360 ("Truth in Lending was created to bring honesty and accuracy to the consumer credit marketplace. To that end, TIL's key 'price tag' disclosures of the APR and finance charge were defined to include . . . all the costs attendant to the credit that the borrower would have to pay."); Landers & Chandler, *supra* note 11, at 60; Lee & Hogarth, *supra* note 26, at 67 (1999) ("TILA was enacted . . . to help consumers make informed decisions about using credit and promote price competition by facilitating comparison shopping."); Hoog, *supra* note 51, at 101 ("The first goal of the disclosure requirements of the TIL Act is to promote comparative shopping by consumers among creditors in the pursuit of increased competition among credit extenders.").

<sup>57</sup> See ALPERIN & CHASE, *supra* note 16, § 275, at 480 ("The basic idea of Truth in Lending is, as the name suggests, to ensure that those who 'lend' money (or, what amounts to the same thing, sell goods on 'time') will disclose the 'truth' about the terms of the transaction, so that the consumer who borrows (or buys on credit) will know what he is getting into."); *id.* § 317, at 526 ("The primary objective of Truth in Lending is to provide consumers with information to enable them to shop for the most advantageous credit terms."); ROHNER & MILLER, *supra* note 11, at 4 ("The primary purpose of the TIL Act is to promote the informed use of credit. . . . The original purpose of the proposals that became the TIL Act was to assure accurate and uniformly computed disclosures of the critical elements of credit costs.").

<sup>58</sup> See 12 C.F.R. § 226.1(b) (stating that the purpose of Regulation Z "is to promote the informed use of consumer credit by requiring disclosures about its terms and cost").

<sup>59</sup> See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1981) ("The Truth in Lending Act has the broad purpose of promoting 'the informed use of credit' by assuring 'meaningful disclosure of credit terms' to consumers.") (citing 15 U.S.C. § 1601); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 377 (1973) ("The Truth in Lending Act reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.'").

<sup>60</sup> See FRB/HUD Report, *supra* note 15, at 7 ("TILA seeks to promote the informed use of credit through standardized disclosures that reflect the cost of credit over the life of a loan and highlight certain credit terms."); NCCF REPORT, *supra* note 41, at 171-75 (discussing various purposes of the Truth in Lending Act, including: (1) facilitating comparison shopping for consumer credit; (2) enabling consumers to determine how to best utilize consumer credit, if at all, after shopping for credit; and (3) promoting economic stability); *id.* at 191 (stating that TILA's intent was "to enable consumers to comparison shop for credit, to choose between using credit or liquid assets and between credit and delayed consumption, and to assist in economic stabilization," but not "to remedy all abuses in the credit market or to fix rates of charge on consumer credit transactions").

## C. THE BASICS OF THE TILA REGIME

The Federal Truth-in-Lending regime<sup>61</sup> today consists of a complex combination of statutory<sup>62</sup> and administrative provisions. Although Congress delegated rulemaking responsibility for implementing TILA to the Board of Governors of the Federal Reserve System,<sup>63</sup> enforcement authority for the Act was divided among nine Federal agencies,<sup>64</sup> led by the Federal Trade Commission.<sup>65</sup> In response to its mandate, the Federal Reserve Board [FRB] promulgated extensive Truth-in-Lending regulations collectively known as "Regulation Z."<sup>66</sup> In addition, the FRB staff has issued legally binding Commentary interpreting both the Act and Regulation Z.<sup>67</sup>

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<sup>61</sup> For those interested in comprehensive treatments of Federal truth-in-lending law, the following two resources are indispensable: ELIZABETH RENUART & KATHLEEN E. KEEST, *TRUTH IN LENDING* (4th ed. 1999 & 2000 Supp.); RALPH J. ROHNER & FRED H. MILLER, *TRUTH IN LENDING* (Robert A. Cook et al., eds., 2000). The National Consumer Law Center released a revised, fifth edition of its Truth in Lending manual just as this Article was being completed.

<sup>62</sup> The Truth in Lending Act has been amended many times since its initial passage in 1968. See ROHNER & MILLER, *supra* note 11, ¶ 1.02[6], at 22-24 (chart summarizing all legislative enactments that constitute the Truth in Lending Act). In its present form, TILA has five parts: Parts A and B which set forth the general rules for the statutory scheme and many of the mandatory consumer credit disclosures required under the Act, 15 U.S.C. §§ 1601-49 (2003); Part C, which addresses credit advertising, 15 U.S.C. §§ 1661-1665(b) (2003); Part D, which governs credit billing practices, 15 U.S.C. §§ 1666-1666j (2003); and Part E, which is the Consumer Leasing Act of 1976, 15 U.S.C. §§ 1667-1667e (2003). See RENUART & KEEST, *supra* note 11, § 1.3, at 41-42 (outlining TILA); ROHNER & MILLER, *supra* note 11, at ¶ 1.02[6], at 22-24.

<sup>63</sup> See 15 U.S.C. § 1604(a) (2003).

<sup>64</sup> See 15 U.S.C. § 1607(a)-(c); ALPERIN & CHASE, *supra* note 16, at 483 n. 6; ROHNER & MILLER, *supra* note 11, ¶ 13.02, at 886-88; Engel & McCoy, *supra* note 9, at 1305 n. 211; Schiltz, *supra* note 20, at 535.

<sup>65</sup> See 15 U.S.C. § 1607(c).

<sup>66</sup> See 12 C.F.R. Part 226. Congress later directed the Federal Reserve Board to create model disclosure provisions and forms for common transactions. See 15 U.S.C. § 1604(b); see also 12 C.F.R. Part 226, App. G-H (model forms and clauses). At times, this Article will only cite to Regulation Z as opposed to the applicable statutory provisions. This is because Regulation Z repeats many of the provisions of the Truth in Lending Act verbatim, and, in some ways, Regulation Z is considered to be a more definitive statement of truth-in-lending law than the Act. See ROHNER & MILLER, *supra* note 11, ¶ 1.03[1], at 25-26.

<sup>67</sup> The Official Staff Commentary of Regulation Z is promulgated by the staff of the Division of Consumer Affairs of the Federal Reserve Board. See ALPERIN & CHASE, *supra* note 16, at 483-85 (discussing administrative implementation of TILA by the Board of Governors of the Federal Reserve System); RENUART & KEEST, *supra* note 11, § 1.4.3, at 44-45; ROHNER & MILLER, *supra* note 11, ¶ 1.03[2][b], at 27-29 (explaining role of the FRB Commentary). The FRB Commentary is Appendix C to Regulation Z. A creditor's good faith compliance with the FRB Commentary precludes the imposition of civil liability under the Act. See 15 U.S.C. § 1640(f). The Supreme Court has held that the Commentary is binding unless it is demonstrably irrational. See *Milhollin*, 444 U.S. at 565-68.

The core of Federal Truth-in-Lending law is theoretically straightforward.<sup>68</sup> TILA and Regulation Z compel the mandatory disclosure of specified information in connection with consumer credit transactions.<sup>69</sup> A creditor's failure to comply with TILA's strictures can lead to civil liability<sup>70</sup> in the form of either actual<sup>71</sup> or statutory damages,<sup>72</sup> depending on the type of violation.<sup>73</sup> In addition, the statute imposes criminal penalties for willful and knowing TILA violations.<sup>74</sup>

The most crucial mandatory disclosures under TILA are those that represent the cost of credit—the finance charge and the annual percentage rate (“APR”).<sup>75</sup> Regulation Z defines the finance charge, in part, as follows:

The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.<sup>76</sup>

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<sup>68</sup> In addition, TILA created several important substantive rights, such as the right to rescind certain transactions, which will not be discussed in this Article. *See supra* note 16.

<sup>69</sup> *See* 12 C.F.R. § 226.2(a)(12) (“‘Consumer credit’ means credit offered or extended to a consumer primarily for personal, personal, family, or household purposes.”); 15 U.S.C. § 1602(h) (defining the adjective “consumer”); 15 U.S.C. § 1602(e) (defining “credit”); *see also* ALPERIN & CHASE, *supra* note 16, §§ 279-80, at 488-92.

TILA specifically exempts various non-consumer credit transactions. *See* 12 CFR § 226.3; *see also* ALPERIN & CHASE, *supra* note 16, § 281, at 492-95; RENUART & KEEST, *supra* note 11, § 2.4, at 66-77 (discussing exempt transactions).

<sup>70</sup> *See* 15 U.S.C. § 1640; *see also* RENUART & KEEST, *supra* note 11, §§ 8.1-8.11, at 461-531 (addressing all consumer remedies).

<sup>71</sup> *See* 15 U.S.C. § 1640. *But see* ROHNER & MILLER, *supra* note 11, ¶ 12.04[1], at 805 (noting difficulty in proving actual damages in many TILA cases).

<sup>72</sup> *See* 15 U.S.C. § 1640(a)(2)(A); ROHNER & MILLER, *supra* note 11, ¶ 12.04[2], at 809-23.

<sup>73</sup> Not all violations of TILA automatically trigger statutory damages. *See* RENUART & KEEST, *supra* note 11, § 8.6.5, at 488-89; ROHNER & MILLER, *supra* note 11, ¶ 12.04[2][a], at 810. The Act also provides for the provision of attorney's fees and costs. 15 U.S.C. § 1640(a)(3).

<sup>74</sup> 15 U.S.C. § 1611 (2003) (providing for a maximum fine of \$5000 and a maximum of one year's imprisonment for willful and knowing TILA violations).

<sup>75</sup> *See* RENUART & KEEST, *supra* note 11, at § 3.1.1 (“The disclosure of the finance charge is at the heart of Truth in Lending.”); ROHNER & MILLER, *supra* note 11, ¶ 1.01[1], at 5 (referring to disclosure of the finance charge and APR as the “core of Truth in Lending”); Griffith, *supra* note 16, at 239; William J. O'Connor, Jr., 46 BUS. LAW. 1199, 1200 (1985) (reviewing Ralph J. Rohner, TRUTH IN LENDING (1984)) (arguing that the critical legislative innovation in TILA was the APR and noting that “[t]he combined annual percentage rate/finance charge, although not completely successful from a logical, legal, or mathematical perspective, was a significant advance”); Peterson, *supra* note 3, at 880.

<sup>76</sup> 12 C.F.R. § 226.4(a); *see also* 15 U.S.C. § 1605(a) (2003) (providing statutory definition of finance charge); 12 C.F.R. § 226.6(a) (2004) (explaining how to disclose finance charge computation methodology on the initial disclosure statement for open-ended credit); ROHNER & MILLER, *supra* note 11, ¶ 3.01[1], at 107 (“The finance charge is the consumer's

The annual percentage rate, or APR, is derived from the finance charge,<sup>77</sup> and is best understood as “simply the relative or percentage cost of credit on a yearly basis.”<sup>78</sup> TILA’s APR and finance charge disclosures are intended to provide borrowers with an accurate “price tag” for the cost of credit to facilitate comparison shopping between lenders and to encourage borrowers to consider whether the use of credit is prudent.<sup>79</sup> The vital importance of the finance charge and the APR is reflected in the fact that TILA requires both of these core disclosures to be more prominently displayed than the Act’s other mandatory disclosures.<sup>80</sup> Moreover, the exact terms “finance charge”<sup>81</sup> and “annual percentage rate”<sup>82</sup> must be used in the disclosures.

Although TILA’s structure appears simple, complexity lurks beneath the surface. First, TILA follows a byzantine “some fees in, some fees out” approach for determining whether particular fees or charges imposed upon borrowers should be included in the finance charge and thus the APR.<sup>83</sup> This explains why the subject of APR and finance charge determination has received so much administrative<sup>84</sup> and schol-

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cost of credit, in dollars and cents.”). Regulation Z states that it is permissible to use a brief definition such as “the dollar amount the credit will cost you.” 12 C.F.R. § 226.4(d) (2004).

<sup>77</sup> Under TILA, a creditor begins by determining the applicable finance charge and then the APR is derived from the finance charge. See RENUART & KEEST, *supra* note 11, § 3.1.1, at 81; ROHNER & MILLER, *supra* note 11, ¶ 4.01[2][c][1], at 187. This Article does not address the actuarial issues raised by the mathematical methodology applied by TILA and Regulation Z to compute APRs. For an in-depth discussion of that subject, see ROHNER & MILLER, *supra* note 11, at 179-239.

<sup>78</sup> ALPERIN & CHASE, *supra* note 16, § 317, at 526; *see also* 15 U.S.C. § 1606 (2003) (determination of annual percentage rate); 12 CFR § 226.14(a) (determination of APR for open-ended credit transactions); 12 CFR § 222.22(a) (2004) (determination of APR for closed-ended credit transactions); ALPERIN & CHASE, *supra* note 16, at 527-31 (determination of APR for closed and open end transactions); RENUART & KEEST, *supra* note 11, § 3.1.1, at 81; ROHNER & MILLER, *supra* note 11, ¶¶ 4.03-04, at 200-39 (closed and open end APRs). Regulation Z states that it is permissible to use a brief definition such as “the cost of your credit as a yearly rate.” 12 C.F.R. § 226.18(e).

<sup>79</sup> See RENUART & KEEST, *supra* note 11, § 3.1.1, at 81; Keest, *supra* note 3, at 361 (“[T]here can be no legitimate disagreement that on an individual basis, a price tag fully reflecting the entire price is necessary to determine whether credit is too expensive, and the consumer should ‘just say no’ to debt.”).

In addition to influencing shopping behavior, TIL is concerned with preventing the excessive and untimely use of credit by consumers who are ignorant about credit costs. The desired effect would be to help consumers choose between credit and liquid assets (savings or available cash), or between credit and the postponement of a purchase until cash is available.

William K. Brandt & George S. Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending*, 7 MICH. J. L. REF. 297, 313 (1974).

<sup>80</sup> See 12 C.F.R. § 226.17(a)(2).

<sup>81</sup> See 12 C.F.R. § 226.18(d).

<sup>82</sup> See 12 C.F.R. § 226.18(e).

<sup>83</sup> See FRB/HUD Report, *supra* note 15, at 8; *see also infra* Part II.B.2.b.

<sup>84</sup> See 12 C.F.R. § 226.4(a) (defining “finance charge”); 12 C.F.R. § 226.4(b) (providing examples of finance charges); 12 C.F.R. § 226.4(d) (addressing treatment of insurance and



arly<sup>85</sup> attention. Second, in addition to the APR and finance charge, TILA sets forth many other required disclosures, some of which vary depending on whether the credit at issue is open-ended,<sup>86</sup> like a credit card or store charge card,<sup>87</sup> or closed-ended,<sup>88</sup> like a typical automobile loan or a home mortgage.<sup>89</sup> Third, as the consumer credit market developed during the 1980s and 1990s, Congress mandated additional distinctive disclosures in areas such as credit advertising,<sup>90</sup> home equity loans,<sup>91</sup> and so-called high interest rate or high fee home loans.<sup>92</sup> Fourth, al-

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debt cancellation coverage); Official Staff Commentary, § 226.6(b), *Truth in Lending*, 68 Fed. Reg. 16,185 (Apr. 3, 2003) (providing guidance on a range of finance charge issues); FRB/ HUD Report, *supra* note 15, at Chs.1-4; Board of Governors of the Federal Reserve System, *Report to Congress, Finance Charges for Consumer Credit Under the Truth in Lending Act* (April 1996).

<sup>85</sup> The topic of finance charges alone warrants a full chapter in each of the major TILA treatises. See RENUART & KEEST, *supra* note 11, at Ch. 3; ROHNER & MILLER, *supra* note 11, at Ch. 3; see also ALPERIN & CHASE, *supra* note 16, §§ 312-18 (detailing the computation of the finance charge, including rules for the inclusion and exclusion of various fees); Elwin Griffith, *Searching for the Truth in Lending Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 275-298 (2000); James Lockhart, *What Constitutes "Finance Charge" Under § 106(A) of the Truth in Lending Act (15 U.S.C.A. § 1605(A)) or Applicable Regulations*, 154 A.L.R. FED. 431 (1999).

<sup>86</sup> Regulation Z defines open-end credit as "[c]onsumer credit extended by a creditor under a plan in which: (i) The creditor reasonably contemplates repeated transactions; (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid." 12 C.F.R. § 226.2(a)(20).

<sup>87</sup> In the case of open-ended credit, creditors must provide an initial disclosure statement before the first transaction is made under the plan, see 12 C.F.R. §§ 226.5(b)(1), 226.6, and also must make regular, periodic statements as required by the regulations. See 12 C.F.R. §§ 226.5(b)(2), 226.7 (2004).

<sup>88</sup> See 12 C.F.R. § 226.2(a)(10) (defining "closed-end credit" as "consumer credit other than open-end credit as defined in this section").

<sup>89</sup> Regulation Z sets forth the basic required closed end disclosures. See 12 C.F.R. § 226.18. In the interests of space, a full listing will not be provided here, but they include, *inter alia*: the amount financed, 12 C.F.R. § 226.18(b); an itemization of the amount financed, 12 C.F.R. § 226.18(c); the finance charge, 12 C.F.R. § 226.18(d); the annual percentage rate, 12 C.F.R. § 226.18(e); the payment schedule, 12 C.F.R. § 226.18(g); the total sale price, 12 C.F.R. § 226.18(j); any late payment penalties, 12 C.F.R. § 226.18(l); and whether the creditor has taken a security interest as part of the transaction, 12 C.F.R. § 226.18(m).

<sup>90</sup> See Fair Credit and Charge Card Disclosure Act, Pub. L. No. 100-583, 102 Stat. 2960 (1988), *codified at* 15 U.S.C. §§ 1610, 1637, 1640 (2003); see also 12 C.F.R. § 226.5a (disclosures for credit and charge card applications and solicitations); RENUART & KEEST, *supra* note 11, § 5.4, at 312.

<sup>91</sup> See Home Equity Loan Consumer Protection Act ("HELCPA"), Pub. L. No. 100-709, 102 Stat. 4725 (Nov. 23, 1988), *codified at* 15 U.S.C. §§ 1637a, 1647, 1665b (2003); see also 12 C.F.R. § 226.5b (illustrating special disclosures for lines of credit secured by a dwelling); RENUART & KEEST, *supra* note 11, § 5.18, at 322-36; ROHNER & MILLER, *supra* note 11, ¶¶ 6.07, at 425-37, 11.04[4], at 763-65.

<sup>92</sup> See Home Ownership and Equity Protection Act ("HOEPA"), Pub. L. No. 103-325, 108 Stat. 2160 (1994), *codified in relevant part at* 15 U.S.C. § 1639 (2003). Under HOEPA, additional disclosures are required for home equity loans that bear interest rates or fees above certain trigger levels set by the applicable statutes and regulations. See 15 U.S.C.

though it is not a part of TILA,<sup>93</sup> the Real Estate Settlement Procedures Act<sup>94</sup> ("RESPA") operates in concert with TILA and mandates additional disclosures in connection with loans secured by a dwelling.<sup>95</sup>

In sum, one must be cognizant of the type of credit being extended as well as the terms of the credit contract to determine which disclosures, in addition to the APR and finance charge, are required under TILA and any other applicable Federal<sup>96</sup> and state laws.<sup>97</sup> This Article, however, will focus on these two major "cost-of-credit" disclosures, given that they are the heart of the mandatory disclosure regime.

## II. CRITIQUES OF TILA'S MANDATORY DISCLOSURE REGIME

### A. INTRODUCTION

Since its passage in 1968, TILA has engendered significant criticism questioning the instrumental rationality<sup>98</sup> of the Act's mandatory disclosure mechanisms.<sup>99</sup> The assault was particularly intense during the first decade of the Act's existence, when TILA came under steady attack by legal scholars and the consumer credit industry.<sup>100</sup> Many of the criti-

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§ 1602(aa)(A); 15 U.S.C. § 1602(aa)(B); 12 C.F.R. § 226.32(a)(1)(i). In addition, HOEPA provides several substantive protections, such as limitations on prepayment penalties and balloon payments. See RENUART & KEEST, *supra* note 11, § 10.4, at 613-16.

<sup>93</sup> The concept of Federal truth-in-lending law is sometimes taken to include other Federal consumer protection laws that mandate disclosure to borrowers, such as RESPA. See ALPERIN & CHASE, *supra* note 16, § 275, at 480 n. 3 ("In a broader sense . . . the term 'Truth in Lending' is used to refer to all aspects of consumer credit law.").

<sup>94</sup> 15 U.S.C. §§ 2601-17 (2003).

<sup>95</sup> For explanations of how TILA interacts with RESPA, see FRB/HUD Report, *supra* note 15, at Chs. 1-4; ROHNER & MILLER, *supra* note 15, ¶ 6.06, at 414-20; Sovern, *supra* note 6, at 76-77.

<sup>96</sup> Compare ROHNER & MILLER, *supra* note 11, ¶ 14.01 (noting that TILA "is essentially a free-standing law that does not displace, overlap, or interact with other federal laws"); with Heselton, McCaffrey, & Miller, *supra* note 41, at 30-32 (discussing how TILA is integrated with the Fair Credit Billing Act and RESPA).

<sup>97</sup> See RENUART & KEEST, *supra* note 11, § 2.5, at 77-79.

<sup>98</sup> See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 147 (2003) (explaining that, in a simple form, "instrumental rationality involves the choice of means that are best suited to achieve a pre-established end") (citing 1 MAX WEBER, *ECONOMY AND SOCIETY* 24-25 (Guenther, Roth, & Claus Wittich, eds., Ephraim Fischhoff et al., trans., 1978)).

<sup>99</sup> This simply means that the critiques of TILA have not challenged the normative desirability of the Act's goals or purposes. See *supra* notes 51-56 and accompanying text (discussing the purposes of TILA). Rather, the critiques have accepted the legitimacy of the Act's purposes, broadly speaking, but have questioned whether the regulatory or legislative means selected to accomplish these goals have been instrumentally effective.

<sup>100</sup> See ALPERIN & CHASE, *supra* note 16, § 272, at 476-77; ROHNER & MILLER, *supra* note 11, ¶ 1.02[2]-[3], at 13-18; William Boyd, *The Truth in Lending Simplification and Reform Act — A Much Needed Revision Whose Time Has Finally Come — Part I*, 23 ARIZ. L. REV. 1, 2-3 (1981) (discussing criticisms of TILA); Rohner, *supra* note 51, at 1004-1007

ques from this period involved questions regarding the burdens that the regulatory regime and TILA litigation imposed upon creditors.<sup>101</sup> Observers argued that the morass of hyper-technical regulations and voluminous administrative interpretations,<sup>102</sup> when combined with unforgiving judicial application of TILA, led to a regime where creditor compliance was extraordinarily difficult to achieve and the penalties for minor non-compliance were unfair and disproportionately harsh.<sup>103</sup> The end result, critics asserted, was a TILA litigation explosion<sup>104</sup> fueled by the consumer finance equivalent of “ambulance chasing attorneys.”<sup>105</sup> A Senate Report summed up the criticism as follows:

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(summarizing critiques of TILA). An excellent example of a critique from the pre-Simplification era is Landers & Rohner, *supra* note 34.

<sup>101</sup> There is no doubt that mandatory disclosure regimes carry costs, and that those who pay these costs are likely to object to their imposition. From a legislative standpoint, the more pertinent inquiry is whether the costs of a particular regulatory regime outweigh the benefits. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 13.3, at 388 (6th ed. 2003) (“Viewed as a method of standardizing complex financial information [TILA] can be defended, although its benefits would have to be weighed against its not inconsiderable costs in fomenting litigation.”); Gregory Elliehausen & Barbara R. Lowrey, *The Cost of Implementing Consumer Finance Regulations: An Analysis of Experience with the Truth in Savings Act*, FEDERAL RESERVE BULLETIN 170 (December 1997); Garwood, Hobbs, & Miller, *supra* note 1, at 784 (“[T]he cost of preparing forms, training personnel, monitoring compliance attempts, and the like for disclosure is not cheap. While effective disclosure allocates resources and produces other benefits that probably justify such expenditures, ineffective disclosure produces little to justify its cost, and may even misallocate resources.”); Sherrill Shaffer, *Rethinking Disclosure Requirements*, BUS. REV. (May/June 1995), available at <http://www.phil.frb.org/econ/br/index.html> (discussing the costs of various disclosure statutes, including TILA, and cautioning against the use of mandatory disclosure in the absence of thorough and continuing cost-benefit analysis); Jason Ross Penzer, Note, *Grading the Report Card: Lessons from Cognitive Psychology, Marketing, and the Law of Information Disclosure for Quality Assessment in Health Care*, 12 YALE J. ON REG. 207, 253 (1995) (“TILA disclosure also reinforces the notion that information strategies can be expensive. . . . These costs are passed on to consumers in the form of higher fees, higher borrowing rates, and lower interest rates on deposits.”). But see Whitford, *supra* note 34, at 432-33 (observing that the cost of government oversight does not seem to have been a major issue in the implementation of TILA).

<sup>102</sup> See Rohner, *supra* note 51, at 1005 (“By 1980, the Federal Reserve had issued more than sixty official Board Interpretations and more than 1500 official and unofficial staff letter interpretations of Regulation Z. Accompanying this explosion in the interpretation process was inconsistent judicial resolution of numerous questions under the Act and Regulation.”).

<sup>103</sup> See Abbott & Campbell, *supra* note 44, at 5-8; Rubin *supra* note 3, at 236-38. Fifteen years after TILA Simplification, some critics still adhered to this view. See, e.g., Robert A. Cook, *The Truth in Lending Act — A Review in Light of Its Original Purpose*, 49 CONSUMER FIN. L. Q. REP. 357, 358 (1995) (noting that “the failure of a lender to make meaningless disclosures required by needlessly complex regulations can lead to harsh penalties that far exceed any justifiable punishment”).

<sup>104</sup> See Abbott & Campbell, *supra* note 44, at 3; Boyd, *supra* note 100, at 3; Heselton, McCaffrey, & Miller, *supra* note 41, at 39; Rohner, *supra* note 51, at 1005-06.

<sup>105</sup> *Truth in Lending Simplification and Reform Act: Hearing Before the Sen. Comm. on Banking, Housing, and Urban Affairs*, 96th Cong. 3 (1979) (statement of Sen. Garn) (referring to “ambulance chasing attorneys who have quit chasing ambulances and now follow Truth in Lending violations to pick up a quick buck”).

Creditors . . . have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions. There is also evidence that many creditors have sincerely tried to comply with the act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation.<sup>106</sup>

To address these problems, Congress passed the Truth in Lending Simplification and Reform Act in 1980,<sup>107</sup> which seemed to mute the most vociferous creditors' complaints.<sup>108</sup> Although additional issues have emerged during the last two decades regarding the regulatory burdens on creditors,<sup>109</sup> such matters (though important) will be placed to

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<sup>106</sup> S. REP. 96-73, reprinted in 1980 U.S.C.C.A.N. 280, 281.

<sup>107</sup> Congress passed the Truth in Lending Simplification and Reform Act, as Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980. See Pub. L. No. 96-221, 94 Stat. 221 (1980). These major changes to TILA "were more than enough to justify the Federal Reserve Board's characterization of the legislation as 'a new Truth in Lending Act.'" RENUART & KEEST, *supra* note 11, § 1.2.2, at 36-38 (citing Federal Reserve Board, *Regulatory Analysis of Revised Regulation Z*, 46 FED. REG. 20941, 20949 (1981)); Peterson, *supra* note 3, at 889. The revision to TILA became effective in 1982, see Pub. L. No. 96-221, § 301, and a new version of Regulation Z was issued to reflect the changes in the Act. See ROHNER & MILLER, *supra* note 11, ¶ 1.03[1], at 16-18. For background on TILA Simplification, see RENUART & KEEST, *supra* note 11, at § 1.2.2.1, at 36; ROHNER & MILLER, *supra* note 11, at ¶ 1.02[2]-[3], at 13-18; William E. Boyd, *The Truth in Lending Simplification and Reform Act — A Much Needed Revision Whose Time Has Finally Come — Part I*, 23 ARIZ. L. REV. 1 (1981); Timothy D. Marrinan & Peter D. Schellie, *Truth in Lending Simplification*, 37 BUS. LAW. 1297 (1982); Rohner, *supra* note 51.

<sup>108</sup> See Peterson, *supra* note 3, at 890 ("[I]ndustry has come to a grudging acceptance of Truth in Lending as litigation and compliance problems have largely been solved.").

<sup>109</sup> This is not to say that additional problems have never arisen regarding litigation and regulatory burdens on creditors. The most significant recent example involves the firestorm surrounding the Eleventh Circuit's controversial decision in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994). The *Rodash* court held that a borrower was permitted to rescind a mortgage refinancing loan and recover all fees and finance charges that had been paid, because the creditor failed to include \$22 in courier fees and a \$200 state tax in the finance charge calculation. The disclosure errors that warranted rescission of the loan agreement in *Rodash* apparently were widespread in the mortgage industry, and following the *Rodash* decision, a series of class action lawsuits were filed seeking the rescission of arguably billions of dollars worth of loan agreements. Fearing the effects of these lawsuits on the mortgage industry (and the U.S. economy), Congress passed a temporary class action moratorium, followed by the Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (1995), which "made significant revisions to the rules for determining the finance charge, disclosure tolerances, civil liability and the right of rescission in closed-end transactions." Rohner & Miller, *supra* note 11, ¶ 1.02[4], at 20. For further discussions of the 1995 Act, see Robert A. Cook and Robert R. Wisner, *Truth in Lending — A Whirlwind Year*, 51 BUS. L. REV. 861 (1996); Robert A. Cook, *Truth in Lending Act Amendments of 1995*, 49 CONSUMER FIN. L. Q. REP. 239 (1995); see also RENUART & KEEST, *supra* note 11, § 1.2.3, at 39-41; ROHNER & MILLER, *supra* note 11, at 359-63; Griffith, *supra* note 16, at 194-96. The *Rodash* story illustrates that the TILA regime's burdens on creditors still potentially have the potential to raise credit industry concerns, but that rapid Congressional action can mute such disquiet before it becomes the

the side in this article. Instead, this Article will focus on critiques regarding efficacy of TILA's mandatory disclosure mechanisms—empirical and theoretical inquiries into whether TILA has succeeded in reducing information asymmetries and indeed has fostered comparison shopping for consumer credit.<sup>110</sup>

## B. CRITIQUES OF MANDATORY DISCLOSURE AS A SOLUTION FOR INFORMATION ASYMMETRIES

### 1. Introduction

Many critiques of TILA involve an interrelated set of empirical, theoretical, and behavioral questions concerning whether TILA's mandatory disclosure mechanisms truly reduce information asymmetries in the consumer finance market and facilitate comparison-shopping for credit. This was a major concern in the pre-simplification era<sup>111</sup> and today remains a subject vital to academics and consumer rights activists. By applying a variety of social science methods to the consumer credit market, critics aim to cast doubt on TILA's economic model by suggesting that consumers, for a variety of reasons, fail to engage in effective comparison-shopping for credit, even though they have been provided with the disclosures that TILA requires.<sup>112</sup> There are two possible categories of reasons for why the problems of imperfect information might persist de-

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fodder for sustained scholarly reflection. A cynic might argue that the 1995 Amendments show that a Republican Congress will satisfy the demands of the banking industry to the detriment of consumers. See John Roddy, *Reversing Field: Is There a Trend Toward Abrogating Truth in Lending?*, 1 CONSUMER FIN. SERVICES LITIG. 637, 639 (1998) ("TILA was amended in 1980, refined and tamed in many respects, but it still retained most of its teeth. TILA was again amended in 1995 though, this time having most of those teeth extracted."). It should be noted that President Clinton, a Democrat, signed the 1995 Amendments bill into law.

<sup>110</sup> In this Article, I often will address all parts of the consumer credit market together. Obviously, the sub-markets for the myriad forms of consumer credit are quite distinct in many respects. This fact is reflected in the scholarship in the field, which at times addresses home mortgages, credit cards, payday loans and other forms of credit separately. Nevertheless, the information asymmetries to which I will be referring often cut across different parts of the consumer credit market. I do concede, of course, that the exact dimensions of the information problems might differ depending on the type of consumer credit at issue, and, as I will discuss later, this leads to the conclusion that properly designed disclosure might vary from one segment of the market to another. See *supra* note 262 and accompanying text.

<sup>111</sup> See *supra* notes 100-01 (discussing the Truth in Lending Simplification and Reform Act).

<sup>112</sup> See Eric J. Gouvin, *Truth in Savings and the Failure of Legislative Methodology*, 62 U. CIN. L. REV. 1281, 1299 n. 66 (1994) ("The underlying assumption of disclosure statutes is that consumers act as rational wealth-maximizers and will use the information supplied by disclosure statutes to shop around to get the best deal. . . . Empirical studies have tended to show, however, that consumers do not actually behave that way.") (citing William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1113-15 (1984) (discussing studies that found that consumers do not shop around

spite TILA's disclosure regime: (1) consumers still might not be receiving the necessary information in the marketplace to make optimal choices, despite TILA's mandates;<sup>113</sup> or (2) consumers might be poorly processing the information that TILA requires and the market produces.<sup>114</sup> In other words, we can ask both whether there is a problem with the TILA regime itself in terms of the content or delivery of the mandatory disclosures and whether consumers are willing or able to avail themselves of the information that TILA (or the market) provides. The following section will survey the main instrumental critiques that have been levied against TILA during the past three decades.

## 2. *Design Defects in the TILA Regime*

To assist consumers' credit-shopping processes, mandatory disclosures must include clear information<sup>115</sup> in manageable quantities<sup>116</sup> and be made at a time when they can actually affect market behavior.<sup>117</sup>

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and instead settle for what is acceptable rather than search for what is best)); Kofele-Kale, *supra* note 46, at 146-47 (criticizing economic model of consumer behavior).

<sup>113</sup> My emphasis here is on whether the information required by TILA is what consumers need. I will not address the important question of creditor compliance with TILA—that is, whether creditors are indeed providing the information mandated by the statute. Compare Cecil J. Hunt, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under a New Theory of Economic Hate Crime*, 35 U. TOL. L. REV. 211, 286 (2003) (“[T]he disclosure requirements have been frequently ignored and abused by lenders and infrequently and inconsistently enforced by the courts. There are many reported instances where lenders’ required TILA disclosures have been misleading, false, late, incomplete, or altogether non-existent.”); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 46-49 (2002) (addressing non-compliance with TILA) with Elizabeth C. Yen, *Current Truth in Lending Issues*, 52 CONSUMER FIN. L. Q. REP. 25 (1998) (concluding that although some honest errors are made and some dishonesty exists, “overall it seems that a majority of consumer credit transactions are probably accompanied by disclosures that substantially (if not fully) comply with TILA”).

<sup>114</sup> This framework is taken from David M. Grether, Alan Schwartz, & Louis L. Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 277-78 (1986). In addition, consumers could receive all of the information that they need in a desired form and amount, but still make choices that have detrimental effect on other consumers or society. See Paul N. Bloom, *A Decision Model for Prioritizing and Addressing Consumer Information Problems*, 8 J. PUB. POL’Y & MARKETING 161, 163 (1989) (citing as examples cigarettes, motorcycles, and alcohol but noting that such decisions are unlikely to be related to the adequacy of information consumers possess).

<sup>115</sup> See Garwood, Hobbs, & Miller, *supra* note 1, at 782 (noting that a “prerequisite of effective disclosure is that it must be uniform and clear” and stating that “disclosures must be brief and simple enough to be readily assimilated”).

<sup>116</sup> See ALPERIN & CHASE, *supra* note 16, § 311, at 517 (“The concept of *meaningful* disclosure does not mean *more* disclosure; rather, it describes a balance between competing considerations of complete disclosure and the need to avoid ‘informational overload.’”) (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1981) (quoting S. REP. 96-73 at 3 (1979))); see also *supra* notes 118-132 and accompanying text (discussing the concept of information overload).

<sup>117</sup> See Garwood, Hobbs, & Miller, *supra* note 1, at 781-782 (“[D]isclosure generally should come at a time to permit the utilization of alternative sources to obtain the consumer

Critics have pointed to three possible fundamental design defects in the TILA regime that may impede effective comparison shopping for credit: (a) the overwhelming nature of TILA disclosures; (b) TILA's flawed finance charge definition; and (c) the late timing of TILA's disclosures in the credit shopping process.

a) Information Overload

Prior to TILA Simplification, scholars<sup>118</sup> and regulators<sup>119</sup> asserted that the Act failed to facilitate credit shopping because consumers were cognitively unable to cope with the voluminous nature of the mandated TILA disclosures. Relying on emerging empirical evidence, proponents of this view claimed that consumers were suffering from something known as "information overload,"<sup>120</sup> a controversial and multifaceted concept borrowed from the social sciences.<sup>121</sup> Needless to say, con-

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financial services sought."); Cook, *supra* note 103, at 359 (discussing how early disclosures are necessary for consumers to be able to shop effectively).

<sup>118</sup> See Landers & Rohner, *supra* note 34, at 722-25 (discussing information overload and TILA); Peterson, *supra* note 3, at 887 ("[T]he credit industry as well as many neutral academics led a rhetorical challenge to TILA asserting the information provided to debtors was not useful. A body of academic literature had developed discussing Truth in Lending even before Congress adopted the Act, but it has grown larger and decidedly more skeptical."); Rohner, *supra* note 51, at 1006-07; Elizabeth J. Keeler, *The Truth in Lending Simplification and Reform Act of 1980: Is "Simplification" Better for Both Consumer and Creditor*, 8 NOVA. L. J. 175, 184-85 (1983) (discussing how consumers overwhelmed with information will fail to digest any of the disclosures); Penzer, *supra* note 101, at 250 ("Critics of the original Truth In Lending Act charged that Truth in Lending disclosures overwhelmed consumers with too much complicated information and ultimately discouraged them from credit shopping.").

<sup>119</sup> See *Simplify and Reform the Truth in Lending Act: Hearings Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Hous., and Urban Affairs, United States Senate*, 95th Cong. 16 (1977) (statement of Philip C. Jackson, Jr., Federal Reserve Board Governor) (arguing that TILA disclosures were potentially overwhelming in pre-Simplification era).

<sup>120</sup> See Sovern, *supra* note 6, at 27-28 ("Information overload may occur when consumers are given too much information in too little time, or information too complex to grasp."); Landers & Rohner, *supra* note 34, at 722 ("The consumer's behavior in the transaction will not be affected if the credit disclosures are so numerous and, in conjunction with the other contract provisions, so formidable as to create a 'cognitive overload.' That is, the consumer becomes overwhelmed by the aggregate mass of words and figures and reacts by ignoring the disclosures entirely."); Kofele-Kale, *supra* note 46, at 128-29 (arguing that when consumers get too much information, they ignore the information completely because they cannot process it); Paredes, *supra* note 1, at 440-43. One student note author explained:

Put simply, overload theory postulates that consumers do not act as rational utility maximizers in the face of an overabundance of data; instead, they completely ignore most or all of the information presented. Consumers provided with too much information disregard most of it and therefore make objectively poorer decisions. Alternatively, consumers may unconsciously avoid overload by selectively accessing subsets of presented information. As a result, choices are based on a fraction of the significant data.

Penzer, *supra* note 101, at 238-39.

<sup>121</sup> See Sovern, *supra* note 6, at 28 n. 70 (collecting and discussing sources on information overload within social science and law review literature); Penzer, *supra* note 101, at 238-41 (summarizing and discussing debate on the validity of information overload theories); see

sumer rights advocates were skeptical of these criticisms and questioned whether reducing the available information to consumers was the proper way to solve TILA's alleged problems.<sup>122</sup> Congress, however, seized upon the concept of information overload, and so TILA Simplification and the subsequent revisions of Regulation Z were aimed at making TILA's disclosures less overwhelming to consumers.<sup>123</sup>

In the years since TILA Simplification, the academic debate over the concept of information overload and its applicability to legal decision-making has persisted.<sup>124</sup> Although commentators continue to mention information overload as a hazard that should be avoided,<sup>125</sup> as a technical concept, it is rarely the centerpiece of academic criticism of TILA as it was in the pre-Simplification era.<sup>126</sup> There are at least three possible explanations for this trend. First, the application of information overload theory to legal regulation has been subjected to a significant amount of scrutiny and criticism.<sup>127</sup> Second, scholars may be wary about advocating a position that might lead towards recommendations of less disclosure for consumers. Third, TILA Simplification arguably ameliorated the worst of TILA's overload problems thus eliminating it as a major scholarly concern.<sup>128</sup>

In any event, even though the tag of "information overload" is invoked less today, critics continue to claim that the disclosure regime fails

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also James R. Bettman, Mary Frances Luce, & Hohn W. Payne, *Constructive Consumer Choice Processes*, 25 J. OF CONSUMER RES. 187, 199-200 (1998); Paredes, *supra* note 1, at 441-43 (noting "voluminous" academic discussion of the subject).

<sup>122</sup> See RENUART & KEEST, *supra* note 11, § 1.2.2.1, at 37-38 ("[C]onsumer advocates did note that the disclosures could be made more readable and comprehensible. For the most part, however, they did not lay much blame for any 'information overload' on flaws in TIL, but rather on creditors' diligent efforts to make sure that they were well-protected in the event of dispute or default."); ROHNER & MILLER, *supra* note 11, ¶ 1.02[3], at 17 ("Consumer spokespersons were suspicious of the motives for TIL simplification, and were especially dubious of the 'information overload' rationale. In their view, it had never been demonstrated reliably that TIL disclosed too much information or that consumers overlooked the disclosures that was [sic] available.").

<sup>123</sup> See S. REP. NO. 96-73, at 2-3 (1980), reprinted in 1980 U.S.C.C.A.N. 280, 280-82.

<sup>124</sup> See Sovern, *supra* note 6, at 28 n. 70; Penzer, *supra* note 101, at 240-41; see also Paredes, *supra* note 1, at 441-43.

<sup>125</sup> See Garwood, Hobbs & Miller, *supra* note 1, at 782-83.

<sup>126</sup> See, e.g., Jeffrey Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1977).

<sup>127</sup> See Grether et al., *supra* note 114; see also Bettman et al., *supra* note 121, at 200; Melvin A. Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986); Paredes, *supra* note 1, at 443; Roberta Romano, *A Comment on Information Overload, Cognitive Illusions, and Their Implications for Public Policy*, 59 S. CAL. L. REV. 313 (1986); Sovern, *supra* note 6, at 28 n.70; Penzer, *supra* note 101, at 240-43.

<sup>128</sup> Such optimism, if warranted, is more suited to the context of closed-end credit. See ROHNER & MILLER, *supra* note 11, at 17 (explaining that the most significant changes to the disclosure regime were in the area of closed-end credit); Heselton, McCaffrey, & Miller, *supra* note 41, at 54.



to require the provision of key cost of credit information in an understandable and manageable format, especially for open-ended credit. For example, home mortgage borrowers are often buried in paper, with little guidance as to which documents contain the most crucial information to facilitate consumer credit decision-making.<sup>129</sup> It would be a mistake to attribute the mass of paper solely to Federal regulatory requirements. As one author points out, much of the volume of disclosures is due to lender requirements and state law, not Federal mandates.<sup>130</sup> It is also important to look at how the disclosure rules interact. For example, credit card providers are required to provide cost of credit information in what is known as the "Schumer Box" at the time of application for a credit card.<sup>131</sup> This tabular format is easy to read and understand. Yet, when the credit card account is actually opened, consumers receive the TILA disclosures in text rather than a tabular format because credit card companies are not required to provide consumers with the information in a Schumer Box at that stage. Therefore, consumers might have a difficult time comparing the terms initially promised with the terms of the actual credit arrangement.<sup>132</sup>

#### b) APR and Finance Charge Definition Issues

The second potential design defect with TILA involves the Act's reliance on the related concepts of the finance charge and APR.<sup>133</sup> TILA's APR provision comports with the notion that consumers are best off when they have a single price tag that they can use to compare credit providers and judge whether the use of credit is prudent.<sup>134</sup> At the outset, it should be noted that this threshold assumption could be challenged—observers have questioned whether the use of APRs might distort the credit shopping process.<sup>135</sup> This objection, however, is not

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<sup>129</sup> See, e.g., White & Mansfield, *supra* note 2, at 238-40 (discussing voluminous nature of TILA disclosures without using the term "information overload").

<sup>130</sup> See Elizabeth Renuart, *Toward One Competitive and Fair Mortgage Market: Suggested Reforms in a Tale of Three Markets Point in the Right Direction*, 82 TEX. L. REV. 421, 431 n. 48 (2003) (discussing fixed-rate, nonpurchase money loans).

<sup>131</sup> See 12 C.F.R. § 226.5a.

<sup>132</sup> Elizabeth Renuart drew my attention to this issue. See National Consumer Law Center, *Comments Regarding Economic Growth and Paperwork Reduction Act "EGPRA"*, 10-11 (April 2004), at [http://www.consumerlaw.org/initiatives/test\\_and\\_comm/content/egrpra-final.pdf](http://www.consumerlaw.org/initiatives/test_and_comm/content/egrpra-final.pdf).

<sup>133</sup> See *infra* notes 138-42 and accompanying text (discussing the definition of finance charge and APR).

<sup>134</sup> See Roy Goode, *Instalment Credit Contracts*, in 2 NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS 333, 333 (1998) (discussing crucial role of credit price disclosures, such as the APR, in credit shopping); Keest, *supra* note 3, at 362-65.

<sup>135</sup> See Hynes & Posner, *supra* note 6, at 194 ("[A] problem common to all scoring systems is that firms are driven to emphasize the measured attribute at the expense of hard-to-measure attributes. If consumers focus disproportionately on the interest rate, lenders have an incentive to compete over this term and provide less attractive collection terms or cut back on

necessarily specific to TILA; it can be construed as a general objection to the misuse of any single metric in complex decision-making.<sup>136</sup> A joint Federal Reserve Board and HUD report explained:

[T]he APR does not, and is not intended to, consider all of the factors that consumers weigh in determining the best loan. For example, the APR cannot tell a consumer whether the best economic choice is to bear credit costs by paying interest paid over time in the rate or paying points up-front; the answer may depend on how long the borrower intends to hold the loan. Consumers who pre-pay several points for a thirty-year mortgage and who sell their homes after a brief period may have a higher cash outlay over that period than for another loan with a higher APR composed of fewer points and a higher interest rate. Similarly, the APR does not, and is not intended to, tell consumers about the financial impact of the amount of the monthly payment or the down payment. And even if the APR could somehow enable consumers to evaluate every cost, information unrelated to costs—such as prepayment penalties or a creditor's ability to meet a selected closing date—can be as important as costs for some consumers.<sup>137</sup>

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customer service.”) (citations omitted); *see also* Beales, Craswell, & Salop, *Information Remedies for Consumer Protection*, *supra* note 8, at 412; Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 244 (1995) (arguing that banks have an incentive to keep activity fees lower and interest rates higher, because these are matters on which consumers focus, while compensating by cutting other costs, such as those reflected in less salient form contract provisions); Landers & Rohner, *supra* note 34, at 739 (discussing dangers of overemphasizing price terms).

<sup>136</sup> *See* Eskridge, *supra* note 112, at 1134 (explaining difficulties with designing disclosures that adequately convey the complexity of certain mortgage transactions). Some scholars argue that lenders make credit contracts more complex than they need to be. *See* Peterson, *supra* note 3, at 899 (“The credit industry has for years seized on the complaint that credit disclosures are not useful because they are too hard to understand. But, a significant amount of confusion is attributable to the industry’s unnecessarily complex contracts which make current disclosures awkward.”) (footnote omitted); Rohner, *supra* note 51, at 115 (“It smacks of hypocrisy for the industry to blame the complexity of disclosure rules on TILA when it is the unending stream of new credit offerings and arrangements that is the source of the complexity.”).

<sup>137</sup> FRB/HUD Report, *supra* note 15, at 9. The FRB/HUD Report was the product of a Congressional mandate for both agencies to study ways to simplify and unify the disclosure requirements under RESPA and TILA. *See* Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, § 2101, 110 Stat 3009 (1996). Eventually, efforts to improve the coordination of TILA and RESPA failed. *See* Elizabeth C. Yen & Timothy P. Meredith, *Truth in Lending Developments in 1999 — Preparing for the New Millennium*, 55 BUS. LAW. 1261, 1261 (2000); *see also* Engel & McCoy, *supra* note 9, at 1309.

Beyond these threshold questions about the general value of APRs, scholars have claimed TILA's particular APR and finance charge definitions may impede comparison shopping for credit.<sup>138</sup> The most common critical argument is that TILA's systematic exclusion of certain fees and costs from the definition of the finance charge, and thus the APR,<sup>139</sup> leads to a chronic understating of the cost of credit. As Professors Engel and McCoy explain:

Under TILA, significant costs are excluded from the finance charge and APR, meaning that the reported total cost of credit is too low. These exclusions include fees for credit reports, appraisals, inspections by lenders, flood certifications, document preparation, title searches, and title insurance, as well as notary fees, recording fees, and government taxes.<sup>140</sup>

This has been a thorny, long-standing problem with TILA,<sup>141</sup> and it was one of the main issues addressed by the Federal Reserve Board and HUD in their extensive joint study on TILA and RESPA.<sup>142</sup> On the one hand, no one would doubt that it is valuable for consumers to have a clear sense of the "true" cost of credit. There is something intuitively disturbing about APRs that are kept artificially low through the exclusion of certain fees. On the other hand, if we view TILA's main purpose as the facilitation of comparison shopping between different providers of credit, then TILA's system-wide "some fees in, some fees out" approach would not necessarily be detrimental to consumers, so long as all of the providers of credit followed the same rules for including and excluding fees. In such a situation, consumers would still be able to choose the cheaper provider of credit, although the total cost of credit would be higher than the consumers believe.<sup>143</sup>

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<sup>138</sup> See Penzer, *supra* note 101, at 253 ("Even though APR disclosure is the centerpiece of TILA, comparison shopping based on the APR is unhelpful in many common credit situations."). One example that has been noted is the difference between how the APR is computed for open and closed-ended credit, which makes it difficult for consumers to compare credit across product lines. See Garwood, Hobbs, & Miller, *supra* note 1, at 786; Rohner, *supra* note 51, at 120 (arguing that "it is time to think seriously of erasing or seriously blurring that line, giving primacy to an open-end kind of regime"); Penzer, *supra* note 101, at 253.

<sup>139</sup> See *supra* note 83 and accompanying text.

<sup>140</sup> Engel & McCoy, *supra* note 9, at 1269 (citing FRB/HUD Report, *supra* note 15); see also Eskridge, *supra* note 112, at 1131-32; Peterson, *supra* note 3, at 899-901.

<sup>141</sup> See FRB/HUD Report, *supra* note 15, at 7 (noting that Congress carved out exceptions from the definition of finance charge from the start).

<sup>142</sup> See FRB/HUD Report, *supra* note 15, at 7-19.

<sup>143</sup> This would be more of an issue if the consumer were trying to compare whether to use cash or credit. But, in the case of home mortgages or other large ticket items, we can assume that this is not typically the case.

Unfortunately, things are not so simple. In reality, credit providers charge a multiplicity of different fees, and inclusion in the APR is handled inconsistently from lender to lender.<sup>144</sup> Moreover, the judicial and administrative process for resolving these distinctive approaches is slow,<sup>145</sup> so at any one time competing creditors in the marketplace are in fact treating arguably similar fees differently.<sup>146</sup> This means that a creditor's APR might both understate the total cost of credit in an absolute sense and impair comparison-shopping between providers of credit. The Federal Reserve Board and HUD recommended changes to the definitions of the APR to include more fees<sup>147</sup> and thus better reflect the "true" cost of credit, but Congress has not acted on these recommendations. Given the foregoing, it would not be an overstatement that the very core of TILA—the provision of the finance charge and the APR to facilitate comparison shopping—suffers from several theoretical and practical problems that have vexed commentators and regulators from the very passage of the Act. As the joint FRB/HUD Report shows, some of these issues might be resolved by improving the statutory finance charge definition, but arguably there are larger issues that definitional tinkering might not resolve.

### c) Timing Problems

A third design defect with TILA involves the regime's disclosure timing rules.<sup>148</sup> Critics long have argued that consumers do not receive TILA disclosures early enough to facilitate shopping for closed-end credit.<sup>149</sup> TILA generally requires that disclosures for closed-end credit<sup>150</sup> be made when the transaction is "consummated,"<sup>151</sup> which is

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<sup>144</sup> See Peterson, *supra* note 3, at 901-02.

<sup>145</sup> The Board noted that it receives thousands of telephone inquiries per year inquiring as to the proper way to characterize fees in connection with real estate transactions. See FRB/ HUD Report, *supra* note 15, at 11.

<sup>146</sup> Peterson, *supra* note 3, at 902.

<sup>147</sup> See FRB/ HUD Report, *supra* note 15, at 13-16.

<sup>148</sup> For a chart summarizing the timing rules for real estate transactions, see FRB/ HUD Report, *supra* note 15, at 38 (fig. 2).

<sup>149</sup> See Cook, *supra* note 11, at 358-59 (arguing that disclosures to consumers should be made when consumers shop for credit, through advertising disclosures); Durkin & Elliehausen, *supra* note 1, at 125 ("Many observers over the years have noted. . . that the formal Truth-in-Lending disclosure notices for closed-end credit typically are presented to the consumer after the credit arrangements are negotiated (but before the contract is signed). Critics say this is too late for shopping usefulness."); Eskridge, *supra* note 112, at 1128-30; Landers & Rohner, *supra* note 34, at 715-16; Lee & Hogarth, *supra* note 26, at 74; Peterson, *supra* note 3, at 898; Rohner, *supra* note 51, at 1020.

<sup>150</sup> This would not be a problem for open-ended credit in most cases because APR information is disclosed in advertisements and solicitations. See Lee & Hogarth, *supra* note 26, at 354.

<sup>151</sup> See 12 C.F.R. § 226.17(b) (2004). In addition, the disclosures must be made "clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R.

defined in Regulation Z as “the time that a consumer becomes contractually obligated on a credit transaction.”<sup>152</sup> Experts have pointed out that a consumer is already verbally and psychologically committed to the deal at this point,<sup>153</sup> making it unlikely that she will terminate the transaction to engage in further comparison-shopping for credit. This pressure to continue with the deal can be compounded by a variety of other factors, including high-pressure tactics from salespeople who discourage consumers from walking away from a deal at the point of consummation and the burdens of further credit shopping.<sup>154</sup> Furthermore, these problems are exacerbated in certain contexts. For example, some lenders verify employment status for payday and car title loans before making the TILA disclosures.<sup>155</sup> One easily can see how borrowers might be reluctant to have their employment status verified multiple times in order to comparison shop for loans. This might not be an issue for someone who works for a large corporation (or an educational institution) where there are independent human resource professionals who handle such inquiries, but in other employment contexts, the employee might not want to burden his boss or supervisor with such matters or make it known at all that he is seeking such a loan.

RESPA attempts to ameliorate these timing issues and coordination problems in the area of home mortgages, but numerous scholars claim

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§ 226.17(a)(1); *see also* Polk v. Crown Auto, Inc., 221 F.3d 691 (4th Cir. 2000); Elwin Griffith, *The Truth and Nothing but the Truth: Confronting the Challenge in the Truth in Lending Act and Regulation Z*, 40 HOUS. L. REV. 345, 351-60 (2003) (discussing the disclosure requirements under TILA and Regulation Z).

<sup>152</sup> *See* 12 C.F.R. § 226.2 (2004).

<sup>153</sup> *See* Peterson, *supra* note 3, at 898 (“Truth in Lending disclosures come at, or very shortly before, the consummation of a transaction to which the consumer is already verbally and psychologically committed. . . . Moreover, it is equally unlikely that at this point the consumer will opt to pay with cash.”); *see also* Cook, *supra* note 11, at 358-59; Durkin & Elliehausen, *supra* note 1, at 125; Landers & Rohner, *supra* note 34, at 715-16; Eskridge, *supra* note 112, at 1128-29; Rohner, *supra* note 51, at 1021; John M. Drain, Jr., Note, *Truth in Lending: The Impossible Dream*, 22 CASE WESTERN L. REV. 89, 107 (1970) (noting that consumers have already made the decision to buy once the contract stage has arrived so that he will only read the contract if he distrusts the salesperson) (citing Robert L. Jordan & William D. Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285, 1320 (1966)).

<sup>154</sup> *See* Kofele-Kale, *supra* note 46, at 129-30. In the area of mortgages, two scholars explain that:

This state of affairs puts unsophisticated loan applicants at risk of high-pressure tactics at closing, where borrowers may learn for the first time that they will be paying higher interest, points, or fees. Confronted by surprise disclosures, they need financial or legal advice at the exact moment that they have to commit. Without that advice, fearful that they will lose their loans and desperate for funds, most borrowers sign the closing documents.

Engel & McCoy, *supra* note 9, at 1307.

<sup>155</sup> *See* Peterson, *supra* note 3, at 895-86.

that these efforts have not been successful.<sup>156</sup> This too was a major subject of the Federal Reserve Board/HUD Report.<sup>157</sup> Under RESPA, a lender must provide a good faith estimate of closing costs (GFE) to borrowers within three days of their application<sup>158</sup> as well as an actual statement of closing costs (the HUD-1) at closing.<sup>159</sup> Critics note that lenders are not liable to borrowers for errors in either the GFE or the HUD-1.<sup>160</sup> In addition, many lenders and mortgage brokers require borrowers to pay an application fee before providing the GFE, thus limiting the GFE's potential role as a shopping tool.<sup>161</sup> As noted before, the Federal Reserve Board/HUD Report suggested many changes to ameliorate these timing and coordination problems and HUD proposed new rules to improve the RESPA regime.<sup>162</sup> But after further consideration HUD withdrew the proposal,<sup>163</sup> and final action has not been taken on this front.<sup>164</sup>

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<sup>156</sup> See Engel & McCoy, *supra* note 9, at 1269; Eskridge, *supra* note 112, at 1128-29 (discussing various reasons why the mortgage disclosures come too late in the borrower's decision-making process to effectively affect transactional behavior); Kofele-Kale, *supra* note 46, at 129-30; Sovern, *supra* note 6, at 76-77.

<sup>157</sup> See FRB/HUD Report, *supra* note 15, at 20-44.

<sup>158</sup> See 24 C.F.R. § 3500.7(a) (2003); 12 C.F.R. § 226.19(a)(1) (2004) (stating that if the transaction is a residential mortgage covered by RESPA "the creditor shall make good faith estimates of the disclosures required. . . before consummation, or shall deliver or place them in the mail not later than three business days after the creditor receives the consumers written application, whichever is earlier").

<sup>159</sup> See 24 C.F.R. § 3500.10 (2003). Technically, the rules state that the HUD-1 must be available for inspection the day before closing, and that delivery of the HUD-1 is to be made "at or before the settlement." *Id.* RESPA disclosures have been the subject of recent discussion within the press, because of the issue of "sticker shock" that homebuyers face when they arrive at closing and find that the closing costs exceed the good faith estimate. See Patrick Barta & Ruth Simon, *Fee Dispute: Furor Greets Bid to Alter System of Closing Costs on Mortgages*, WALL ST. J., Aug. 19, 2003, at A1.

<sup>160</sup> See Engel & McCoy, *supra* note 9, at 1269, 1306; FRB/HUD Report, *supra* note 15, at 20-21.

<sup>161</sup> See Engel & McCoy, *supra* note 9, at 1269; Eskridge, *supra* note 112, at 1129; FRB/ HUD Report, *supra* note 15, at 20-21.

<sup>162</sup> See Real Estate Settlement Procedures Act (RESPA), U.S.C. §§ 2601-17 (2003); Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers, Fed. Reg. 49134 (proposed July 29, 2002) (proposal was withdrawn).

<sup>163</sup> See *RESPA Rule Recalled, Reaction Distinct*, 7 CONSUMER FIN. SERVICES L. REP. NO. 19, April 9, 2004; James R. Hagerty, *White House Retreats on Plan over Mortgages — Rule to Cut Fees for Loans Encountered Opposition from Small Service Firms*, WALL ST. J., Mar. 23, 2004, at A2; Jennifer Bayot, *Revised Rules on Mortgages Are Scuttled*, N.Y. TIMES, Mar. 23, 2004, at C1; Letter from Alphonso Jackson, Acting Secretary, U.S. Department of Housing and Urban Development to Dr. John Graham, Administrator, Office of Management and Budget (March 22, 2004), available at <http://www.hud.gov/news/resparule.cfm> (last visited June 30, 2004).

<sup>164</sup> Alphonso Jackson, now the HUD Secretary, has indicated that he will press ahead with RESPA reform. Ben Whisenant, *Secretary Proposes More RESPA Reform*, AMERICAN BANKER, June 3, 2004. But one must wonder whether reform is likely to occur in the near future, given the difficulties encountered the last time that an attempt was made on this front.

### 3. *Psychological, Cognitive, Educational, and Behavioral Critiques of TILA*

The previous subsection addressed structural barriers to effective consumer credit shopping created by the TILA regime itself. Observers, however, also have noted a myriad of potential psychological, behavioral, cognitive, and educational barriers to effective consumer credit shopping.<sup>165</sup> The following discussion will highlight the diverse theoretical perspectives criticizing the basic economic model of TILA's mandatory disclosure approach.<sup>166</sup>

First, experts in the field express serious doubt as to whether consumers read their TILA disclosures<sup>167</sup>—a viewpoint that finds some support in surveys of consumers.<sup>168</sup> For example, in 2001, 49% of one survey's respondents agreed that they read their TILA statements carefully,<sup>169</sup> which represented a dramatic increase from the 1997 survey,

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<sup>165</sup> For general background on consumer decision-making processes, see Bettman et al., *supra* note 121.

<sup>166</sup> A full treatment of the recent behavioral law and economics assault on the traditional law and economics model of rational decision-making is beyond my scope here. For more on that subject, see *infra* note 230.

<sup>167</sup> See Cook, *supra* note 11, at 358 ("The percentage of mortgage customers and new car buyers that read their disclosures cannot be large, and one can seriously question whether anyone looks at the required disclosures that accompany new credit cards."); Elizabeth C. Yen, *Current Truth in Lending Issues*, 52 CONSUMER FIN. L.Q. REP. 25, 26 (1998) ("Intellectually honest consumer advocates, creditors, regulators and legislators might all privately concede that the vast majority of consumers do not both read and fully comprehend TILA disclosures."). To support this point Dwight Golann, the Chair of the Committee on Consumer Financial Services of the ABA Section of Business Law, stated:

For some years I've had this guilty feeling because I never read the disclosure documents from my last mortgage refinancing, or any of the refinancings before that either. There's this pile of disclosure papers at home; I keep them just in case. Recently I finally pulled them out, thinking I should read a few. But I got only as far as a full-page disclosure of the transfer of mortgage servicing rights before I decided I can't take this any more. So I thought, if I don't read this stuff, how many other people do?

Panel Discussion, *Re-Examining Truth in Lending: Do Borrowers Actually Use Consumer Disclosures?*, 52 CONSUMER FIN. L. Q. REP. 3, 3 (1998).

<sup>168</sup> In 2001, seventy-five percent of respondents agreed either somewhat or strongly that TILA statements were complicated, and 66% agreed either somewhat or strongly that TILA statements contain some information that is not very helpful. See Thomas A. Durkin, *Consumers and Credit Disclosures: Credit Cards and Credit Insurance*, FED. RES. BULL. 201, 208 (tbl. 9) (April 2002) (survey of holders of bank-type credit cards). On the positive side, 67% of the respondents indicated that the TILA disclosures make people more confident when dealing with creditors. *Id.*

<sup>169</sup> *Id.* This includes respondents that agreed either somewhat or strongly with the stated proposition. The population surveyed also changed from families that had incurred closed-ended installment debt in the past year to those holding bank-type credit cards, but it seems unlikely that this is responsible for the stated increase. I do not have any empirical proof to dispute this claim, but it seems rather doubtful that nearly half of borrowers read their TILA statements closely. Thomas Durkin attributes this number in some degree to "yea saying," or attempting to give the survey taker the "right" answer. *Id.* at 208.

where only 29% of respondents agreed (69% disagreed) that "most people" (as opposed to the respondent) read their disclosures carefully.<sup>170</sup> A skeptic might think it unlikely that there was a dramatic increase in the number of consumers reading TILA disclosures from 1997 to 2001. Rather, the key is that the phrasing of the question was changed and that people think that *they* read their disclosures but that other consumers do not.<sup>171</sup>

Second, even assuming that consumers read their disclosures, we must face the issue of whether consumers truly understand the most vital "price tag" concepts in the disclosures such as the APR. This empirical question has drawn the attention of social scientists and legal scholars over the past three decades,<sup>172</sup> and the evidence is decidedly mixed.<sup>173</sup> On the positive side, most scholars agree that there is evidence of an increase in general public awareness of interest rates since TILA's passage in 1968.<sup>174</sup> Before Congress passed TILA, only 27% of credit card

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 208 ("[a] degree of belief among consumers that they exercise reasonable care themselves but that others may be less inclined to do so").

<sup>172</sup> Surveys of the empirical work on TILA may be found in the following sources: Durkin & Elliehausen, *supra* note 1, at 119-136; Durkin, *supra* note 168; Hynes & Posner, *supra* note 6, at 194; Lee & Hogarth, *supra* note 26, at 67-68; Shay & Brandt, *supra* note 47; Sovern, *supra* note 6, at 13, 28 n.70.

<sup>173</sup> In the ever-evolving marketplace for consumer credit, it is always difficult to establish causation and to establish with certainty whether specific changes in consumer awareness or understanding are due to the Truth in Lending Act. As Thomas Durkin explains:

Assessing the direct effects of disclosure legislation in these areas is difficult. For example, an apparent increase in consumers' understanding of credit matters might be explained by improved disclosure laws, but it might also be explained by advances in education, more widespread and frequent use of credit, or by more-effective solicitations for credit, advertisements, and publications that are not specifically tied to disclosure requirements.

Durkin, *supra* note 168, at 201.

<sup>174</sup> See Durkin & Elliehausen, *supra* note 1, at 122 ("[I]t appears reasonable to state that, as a whole, the public's correct perception of consumer credit rates has risen in the three decades since the Day-Brandt study that was conducted immediately after TIL."); Rubin, *supra* note 3, at 235 ("The studies confirm that there has been a significant increase in consumer awareness of the annual percentage rate.") (citing William K. Brandt & George S. Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending*, 7 U. MICH. J. L. REF. 297, 302-03 (1974); George S. Day & William K. Brandt, *A Study of Consumer Credit Decisions: Implications for Present and Prospective Legislation*, in 1 NATIONAL COMM'N ON CONSUMER FIN., TECHNICAL STUDIES 47 (1973); Robert P. Shay & Milton W. Schober, *Consumer Awareness of Annual Percentage Rates Charge in Consumer Installment Credit: Before and After Truth-in-Lending Became Effective*, in 1 NATIONAL COMM'N ON CONSUMER FIN., TECHNICAL STUDIES 7-8 (1973)); NCCF Report, *supra* note 41, at 175-77 (contending that, in general, APR awareness had increased in the fifteen months after the passage of TILA, although problems remained in certain segments of the consumer credit market) (citing Robert P. Shay & Milton W. Schober, *supra* note 174; Day & Brandt, *supra* note 174); S. REP. NO. 96-73 (1980), reprinted in 1980 U.S.C.C.A.N. 280, 281 (discussing increases in consumer awareness of APRs, open-end account rates and the cost of borrowing from various lending institutions during the first ten years after TILA's passage).



users were considered “aware” of APRs,<sup>175</sup> whereas by 2001, this percentage had risen to over 80%.<sup>176</sup> This impressive development makes sense given that TILA created a new uniform vocabulary for consumer credit transactions<sup>177</sup> and that competition between credit providers based upon APRs has flourished.<sup>178</sup> On the other hand, many observers within the academic community contend that the public’s general awareness and appreciation of interest rates has not translated into the type of understanding of the meaning of APRs<sup>179</sup> that is necessary for effective credit comparison shopping.<sup>180</sup> As Professor Edward Rubin explains, TILA may have “succeeded in making consumers increasingly aware, but it has not managed to explain to them what it is they have been made aware of.”<sup>181</sup> More troubling, however, is “evidence that the beneficial effects of . . . [TILA] in enabling consumers to better shop for attractive loans may have been limited to well-educated, affluent borrowers.”<sup>182</sup> This highlights two distinct areas of concern: first, possible links between economic class or educational levels and APR understanding,<sup>183</sup>

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<sup>175</sup> For an explanation of the term “awareness” as it is used in this context, see Thomas A. Durkin, *Credit Cards: Use and Consumer Attitudes, 1970-2000*, FED. RES. BULL. 623, 630-31 (Sept. 2000).

<sup>176</sup> See Durkin, *supra* note 168, at 207.

<sup>177</sup> See Griffith, *supra* note 16, at 192; Rubin, *supra* note 3, at 235-36.

<sup>178</sup> See Lee & Hogarth, *supra* note 30, at 332 (noting interest rate competition in the context of credit card lending).

<sup>179</sup> APR awareness and understanding are necessary, though not sufficient, preconditions to informed credit shopping behavior. See Durkin, *supra* note 175, at 630; Lee & Hogarth, *supra* note 26, at 67 (“Awareness and understanding, however, are different; increased awareness of the price of credit does not guarantee improvement in consumer understanding. There is general consensus that consumers’ lack of understanding is a problem in credit markets.”) (citing literature on the subject).

<sup>180</sup> See Lee & Hogarth, *supra* note 26, at 67 (“There is a general consensus in the research community that consumers do not seem to understand APRs.”) (citing Regina Y. Chang & Sherman Hanna, *Consumer Credit Search Behavior*, 16 J. CONSUMER STUDIES & HOME ECON., 207 (1992); Ralph C. Kimball et al., *Alternative Visions of Consumer Financial Services*, 19 J. OF RETAIL BANKING SERVICES 1 (1997); Jean Kinsey & Ray McAlister, *Consumer Knowledge of the Costs of Open-End Credit*, 15 J. OF CONSUMER AFFAIRS, 249 (1981); Lewis Mandell, *Consumer Knowledge and Understanding of Consumer Credit*, 7 J. OF CONSUMER AFFAIRS 23 (1973); James H. McAlexander & Debra L. Scammon, *Are Disclosures Sufficient? A Micro Analysis of Impact in the Financial Services Market*, 7 J. OF PUB. POL’Y & MARKETING 185 (1988); Anjan V. Thakor et al., *Common Ground: Increasing Consumer Benefits and Reducing Regulatory Costs in Banking*, *General Banking Study*, prepared for the Herbert V. Prochmow Educational Foundation, Graduate School of Banking, University of Wisconsin, Barefoot, Marrinan & Associates, Inc.); Betty Jo White & Nancy A. Barclay, *A Survey of Consumer Difficulties with the Homebuying Process in One Colorado Community*, 15 J. CONSUMER AFFAIRS 358 (1981); Whitford, *supra* note 34, at 417-18 (discussing early studies that suggested that TILA did not promote comparative interest rate shopping).

<sup>181</sup> Rubin, *supra* note 3, at 236.

<sup>182</sup> Hynes & Posner, *supra* note 6, at 194 (collecting sources).

<sup>183</sup> In their study of this issue, Lee and Hogarth did not find income to be associated significantly with an understanding of the relationship between the APR and the contract interest rate. See Lee & Hogarth, *supra* note 26, at 70. But, they did conclude that education was

and second, that some poorer shoppers may be focusing on issues other than the APR in the credit shopping process, such as the minimum monthly payment required under the credit contract.<sup>184</sup>

In addition to APR comprehension issues, scholars have raised other concerns that would call into question whether consumers are sufficiently well-informed or educated to comparison shop for credit. First, some scholars have pointed out that many consumers in the consumer credit market face English language problems that may interfere with a full understanding of TILA disclosures.<sup>185</sup> Second, there are general literacy and educational problems in the population limiting consumer understanding of complex financial disclosures.<sup>186</sup> Third, some commentators have begun to focus on the topic of “financial literacy” by analyzing consumer knowledge and behavior regarding financial matters.<sup>187</sup> To some extent, these concerns over consumer literacy and un-

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associated with understanding of the APR-CIR relationship, given that those with a graduate education understood the APR-CIR relationship better than those with a high school education or less. *Id.* Interestingly, consumers who attended or graduated from college did no better than those with a high school education or less. *Id.*

<sup>184</sup> See POSNER, *supra* note 101, § 13.3, at 389 (noting that those who are “liquidity-constrained” may be weighing considerations that are not captured in an interest rate); Patricia A. McCoy, *Predatory Lending Practices: Definition and Behavioral Implications*, in WHY THE POOR PAY MORE: HOW TO STOP PREDATORY LENDING 94 (Gregory D. Squires, ed. 2004) (citing George S. Day and William K. Brandt, *Consumer Research and the Evaluation of Information Disclosure Requirements: The Case of Truth in Lending*, 1 JOURNAL OF CONSUMER RESEARCH 22, 22-23 (1974); Richard H. Thaler, *Mental Accounting Matters*, 12 J. OF BEHAVIORAL DECISION MAKING 187, 187-88 (1998)); Kofele-Kale, *supra* note 46, at 142 (discussing non-economic considerations that influence low-income shoppers, such as the fear of rejection from a new source of credit or lender and noting that subprime customers “tend to focus on whether the monthly payments offered are affordable, rather than on lower interest rates”); see also Iain Ramsey, *Consumer Protection*, in 1 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 410, 412 (1998) (“Low-income consumers may be practicing rational ignorance in failing to learn the finer points of the APR. . . on their credit contract, when they have limited choices of credit.”).

At the same time, it is important to distinguish true borrowers from “convenience” credit card users who do not carry a balance from month to month. See Jinkook Lee & Jeanne M. Hogarth, *Relationships Among Information Search Activities When Shopping for a Credit Card*, 34 J. CONSUMER AFFAIRS 330, 333-34 (2000) (distinguishing shopping behavior of convenience card holders and “revolvers” who carry debt); Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 101-02 (2000) (noting that “convenience” credit card users, who constitute the majority of cardholders, are less interested in interest rates than card benefits because they do not intend to carry a balance from month to month).

<sup>185</sup> See Bender, *supra* note 16, at 1075-77; Peterson, *supra* note 3, at 893.

<sup>186</sup> See White & Mansfield, *supra* note 2; Bender, *supra* note 16, at 1074-75; Panel Discussion, *supra* note 167, at 4 (comments of Kathleen E. Keest).

<sup>187</sup> See, e.g., Marianne A. Hilgert & Jeanne M. Hogarth, *Household Financial Management: The Connection Between Knowledge and Behavior*, FED. RES. BULL. 309 (July 2003) (analyzing consumer survey research on four household financial-management practices: cash-flow management, credit management, saving, and investment); Lee & Hogarth, *supra* note 26, at 74-75 (discussing study in which at least 40% of closed-end mortgage borrowers did not understand the relationship between the contract interest rate and the APR, a lack of understanding that might impair a rational borrowing decisions).

derstanding overlap with the “information overload” concerns discussed above,<sup>188</sup> with some critics focusing on the structure and content of the disclosures, while others emphasize the ability of consumers to understand the disclosures.<sup>189</sup>

Finally, in recent years, an academic discussion has begun as to whether consumer credit borrowers exhibit various behavioral anomalies that might explain sub-optimal contracting behavior. Two examples will illustrate these critiques. First, some scholars have argued that credit card<sup>190</sup> users suffer from a combination of behavioral biases that lead them to underestimate their future borrowing.<sup>191</sup> The potential importance of this theory for mandatory disclosure regulation is evident. As Oren Bar-Gill explains: “Knowledge of credit terms is meaningless, if the consumer mistakenly believes that she will not borrow.”<sup>192</sup> Disclosure remedies would have to be carefully crafted to overcome such behavioral biases.<sup>193</sup>

Second, Professor Patricia McCoy has explored the ways in which lenders target vulnerable borrowers in the predatory, subprime home loan market.<sup>194</sup> These lenders identify financially distressed homeowners (who are neither in the market for credit nor engaging in comparison shopping) and offer them a seemingly simple way to convert their existing home equity into cash flow that will ameliorate their financial difficulties.<sup>195</sup> McCoy argues that lenders in this market frame their sales pitches to exploit certain predictable behavioral or cognitive anomalies, making it unlikely the borrowers will fully appreciate the enormous financial risk that these transactions pose.<sup>196</sup> As with credit cards, the policy implications are clear—remarkably forceful disclosures would be

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<sup>188</sup> See *supra* notes 118-121 and accompanying text.

<sup>189</sup> See, e.g., White & Mansfield, *supra* note 2, at 238-39 (arguing that, given the structure of the TILA disclosures, “90 million American adults, more than 50% of the American adult population, cannot reliably extract the information about contract terms from the TILA disclosure document”).

<sup>190</sup> A full discussion of credit card pricing and the “stickiness” of credit card interest rates is beyond the scope of my discussion here. For a recent survey of the literature on that subject, see Mitchell Berlin & Loretta J. Mester, *Credit Card Rates and Consumer Search*, 13 REV. FIN. ECON. 179 (2004).

<sup>191</sup> See Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373 (2004); Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits and Bankruptcy*, 71 AM. BANKR. L. J. 249, 261-62 (1997); Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 70-72 (1991). For more optimistic views on consumer rationality in the credit card market, see Dagobert L. Brito & Peter R. Hartley, *Consumer Rationality and Credit Cards*, 103 J. POL. ECON. 400 (1995); Zywicki, *supra* note 184, at 101-10.

<sup>192</sup> See Bar-Gill, *supra* note 191, at 1418.

<sup>193</sup> See Bar-Gill, *supra* note 191, at 1418-19.

<sup>194</sup> McCoy, *supra* note 184.

<sup>195</sup> *Id.* at 91, 93.

<sup>196</sup> *Id.* at 89-94 (discussing loss aversion, reference dependence and framing effects, and choice heuristics).

needed to overcome the behavioral biases that these borrowers possess, or the conduct of the lenders would have to be regulated in such a manner to discourage their exploitation of these behavioral anomalies.<sup>197</sup> These critiques of TILA call into question the theoretical validity of the economic model of disclosure remedies in the consumer finance market. One who is convinced that the market is not operating efficiently due to information asymmetries and that consumers are not rationally utilizing the disclosures to comparison shop for credit might conclude that more aggressive forms of market regulation are necessary.<sup>198</sup>

### C. ASSESSING THE CURRENT REGULATORY AND SCHOLARLY CLIMATE

As we have seen, scholars have levied potent theoretical and empirical critiques against TILA's disclosure regime for over thirty years. A review of these critiques might inspire a bit of pessimism when it comes to the efficacy of mandatory disclosure and might lead someone to wonder whether the quest for effective<sup>199</sup> disclosures is futile.<sup>200</sup> Professor Rohner captures this perspective:

Nothing in TILA compels consumers to read, understand and respond to its disclosures. There is no TILA elixir to cure consumer illiteracy, "innumeracy," or plain disinterest. TILA cannot force economic rationality into a consumer's consciousness. About all that can be expected is that adequate amounts of credit cost information are available, at appropriate times, in a more or less standardized vocabulary and understandable format, so that consumers wanting to use it can do so.<sup>201</sup>

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<sup>197</sup> *Id.* at 95-96.

<sup>198</sup> For example, Professors McCoy and Engel suggest imposing a "suitability" duty upon lenders, such as the duty imposed upon securities brokers, which would require subprime lenders to consider the customer's financial status, needs and goals when recommending a loan product. *See* Engel & McCoy, *supra* note 9, at 1317-59.

<sup>199</sup> Assuming that we read "effective" to mean having a direct, substantial effect on consumer transactional behavior.

<sup>200</sup> A variant of this view was stated almost 25 years ago, prior to TILA Simplification, by two preeminent experts, Professors Landers and Rohner, who argued that TILA:

[A]ssumes that consumers will behave differently in their credit transaction if they are given the best possible TIL disclosure statements. If the desired results have not been achieved, the argument goes, it is because an adequate set of disclosures has not yet been designed. But there is every indication that attaining this expressed purpose is a forlorn hope. Behavioral scientists, public opinion research, consumer research, and our own common sense tells us the same thing: consumer behavior in a particular transaction is almost certainly *not* going to be affected by a TIL disclosure statement, notwithstanding the quality of that statement.

Landers & Rohner, *supra* note 34, at 714-15.

<sup>201</sup> Rohner, *supra* note 50, at 114.

Still, given that disclosure is a relatively recent regulatory development,<sup>202</sup> some scholars hold out hope that TILA's disclosure regime could be reformed to achieve its goals by improving the content of the TILA disclosures and the timing mechanisms of the disclosure regime.<sup>203</sup> Thus, the critiques surveyed above might be viewed as the basis for a legislative reform agenda. For example, the joint Federal Reserve Board-HUD Report<sup>204</sup> had numerous suggestions for improving TILA (and RESPA<sup>205</sup>), including expanding the definition of APR to include certain costs that are now excluded<sup>206</sup> and revising the timing rules for mandatory disclosures.<sup>207</sup> Similarly, scholars have proposed a wide range of solutions to problems faced by specific consumers, such as Professor Bender's calls for more effective disclosures for language minorities.<sup>208</sup> Even Professor Rohner, who is less than sanguine about the direct transactional benefits of disclosures,<sup>209</sup> has several put forward several insightful proposals for reinvigorating TILA's disclosure regime,<sup>210</sup> including reducing the statute's at times archaic distinctions between open and closed-ended credit.<sup>211</sup>

Most importantly, members of Congress have not given up on the concept of disclosure. The Bankruptcy Abuse Prevention and Consumer

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<sup>202</sup> See Peterson, *supra* note 3, at 877-78; Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 619 (1999) ("Mandatory disclosure was a central part of the rights revolution of the 1960s and 1970s, and it has become especially prominent in the 1980s and 1990s, largely as an alternative to command-and-control regulation.").

<sup>203</sup> As Professor Christopher Peterson states:

From a long term historical perspective, unlike other American high-cost credit policy strategies, the disclosure approach is relatively untried. Despite limitations made apparent over the past thirty-five years, the disclosure approach to preventing harmful social consequences of high-cost credit may yet prove more valuable than other far older strategies. However, to date, Truth in Lending has not lived up to its potential. The challenge for consumer advocates is to rhetorically recapture disclosure law from industry lobbyists. To do so, consumer advocates must recast the goal of disclosure law as aiming not merely to truthfully describe contracts, but as aiming to create practical contractual understanding on the part of vulnerable debtors. Anything less risks wasting the historically unique opportunity of credit disclosure law as yet another demobilizing illusion of debtor protection.

Peterson, *supra* note 3, at 903; see also *id.* at 815 ("With aggressive and practical reform, Truth in Lending may blossom into a much more effective strategy than those which predate it by hundreds or even thousands of years.").

<sup>204</sup> See *supra* note 137.

<sup>205</sup> See FRB/HUD Report, *supra* note 15. HUD's efforts to reform the RESPA rules are discussed *supra* at notes 156-164.

<sup>206</sup> *Id.* at 15-16.

<sup>207</sup> *Id.* at 41-44.

<sup>208</sup> See Bender, *supra* note 16, at 1079-83.

<sup>209</sup> See *supra* note 201 and accompanying text.

<sup>210</sup> See Rohner, *supra* note 50, at 119-22.

<sup>211</sup> See *id.* at 120-22.

Protection Act of 2005<sup>212</sup> contains several amendments to TILA's disclosure regime, including enhanced disclosure for open-end credit plans<sup>213</sup> and credit extensions secured by a dwelling,<sup>214</sup> and new disclosures for introductory (teaser) rates<sup>215</sup> and late payment deadlines and penalties.<sup>216</sup> The bill passed the Senate in March 2005<sup>217</sup> and soon will be considered by the House of Representatives, where passage seems assured.

It would be fair to observe, then, that despite the long history of TILA criticism, some of which casts doubt on the very notion of effective disclosure, government regulators will continue to rely on disclosure as an essential method of regulating the consumer credit market. Given that the reign of disclosure is unlikely to end any time soon, the next section will provide some suggestions for TILA reform. In particular, it will address some of the ways in which ongoing TILA reform can be enriched by interdisciplinary socio-economic theory.

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<sup>212</sup> See The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), S. 256, 109th Cong. (2005). For discussions of earlier versions of this bill, see Ann Morales Olazábal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(B): A Case-Based Analysis*, 12 B.U. PUB. INT. L.J. 317 (2003), and Zachary Price, *The Bankruptcy Abuse Prevention and Consumer Protection Act*, 39 HARV. J. ON LEGIS. 237 (2002) (discussing the version of the BAPCPA passed by the 107th Congress). The 2003 version of this bill passed by a wide margin in the House of Representatives. see *Final Vote for Roll Call 74*, H.R. 975, Mar. 19, 2003, available at <http://clerk.house.gov/evs/2003/roll074.xml> (vote in the House was 315-113, with one member answering "present" and five members not voting), but was held up in the Senate over the issue of abortion. Senator Charles Schumer (D-N.Y.) led an effort to include a provision that would have prevented abortion protesters from discharging civil judgments by declaring bankruptcy. See Beth Aluisse, *House Piggybacks Bankruptcy Reform on Farmers' Aid Bill*, CARD NEWS, Feb. 4, 2004; Margaret Whiteman, Note, *F.A.C.E.-ing Up to Bankruptcy Reform: Why a Separate Provision Denying Discharge of Debts Arising Out of Abortion Clinic Violence Is Redundant*, 108 PENN ST. L. REV. 395 (2003).

<sup>213</sup> See S. 256, BAPCPA § 1301. The following provision is illustrative of the Act's disclosure approach:

In the case of an open end credit plan that requires a minimum monthly payment of more than 4 percent of the balance on which finance charges are accruing, the following statement, in a prominent location on the front of the billing statement, disclosed clearly and conspicuously: "Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. For example, making only 2% minimum monthly payment on a balance of \$1,000 at an interest rate of 17% would take 88 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum payments, call this toll-free number: \_\_\_\_." (the blank space to be filled by the creditor).

*Id.* § 1301(a).

<sup>214</sup> *Id.* § 1302.

<sup>215</sup> *Id.* § 1303.

<sup>216</sup> *Id.* § 1305.

<sup>217</sup> The vote was 74 in favor to 25 opposed, with one member not voting. See 151 CONG. REC. S2474 (daily ed. March 10, 2005).

### III. MOVING FORWARD: THE ROLE OF SOCIO-ECONOMIC THEORY IN TILA REFORM

#### A. LAW AND SOCIOECONOMICS IN A NUTSHELL

Within the legal academy, socioeconomics<sup>218</sup> is a multidisciplinary movement dedicated to enriching the study and practice of law through the application of economics, psychology, sociology, political science, anthropology, and biology, as well as other academic disciplines.<sup>219</sup> The socioeconomic perspective has at least three core elements: (1) a critique

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<sup>218</sup> The spellings "socioeconomics" and "socio-economics" are used interchangeably in the literature.

<sup>219</sup> See Robert Ashford, *What Is Socioeconomics?*, 41 SAN DIEGO L. REV. 5 (2004); Lynne L. Dallas, *Teaching Law and Socioeconomics*, 41 SAN DIEGO L. REV. 11, 11-12 (2004). The Association of American Law School's Section on Socio-Economics proffers the following answer to the question of "What Is Socio-Economics?":

Socio-economics begins with the assumption that economics is not a self-contained system, but is embedded in society, polity, culture, and nature. Drawing upon economics, sociology, political science, psychology, anthropology, biology and other social and natural sciences, philosophy, history, law, management, and other disciplines, socio-economics regards competitive behavior as a subset of human behavior within a societal and natural context that both enables and constrains competition and cooperation. Rather than assume that the individual pursuit of self-interest automatically or generally tends toward an optimal allocation of resources, socio-economics assumes that societal sources of order are necessary for people and markets to function efficiently. Rather than assume that people act only rationally, or that they pursue only self-interest, socio-economics seeks to advance a more encompassing interdisciplinary understanding of economic behavior open to the assumption that individual choices are shaped not only by notions of rationality but also by emotions, social bonds, beliefs, expectations, and a sense of morality.

Socio-economics is both a positive and a normative science. It is dedicated to the empirical, reality testing approach to knowledge. It respects both inductive and deductive reasoning. But it also openly recognizes the policy relevance of teaching and research and seeks to be self-aware of its normative implications rather than maintaining the mantle of an exclusively positive science. Although it sees questions of value inextricably connected with individual and group economic choices, socio-economics does not entail a commitment to any one paradigm or ideological position, but is open to a range of thinking that treats economic behavior as involving the whole person and all facets of society within a continually evolving natural context.

Unique among interdisciplinary approaches, however, socio-economics recognizes the pervasive and powerful influence of the neoclassical paradigm on twentieth century thought. Recognizing that people first adopt paradigms of thought and then perform their inductive, deductive, and empirical analyses, socio-economists seek to examine the assumptions of the neoclassical paradigm, develop a rigorous understanding of its limitations, improve upon its application, and develop alternative, perhaps complementary, approaches that are predictive, exemplary, and morally sound. With modest amendment, this description of socio-economics was the substance of the petition signed by more than one hundred twenty law professors from over fifty AALS member schools, to establish the AALS Section on Socio-Economics. It serves as the constitution of the Section.

AALS SEC. ON SOCIO-ECON. NEWSL., No. 19, at 4 (November-December 2003), available at <http://www.journaloflawandsocioeconomics.com> (last viewed June 30, 2004).

of the law and neoclassical economics approach, especially its assumptions regarding rationality;<sup>220</sup> (2) a recognition that law and legal decision-making both reflect and affect the distribution of wealth, power, and well-being in our society and that these effects have normative significance;<sup>221</sup> and (3) an endorsement of empirical legal research,<sup>222</sup> in part to create a body of evidence that can be used to challenge or refine neoclassical economic assumptions regarding the marketplace. Given these core elements, socioeconomics might be viewed as a liberal or progressive alternative to the traditional law and economics movement, which is often seen (correctly or not) as a sub-discipline captured by those who operate from conservative or libertarian perspectives.<sup>223</sup> Socio-economists notably assert that the discipline does not require the adoption of any particular economic or political ideology,<sup>224</sup> though healthy respect for the scientific method is a prerequisite to practicing socioeconomics.<sup>225</sup>

The persuasive socioeconomic entreaty to eschew unpersuasive neoclassical assumptions regarding human rationality is not, of course, unique within legal scholarship. Building upon Herbert Simon's ground-

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<sup>220</sup> See Robert Ashford, *Socio-Economics: What Is Its Place in Law Practice?*, 1997 WIS. L. REV. 611, 612 ("Socio-economics begins with the assumption that an adequate understanding of economic behavior cannot be achieved by the assumptions of autonomy, rationality, and efficiency that stand at the epistemological foundation of neoclassical economics and rational choice theory."); Ashford, *supra* note 219, at 6-7; Lynne L. Dallas, *Law and Socioeconomics in Legal Education*, 55 RUTGERS L. REV. 855 (2003); Thomas S. Ulen, *A Crowded House: Socioeconomics (and Other) Additions to the Law School and Law and Economics Curricula*, 41 SAN DIEGO L. REV. 35, 49 (2004); see also Dallas, *supra* note 219, at 16-18; AALS SEC. ON SOCIO-ECON. NEWSL., *supra* note 219, at 4.

<sup>221</sup> See Ashford, *supra* note 219, at 9; Dallas, *supra* note 219, at 19-20. Jeffrey Harrison points out that socioeconomics cannot provide an answer to what is "just," but it can reveal the limitations of a purely economic approach to such questions. See Jeffrey L. Harrison, *Law and Socioeconomics*, 49 J. LEGAL EDUC. 224, 225-30 (1999).

<sup>222</sup> See Ashford, *supra* note 220, at 613; Margaret F. Brinig, *The Role of Socioeconomics in Teaching Family Law*, 41 SAN DIEGO L. REV. 177, 178 (2004).

<sup>223</sup> William K. Black, *The Imperium Strikes Back: The Need to Teach Socioeconomics to Law Students*, 41 SAN DIEGO L. REV. 231, 236-37 (2004).

<sup>224</sup> See Ashford, *supra* note 219, at 7; Harrison, *supra* note 221, at 235 (noting that a challenge to the field is resisting capture by "true believers of one kind or another"); AALS SEC. ON SOCIO-ECON. NEWSL., *supra* note 219, at 4 ("Although it sees questions of value inextricably connected with individual and group economic choices, socio-economics does not entail a commitment to any one paradigm or ideological position. . .").

<sup>225</sup> See Ashford, *supra* note 219, at 8; Robert Ashford, *What Is the "New" Corporate Social Responsibility? The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 TUL. L. REV. 1187, 1195 (2002); Jeffrey L. Harrison, *Socioeconomics: Choices and Challenges*, 41 SAN DIEGO L. REV. 257, 265-66 (2004).



breaking work<sup>226</sup> on “bounded rationality,”<sup>227</sup> scholars have addressed whether there are discernable or predictable patterns to decision-making,<sup>228</sup> and whether, when, and how legal rulemaking should respond to these patterns.<sup>229</sup> This scholarly trend is reflected in the extraordinary growth of the field of behavioral law and economics,<sup>230</sup> which shares with socioeconomics a deep skepticism of the predictive power of neo-classical economic assumptions.<sup>231</sup>

## B. SOCIOECONOMICS AND TILA

This section will attempt to illustrate the value that socioeconomics can add to TILA reform. By exploring one source of contention between progressive critics and defenders of the neoclassical economic model of consumer credit shopping, I will seek to demonstrate the value of using empirical study in the design of consumer credit regulations.

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<sup>226</sup> See HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: ECONOMIC ANALYSIS AND PUBLIC POLICY* (2nd ed. 1982) [hereinafter SIMON, *MODELS OF BOUNDED RATIONALITY*]; Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955) [hereinafter Simon, *A Behavioral Model*].

<sup>227</sup> See Stephen Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 3 n.1 (2002) (“According to the theory of bounded rationality, economic actors seek to maximize their expected utility, but the limitations of human cognition often result in decisions that fail to maximize utility. Decisionmakers inherently have limited memories, computational skills, and other mental tools, which in turn limit their ability to gather and process information.”).

<sup>228</sup> For discussions in the area of consumer decision-making, see James R. Bettman et al., *Constructive Consumer Choice Processes*, 25 J. OF CONSUMER RES. 187 (1998); Paredes, *supra* note 1, at 434-43.

<sup>229</sup> See Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1765-73 (2003) (assessing the current state of legal decision theory).

<sup>230</sup> See Prentice, *supra* note 229, at 1667 n.10 (collecting sources); see also Russell B. Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1218-44 (2003); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision-Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2002); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002); Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1495 (1998).

<sup>231</sup> See Korobkin & Ulen, *supra* note 27, at 1074-75 (“The goal of the law-and-behavioral-science movement is not . . . to replace rational choice theory with an inconsistent paradigm but to modify the implausible elements of rational choice theory and supplement the inadequate elements in order to create a tool with more predictive power in specific situations.”); Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973, 979 (“The ambition of advocates of the new law and behavioral science model is to develop an approach to legal questions that integrates findings from cognitive and social psychology . . . into an economic framework in order to yield an approach with greater descriptive accuracy and predictive reliability.”).

### 1. *Progressive, Market-Specific Concerns Underlying TILA Critiques*

As we saw earlier, many of the critiques of TILA raise global questions about the efficacy of regulating through disclosure.<sup>232</sup> Despite the potential wide reach of such criticisms, much of the progressive, critical scholarship in the field, upon close examination, is quite context-specific in its orientation. Scholars often argue that TILA disclosure is unlikely to succeed as a market perfecting mechanism *in the particular market for consumer credit being studied*. This prudent approach leaves open the possibility that improved disclosures might be an effective remedy in another part of the market.<sup>233</sup> Moreover, adopting this intellectually cautious stance avoids the need to support the extreme argument that mandatory disclosure is doomed to failure as a regulatory tool in all circumstances—an argument that few scholars would want to champion.

Thus, Professors Engel and McCoy, in a penetrating article on mortgage lending, focus on the predatory market for home mortgages, rather than the prime or legitimate subprime markets.<sup>234</sup> This qualification later ties in to their conclusion that disclosure alone will not be a sufficient remedy in *that* market.<sup>235</sup> Other scholars likewise have limited the full force of their critiques to carefully delineated segments of the subprime consumer credit market,<sup>236</sup> leaving open the theoretical possibility that disclosure might be sufficient to regulate aspects of the prime or legitimate subprime markets.<sup>237</sup> For example, Lynn Drysdale and Kathleen Keest focus on the “payday loans, refund anticipation loans, pawns and title pawns for cash advances, and rent-to-own products for retail

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<sup>232</sup> See, e.g., White & Mansfield, *supra* note 1, at 261 (expressing general skepticism over ability of disclosure to solve information asymmetry problems).

<sup>233</sup> Bender, *supra* note 16, at 1C77 (“The extent of the inability to correct the particular market failure through disclosure should be weighed against the degree of infringement that market control places on the consumer’s freedom of contractual choice. Therefore, the appropriate choice may vary for different consumer transactions.”).

<sup>234</sup> See Engel & McCoy, *supra* note 9, at 1261, 1279.

<sup>235</sup> See Engel & McCoy, *supra* note 9, at 1309 (“[M]ost victims of predatory lending already find current disclosures incomprehensible. For naïve borrowers, piling on more disclosures will not help. . . . More disclosure would simply compound the confusion that currently exists.”).

<sup>236</sup> Cecil J. Hunt, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under a New Theory of Economic Hate Crime*, 35 U. TOL. L. REV. 211, 286 (2003) (“In the subprime market, and especially the predatory extremes of that market, the borrowers generally have neither the financial sophistication to meaningfully understand the disclosures or the market power to use them as a basis to comparison shop.”).

<sup>237</sup> See *id.* (“While such disclosures undoubtedly can make a significant difference in the prime market where borrowers are sufficiently sophisticated to meaningfully understand them and possess enough market power to shop around for the best comparison deal, the same is not true in the subprime market.”).

sale,”<sup>238</sup> which are part of a so-called “fringe banking marketplace” most often utilized by those who are financially below the middle-class.<sup>239</sup> Moreover, Christopher Peterson, in his comprehensive historical account of consumer credit regulation, takes great care to emphasize that his target for reform is information distortion in the “high-cost credit” market that serves vulnerable debtors.<sup>240</sup> In sum, it is fair to state that an underlying theme of TILA criticism is the inability of disclosure to protect economically disadvantaged and disenfranchised consumers within certain segments of the consumer credit market.<sup>241</sup> Although this concern has been reinvigorated with recent attention to the problem of predatory lending, it has been a major issue with TILA since its inception. The earliest Truth in Lending literature focused on the poor and was characterized by scholarly skepticism regarding whether disclosure could solve the social or financial ills faced by disenfranchised consumers.<sup>242</sup> This progressive theme highlights the situation-specific nature of TILA critiques and will be an important factor to keep in mind, as the discussion proceeds to the ways in which socioeconomics can clarify the debate over disclosure.

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<sup>238</sup> See Drysdale & Keest, *supra* note 9, at 595; see also *id.* at 661 (“[M]arket forces work better in some parts of the consumer credit marketplace than in others. But the basic threshold question must always be whether the particular marketplace under scrutiny is one in which market forces work well, and the fringe market raises serious questions in this regard.”).

<sup>239</sup> See *id.* at 626-27 (“[T]he broad outlines suggest that, while some middle class consumers may turn to the fringe banking system for convenience or because of temporary setbacks, the primary target market for the fringe banking system is one in which market forces may not work well.”).

<sup>240</sup> See Peterson, *supra* note 3, at 890-902 (“Unfortunately there are strong indications that, at least in the market for high-cost credit, Truth in Lending has failed almost entirely in promoting price informed borrowing decisions among the most vulnerable debtors. In the high-cost credit market, structural and market forces act, not to promote price competition, but to promote confusion and strategic lending behavior.”) (emphasis added).

<sup>241</sup> Engel and McCoy decline to make race, gender, income, or class a necessary definitional element of “predatory lending.” See Engel & McCoy, *supra* note 9, at 1260 n.7 (“[P]redatory lenders target vulnerable consumers for financial exploitation, often because of their race, gender, income, or class. . . . However, predatory loans can occur in the absence of such targeting, so we do not include it as a defining feature.”) (internal cross-citation omitted). Nevertheless, they do observe that lenders engage in a variety of tactics to target vulnerable consumers. See *id.* at 1280-86; see also Renuart, *supra* note 130, at 430.

<sup>242</sup> See Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967); John M. Drain, Jr., Note, *Truth in Lending: The Impossible Dream*, 22 CASE WESTERN L. REV. 89, 111-14 (1970); Homer Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 11-13 (1969); Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. INDUS. & COM. L. REV. 441, 449 (1967) (“The existing scheme of consumer-credit laws—although well-intended and carefully devised—is vulnerable to the criticism that it supplies largely middle-class solutions (e.g., rate ceilings, disclosure) to what has increasingly become a lower class problem.”); see also Kofele-Kale, *supra* note 46, at 142-46; Hynes & Posner, *supra* note 6, at 194.

## 2. *The Neo-Classical Response: The Informed Minority Argument*

A progressive skeptic might conclude that price inefficiency is inevitable if most consumers are not actually comparison shopping for credit, even if we assume (however implausible this might seem) that there is full price transparency<sup>243</sup> and an absence of search costs. Neoclassical economics, however, suggests that it is not necessary for all or nearly all of the consumers to comparison shop for the market to be efficient or competitive.<sup>244</sup> This is the “informed minority” argument. Ted Cruz and Jeffrey J. Hinck explain: “Simply stated, the informed minority argument is that if a sufficient number of buyers are well-informed regarding the price and quality of a product, then it will behoove the seller to sell the efficient quality product at the competitive price to all buyers.”<sup>245</sup> Under this view, well-informed consumers can “police the market”<sup>246</sup> if (and this is a big “if”) creditors have no sufficiently inexpensive method for discriminating between informed and uninformed consumers.<sup>247</sup> As Schwartz and Wilde explain:

The presence of at least some consumer search in a market creates the possibility of a “pecuniary externality”: persons who search sometimes protect nonsearchers from overreaching firms. This result can obtain because in mass transactions it is usually too expensive for firms to distinguish among extensive, moderate, and non-searchers. . . . Thus, if enough searchers exist, firms have incentives both to compete for their business and to offer the same terms to nonsearchers. When the prefer-

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<sup>243</sup> This may not be the case in the subprime mortgage market. See Alan M. White, *Risk-Based Mortgage Pricing—Present and Future Research*, 15 *Housing Policy Debate* 503, 509 (2004) (“[C]urrent subprime mortgage rates at the retail level are secret.”).

<sup>244</sup> See Hynes & Posner, *supra* note 6, at 172-73; Lee & Hogarth, *supra* note 26, at 74 (discussing Michael J. Fishman & Kathleen M. Hagerty, *Mandatory vs. Voluntary Disclosures in Markets with Informed and Uninformed Consumers*, Working Paper, Kellogg Graduate School of Management, Northwestern University (1997)); Schwartz & Wilde, *supra* note 28, at 638 (footnotes omitted).

<sup>245</sup> R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 *HASTINGS L.J.* 635, 646 (1996); see also Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 *SAN DIEGO L. REV.* 55, 70 (2004) (“It is. . . well accepted among economists that shopping behavior by a relatively small proportion of consumers is sufficient to create a competitive market.”) (citing George L. Priest, *A Theory of the Consumer Product Warranty*, 90 *YALE L.J.* 1297, 1347 (1981)).

<sup>246</sup> Brandt & Day, *supra* note 79, at 327 (“Although most consumers are still generally uninformed about credit terms, current awareness levels may be sufficient to ‘police the market’ in the sense of acting as a price-sensitive segment that is large enough to encourage viable competition on the basis of the APR.”).

<sup>247</sup> See Hynes & Posner, *supra* note 6, at 173.

ences of searchers are positively correlated with the preferences of nonsearchers, competition among firms for searchers should tend to protect all consumers.<sup>248</sup>

Like most elegant economic theories, the informed minority argument has been subjected to criticism from scholars who question its premises.<sup>249</sup> Three critiques are particularly trenchant. First, scholars question whether a sufficient number of consumers will engage in searching activity to achieve the pecuniary externality described by Schwartz and Wilde.<sup>250</sup> Second, assuming a large enough informed minority exists, scholars doubt whether the interests of these marginal consumers<sup>251</sup> always are aligned with the interests of average consumers whose interests they are supposed to protect.<sup>252</sup> Third, critics claim that sellers are, in fact, able to and do distinguish between informed and uninformed<sup>253</sup> consumers<sup>254</sup> and thus are able to offer less attractive terms to uninformed consumers without risking the loss of marginal consumers.

### 3. *Socioeconomics and the Future of TILA*

The debate over the informed minority argument has practical implications for TILA reform because it highlights how the socioeconomic approach can enrich the standard law and economics approach that underlies the Act's disclosure mechanisms. On one side of the debate are critics and commentators who are particularly concerned with the market's ability to protect the interests of disadvantaged, marginalized consumers of credit. Such critics not only doubt the ability of the marketplace to provide just or fair results, but also are skeptical of the ability of government-mandated disclosures, such as those compelled by TILA, to remedy market failures. In opposition are theorists who see the promise (perhaps unfulfilled) of disclosure as a market-perfecting device, buttressed by the informed minority argument—the contention that shop-

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<sup>248</sup> Schwartz & Wilde, *supra* note 28, at 638 (footnotes omitted).

<sup>249</sup> See Cruz & Hinck, *supra* note 245; Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1270-71 (1993) ("Despite wishful commentary to the contrary, there is no evidence that a small cadre of type-A consumers ferrets out the most beneficial subordinate contract terms, permitting the market to protect the vast majority of consumers.").

<sup>250</sup> See Cruz & Hinck, *supra* note 245, at 664-69; Eisenberg, *supra* note 135, at 243-44.

<sup>251</sup> See Cruz & Hinck, *supra* note 245, at 669-70 (describing marginal consumers as those who are willing to leave the market if they do not get their terms).

<sup>252</sup> See Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 776 (1993); Cruz & Hinck, *supra* note 245, at 670-72; Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 383-84.

<sup>253</sup> Some consumers may be informed but searching on terms other than the APR. See *supra* note 184.

<sup>254</sup> See Croley & Hanson, *supra* note 252, at 776; Cruz & Hinck, *supra* note 245, at 672-75; McCoy, *supra* note 184, at 91; Prentice, *supra* note 252, at 383-84.

ping by a subset of all consumers can create market efficiency for non-shopping consumers.

Socioeconomics can either help resolve the impasse or, at the very least, clarify the precise nature of the discord between these two camps. In this case, we begin with the understanding that there is much agreement between the neoclassical economic approach, with its reliance on the informed minority argument, and the skeptical, progressive viewpoint: Both sides agree that there are conditions under which disclosure is sufficient to enable an informed minority to assist in the market perfection process. The ultimate question is whether these necessary conditions are present in a particular segment of the market. Thus, the dispute between the two groups is best seen not as a theoretical, ideological, or normative divide, but rather as an empirical conflict that can be resolved or illuminated through interdisciplinary study of the consumer credit market.<sup>255</sup>

Socioeconomics directs us to question the neoclassical model by empirically testing our assumptions regarding consumer behavior. It thus demands that the existence and actions of the informed minority and the creditors' responses be proven rather than assumed. This leads to three propositions or scholarly challenges. First, it is insufficient for adherents of the neoclassical model to assert baldly that an informed minority will protect the interests of all shoppers. Regulators must require some demonstration of the existence of a sufficiently large informed minority who share the preferences of non-searchers within a particular market. If such a minority exists, we then need to establish whether creditors discriminate between classes of shoppers within this market.

Second, by the same token, progressive critics must empirically challenge the informed minority argument head-on. The neoclassical economic model cannot be dismissed simply by noting the existence of information asymmetries within the consumer credit market based upon TILA's flawed disclosure regime or the cognitive or behavioral failings of consumers. Such claims imply, intentionally or not, that large numbers of consumers must be informed to guarantee market efficiency. There may be contexts in which this is true, but it cannot be assumed; the sufficiency of an informed minority must be demonstrated in the particular segment of the consumer credit market at issue. Thus, progressive critics must determine empirically why the informed minority is unlikely to function and facilitate market efficiency in the particular segment of the consumer market being studied. Evidence from other markets, while

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<sup>255</sup> See Rubin, *supra* note 245, at 70 ("[I]t is . . . well accepted among economists that shopping behavior by a relatively small proportion of consumers is sufficient to create a competitive market. *The question is whether such shopping behavior occurs and whether firms respond to it.*") (footnote omitted) (emphasis added).

valuable, is insufficient because each market operates differently.<sup>256</sup> Similarly, one cannot presume creditors have the ability to differentiate between informed and uninformed shoppers; empirical proof of creditor conduct can move us past anecdotal or intuitions about such sorting.

Building upon this socioeconomic approach, if disclosure is not demonstrably futile, any conclusions regarding the efficacy of existing or proposed disclosures should take into account the reality of how consumers process and use the information contained in these disclosures.<sup>257</sup> The information overload debate suggests that more disclosure is not always better.<sup>258</sup> Further study of the consumer credit market,<sup>259</sup> however, will enable regulators to move past such simple bromides and endeavor to design more effective consumer credit disclosures. As regulators proceed, they must remain cognizant of the possibility that an informed minority can police the market. To be the most effective, the design of disclosures must take into account not only consumer decision-making at a general level, but it must also reflect an understanding that different disclosures may be required for different audiences. For example, in securities regulation, various experts play a role analogous to the informed minority in (arguably) keeping the securities markets efficient.<sup>260</sup> The

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<sup>256</sup> For example, a cautious critic would note that some of the criticisms of the informed minority argument I previously reviewed (see *supra* Part III.B.2) arose in response to the argument that an informed minority could generate efficient terms in form contracts and warranties. See Croley & Hanson, *supra* note 252, at 776; Eisenberg, *supra* note 135, at 240-45; Meyerson, *supra* note 249, at 1270-71. These criticisms do not necessarily apply to the price term in consumer credit contracts, which is conceded even by the critics of the informed minority argument. See Meyerson, *supra* note 249, at 1271 ("Obvious terms, such as pricing and warranties, may be subject to such comparison shopping. It is hard, however, to imagine a sufficient number of prospective consumers refusing to rent a car because the contract contains an unfair forum selection clause."); Michael I. Meyerson, *The Efficient Form Contract: Law and Economics Meet the Real World*, 24 GA. L. REV. 583, 601 (1990) (drawing a distinction between shopping for subordinate contract terms and shopping for price).

<sup>257</sup> See William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 672 n.285 (2001) (citing Eisenberg, *supra* note 135, at 244 (noting that the argument regarding the efficiency of form contract disclaimers or risk-shifting provisions "depends on how many people actually read form contracts, which is an empirical question, and there is disagreement that enough actually do" and "very little empirical data available on the question")); cf. Rubin, *supra* note 245, at 70 ("[C]onsumer behavior regarding form contracts is an empirical question and a question that lends itself to psychological and sociological analysis.").

<sup>258</sup> See *supra* Part II.B.2.a.

<sup>259</sup> There have been some scholarly efforts to move past anecdotal evidence towards a richer, more comprehensive account of certain segments of the consumer credit market. See, e.g., Engel & McCoy, *supra* note 9 (addressing predatory mortgage market). Additional empirical studies would undoubtedly enrich such scholarship.

<sup>260</sup> See Paredes, *supra* note 1, at 432 ("As a practical matter, a company's disclosures are largely 'filtered' through experts—various securities professionals and financial intermediaries—who research and process the information and whose trades and recommendations ultimately set securities prices."); Schwarcz, *supra* note 1, at 17-18 ("[N]ot all investors need to understand any given disclosure. The explanation for how markets can assimilate new

market for securities information, however, is not homogeneous, thereby requiring different required disclosures in different contexts. As Professors Michael Fishman and Kathleen Hagerty point out, the disclosure requirements for hedge funds are less onerous than those for mutual funds because hedge funds are only open to a class of wealthy investors who are presumed to be sophisticated.<sup>261</sup> Thus, conclusions regarding an informed minority or necessary disclosures might differ across the markets for home mortgages, credit cards, and automobile loans, as well as in forms of high-cost consumer credit.<sup>262</sup>

A few final points regarding the socioeconomic approach are in order. First, none of the foregoing discussion means that there will not be cases where disclosure is futile and more substantive regulation of the market is warranted. But, as critics of disclosure are aware, there are significant political challenges that face those who seek such substantive regulation of the consumer credit market. The socioeconomic approach will help critics articulate why disclosure is futile in a particular context (if the conclusion is empirically warranted), or if substantive regulation is unlikely to emerge the socioeconomic approach can at least help us to design more effective disclosures.

Second, the socioeconomic approach suggests the need for even more empirical research of the consumer credit market.<sup>263</sup> Such calls within the legal academy are problematic for a variety of reasons, including questions regarding the competence of some law professors to gener-

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information so rapidly stems from the existence of a *large number* of sophisticated market investors who trade for their own account or for the investors they represent.”).

<sup>261</sup> See Michael J. Fishman & Kathleen M. Hagerty, *Mandatory Versus Voluntary Disclosure in Markets with Informed and Uninformed Customers*, 19 J. OF LAW, ECON. & ORGAN. 45, 59 (2003). I do not mean to suggest that regulators have arrived at optimal disclosure design solutions based upon empirical study of the securities markets. This is simply cited as an example of the wisdom of tailoring disclosure solutions to the particular informational context at hand. It may very well be that similar empirical study is warranted in the area of securities. See Paredes, *supra* note 1, at 473-74. In addition, it should be noted that the SEC is in the process of expanding its regulation of hedge funds. See Deborah Solomon, *SEC Pushing Proposal to Regulate Hedge Funds—Donaldson Is Set on July 14 to Defy Critics with Call for Registration of Advisers*, WALL ST. J., July 1, 2004, at C4.

<sup>262</sup> See *supra* notes 3 and 8 and accompanying text (discussing literature on forms of high-cost credit). TILA does mandate some additional disclosures for different areas of the consumer credit market. See *supra* notes 11, 15-17, 41, and 69 and accompanying text. The design of these disclosures, however, is not the product of the type of socioeconomic study or reflection described in this article, and there has been no effort to empirically demonstrate that the additional disclosures serve their intended functions.

<sup>263</sup> In the scholarly literature, one still sees reliance on studies from the early 1970's regarding consumer credit shopping behavior. This is understandable given the lack of empirical work in the field, but should concern scholars and regulators because these studies were produced before TILA's effects could be fully realized in the marketplace, and they pre-date massive changes in the U.S. consumer credit market in the past 30 years such the dramatic expansion of credit card usage. See Durkin, *supra* note 175.



ate this research<sup>264</sup> and skepticism regarding the limits of using social science findings in lawmaking.<sup>265</sup> Nevertheless, these doubts counsel only caution, not the abandonment of an empirically enlightened approach. A more serious problem with empirical study of consumer credit is the ability of legal scholars and other independent critics to obtain the necessary data at an affordable cost.<sup>266</sup> This problem is magnified if the most relevant data is held by industry members or their surrogates, and, for whatever reasons, they are unwilling to share this information with academics that wish to study financial services industry practices.<sup>267</sup>

Third, none of the prior discussion excludes someone with a socioeconomic bent from moving beyond empirical inquiries into the validity of the informed minority argument. I selected that context as a way to illustrate the value of socioeconomics,<sup>268</sup> but of course, there may be many other barriers to market or price efficiency that warrant empirical study.<sup>269</sup> Moreover, it would be fascinating to move beyond empirical, market efficiency critiques into a broader normative analysis of consumer credit regulation. For example, a socioeconomic critic could criticize the outcomes of TILA's regulatory regime based on political or philosophical goals other than market efficiency. A rigorous moral evaluation of the consumer credit market would certainly be of value in addition to the socioeconomic method discussed here.

Finally, it should be acknowledged that there are some encouraging governmental developments that could conceivably dovetail with the socioeconomic approach described above. First, Congress recently passed the Financial Literacy and Education Improvement Act,<sup>270</sup> which created the Financial Literacy and Education Commission, whose goal is to improve "the financial literacy and education of persons in the United States through development of a national strategy to promote financial literacy and education."<sup>271</sup> Pursuant to its statutory mandate, the Commission is working on initiatives including the creation of a toll-free fi-

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<sup>264</sup> See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819; Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807 (1999); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002).

<sup>265</sup> See Rostain, *supra* note 231, at 1000-03.

<sup>266</sup> See Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 26-30 (discussing empirical data at issue in bankruptcy reform debate). Professor Patricia McCoy drew my attention to this issue.

<sup>267</sup> *Id.*

<sup>268</sup> Recall that my discussion of the informed minority argument began with several simplifying assumptions. See *supra* Part III.B.2.

<sup>269</sup> See generally Alan M. White, *Risk-Based Mortgage Pricing—Present and Future Research*, 15 *Housing Policy Debate* 503 (2004).

<sup>270</sup> Pub. L. 108-159, §§ 511-519 (2003).

<sup>271</sup> *Id.* at § 513(b).

nancial education hotline number and a financial education website. These initiatives indirectly reinforce the vitality of disclosure because informed and educated consumers are a necessary part of any market-perfection solutions. The Commission's members include twenty high-ranking government officials with a common interest in stimulating financial literacy and supporting financial education.<sup>272</sup> This makes it an ideal body to encourage the type of socioeconomic research needed to improve both TILA scholarship and the mandatory disclosure system. In fact, the statute mandates the generation of a study and report of financial literacy.<sup>273</sup>

Second, as part of the pending Bankruptcy Reform Act,<sup>274</sup> Congress directed the Federal Reserve Board to conduct two separate studies, the first regarding consumer understanding of financial disclosures and consumer understanding of credit arrangements,<sup>275</sup> and the second on the bankruptcy impact of credit extended to dependent students.<sup>276</sup> The study of financial literacy and consumer understanding of credit arrangements can be an essential start to the socioeconomic process of rethinking the structure and design of TILA's mandatory disclosure regime.

### CONCLUSION

During the past 35 years, scholars and commentators have argued that the Truth in Lending Act's mandatory disclosure regime has neither eliminated information asymmetries in the consumer credit market, nor promoted informed credit shopping. Critics argue that the disclosure regime is ineffective either because the disclosures are somehow flawed or because consumers are unwilling or unable, for a variety of cognitive and

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<sup>272</sup> See *id.* § 513(c) (setting forth composition of Commission); § 513(d) (designating the Secretary of the Treasury as the Commission Chairperson). According to a Department of the Treasury press release, the Commission currently includes the Secretary of the Treasury and the heads of the Office of the Comptroller of the Currency; the Office of Thrift Supervision; the Federal Reserve; the Federal Deposit Insurance Corporation; the National Credit Union Administration; the Securities and Exchange Commission; the Departments of Education, Agriculture, Defense, Health and Human Services, Housing and Urban Development, Labor, and Veterans Affairs; the Federal Trade Commission; the General Services Administration; the Small Business Administration; the Social Security Administration; the Commodity Futures Trading Commission; and the Office of Personnel Management. Press Release, Department of Treasury Office of Public Affairs, *Treasury Deputy Secretary Samuel W. Bodman Opens Second Meeting of the Financial Literacy and Education Commission*, May 20, 2004, available at <http://www.treas.gov/press/releases/js1688.htm> (last visited July 7, 2004).

<sup>273</sup> See Pub. L. 108-159, § 517 (2003) ("The Comptroller General of the United States shall conduct a study to assess the extent of consumers' knowledge and awareness of credit reports, credit scores, and the dispute resolution process, and on methods for improving financial literacy among consumers.").

<sup>274</sup> See *supra* notes 212-17 and accompanying text.

<sup>275</sup> See The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, § 1301(c), 109th Cong. (2005).

<sup>276</sup> *Id.* § 1308.

behavioral reasons, to utilize the disclosures to maximize their self-interest as neoclassical economics would predict. These criticisms have led to deep skepticism over the sufficiency of disclosure as a means to regulate the consumer credit market, especially with regard to protecting financially disenfranchised consumers.

Nevertheless, legislators have not lost faith, and mandatory disclosure will continue to be an essential part of any regulatory scheme. Given this reality, scholars who seek to criticize, defend, or improve the TILA regime should be prepared to address the core assumptions of the neoclassical economic model on which TILA is based. Socioeconomics, a multidisciplinary, critical approach to legal practice, can enrich this process by challenging standard economic assumptions regarding consumer rationality and encouraging scholars to test empirically their assumptions regarding consumer credit shopping behavior. This article illustrated this point by showing how socioeconomics could force both defenders and detractors of mandatory disclosure to confront the “informed minority” argument—the claim that shopping by a segment of consumers can inure to the benefit of all consumers within a particular market.

By following a socioeconomic approach, commentators on mandatory disclosure can help create a comprehensive, empirical understanding of the consumer credit market that will have two major benefits. First, legislators and regulators will have a more systematic method for determining which segments of the consumer credit market are most amenable to regulation through disclosure. Second, proponents of additional or different mandatory disclosures will have an empirically sound basis for determining whether the design of these disclosures is optimal and likely to affect consumer-shopping behavior in the desired manner. The regulation of the consumer credit market through mandatory disclosure laws such as the Truth in Lending Act is a central feature of the U.S. regulatory landscape. Both proponents and critics of such market-perfecting regulation will benefit from a socioeconomic turn in TILA scholarship. Such a path will enrich scholarship on both sides, improve proposed changes to the regime, and may even provoke a deeper discussion over the contexts in which disclosure is likely to serve our social goals, which in turn could lead to more debate over the precise nature of the goals of disclosure.

