Commentary: The 21st Century, TILA Style

Alvin C. Harrell, Oklahoma City University School of Law

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By Alvin C. Harrell

While there will always be aberrational and poorly motivated caselaw, especially in areas of the law like consumer finance where political influences may be evident, the articles in this issue concerning the Truth in Lending Act (TILA) suggest that today most TILA litigation is being handled well by the courts. Hopefully this represents a maturing of TILA law so that even if, as some critics maintain, the TILA does not sufficiently or effectively accomplish its purposes, at least it is no longer the endless legal swamp it once appeared to be. Several hands on the Federal Reserve Board (FRB), together with a judicial learning curve and a generally high-quality judiciary, no doubt deserve much of the credit.

On the other hand, the articles in this issue also suggest that the legal balance is precarious; it is all too easy for a maverick judge or litigator to slip off the track and produce unreasonable results. The TILA facilitates this by its complexity, technical requirements, and some tendencies toward ambiguity, even after all of these years.

The complexity and constant evolution of lending products and technology mean that creditors must consistently do the impossible: Foresee chang-
program as the result of litigation—this is not always the most conducive path to effective TIL compliance.

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The legal complexity, costs and risks associated with the TILA (and other, related laws) have also likely contributed to the wide-scale demise of independent community banks, which previously funded many reasonable-cost consumer loans but often cannot do so today (even if the bank still exists) because they can’t justify the risks, costs and complexity of modern compliance programs. And so this is probably as good as it is going to get, in terms of a rational legal climate (regulatory, statutory and judicial) for TILA transactions. It is better than it has been, prior to various TILA reforms, and the system is working at all levels as well as most could reasonably expect. But even at its best, the TILA has yet to demonstrate that it can pass the test of a cost-benefit analysis. Clearly there have been significant TILA costs, adversely affecting the price of consumer credit, and the extent of the benefits remains subject to debate.2

Thus, in the golden age of the TILA, we have a very different consumer credit market than that of 40 years ago. In some ways it is better for the consumer, but in many ways it is not. The TILA deserves neither the full blame nor the full credit for these changes, but clearly has been a major factor in consumer credit developments since its enactment, and therefore bears some responsibility for the results.

The TILA is here to stay, and consideration of fundamentally different approaches to accomplishing its goals is likely to be an academic exercise, despite periodic rumblings of major reforms. Creditors have mostly accommodated themselves to the TILA requirements, have come to enjoy its defensive aspects, and simply live with the risk that they may be the target of intense administrative investigations (which nearly always seem to find and punish errors of some kind) or debilitating litigation.3 For larger creditors, it is just a cost of doing business, passed on to the consumer. Smaller creditors who cannot live with this level of financial risk, are prone to simply leave the market. Thus the legal and regulatory environment of which TILA is a part has helped reshape our financial system, not necessarily to the consumer’s benefit. But as the price of consumer credit has been driven up to levels commensurate with these higher risks, the incentive to enter the credit markets has remained intact for those who are adventurous enough to embrace the cost-benefit risk/reward ratio. Much the same can be said for adventurous litigators. Again, the consumer pays the price.

The result is a high-risk, high-cost, high-profit, highly complex, highly litigious and increasingly politicized consumer credit marketplace. Welcome to the 21st Century, TILA style.

1. Of course, the TILA is more comprehensive to state law and its consumer law foundations from over federal laws and regulations, in that it is primarily a disclosure statute imposed on top of, and designed to harmonize, the underlying state law transaction. And the TILA has been implemented by a FRB that is unusually sensitive to these issues. But even so, with the best of intentions and a generally optimal administration, agency and judicially, the TILA is still characterized with modern administrative law as noted in this text.

2. Presumably, no one would question the intent of requiring uniform disclosures of essential terms, and most would agree that the TILA has achieved significant success in this regard, though there are some who argue that the further simplification should be possible without endangering that goal. More, however, the broad and many comparable financial transactions are conducted without any direct equivalent of the APL disclosures, apparently at reasonable cost and without any greater abuses.

3. Around 75% of bank compliance examinations routinely uncover TILA violations, and the figure is probably closer to 100% for more intense investigations.