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Preventing Future Economic Crises through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers

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ABSTRACT

This paper argues that one cause of the current economic crisis was that the federal Truth in Lending Act failed to provide mortgage borrowers with the tools to determine whether they would be able to meet their loan obligations, and that as a result many borrowers assumed loans on which they would later default. The paper first explores the disclosures for adjustable rate mortgages—which were commonly used for subprime loans—and explains how those disclosures misled borrowers about their monthly payments. Next, the paper reports on a survey of mortgage brokers conducted in July of 2009. The brokers were nearly unanimous in reporting that borrowers never withdrew from a loan after reading the final TILA disclosures at the closing, and never used those disclosures for their stated purpose of comparison shopping for loans. In addition, brokers reported that many borrowers spent a minute or less with the disclosures, despite the fact that mortgage loans are among the largest, longest-term, and most complex obligations most consumers ever assume. It thus appears that many borrowers enter into their mortgages without comprehending the terms and the ramifications of those loans.

The paper suggests several measures to increase the likelihood that borrowers will attend to and understand their loan terms. At present, disclosures are mandated by governmental entities that do not participate in the loan transaction—thereby reducing their control over how the disclosures are presented; provided by lenders who do not have a stake in having consumers understand the disclosures and in some cases have an interest in obscuring them; and received by consumers who may not appreciate their importance and may even have reasons to overlook them. The paper therefore suggests a switch from the current TILA disclosure regime to a comprehension regime under which lenders would be obliged to insure that borrowers understand their loan terms. Alternatively, the paper suggests that lenders should be required to determine what proportion of their borrowers understands their loan terms and disclose those figures in the hope of generating competition among lenders for better comprehension scores. The hope is that either choice would give a party to the loan transaction—the lender--a stake in borrowers understanding their loan terms. Creation of such an incentive might cause lenders to reduce distractions to consumers reading disclosure forms, enlist the aid of lenders in conveying key terms to consumers, increase the intelligibility of loan terms, and lead lenders to abandon loan terms that consumers cannot comprehend.

If such a proposal proves politically unfeasible, the paper also draws on the work of Cass Sunstein and Richard H. Thaler to suggest “nudges” that might enhance the current disclosure regime. Specifically, the paper advocates requiring borrowers to view a video of the pain and risk of default and foreclosure to make those risks more salient and increase the likelihood that consumers attend to disclosures. The paper also suggests that loan applicants be obliged to draft a budget, taking into account any future increases in loan payments, so that they will understand the consequences of their payment obligations. Finally, the paper calls for requiring borrowers to take a “placement exam” to demonstrate their mastery of their loan terms and the budgetary consequences. Those who fail the exam would not be permitted to borrow unless a neutral credit counselor worked with them and certified that they understand their loan terms.
I. Introduction

The goal of this paper is to tell a story that goes like this: the economic crisis that hit in 2008 had many causes, among which was the failure of the Truth in Lending Act ("TILA"). TILA, intended to enable consumers to borrow wisely, not only failed the subprime borrowers in that goal, but in fact was interpreted to require lenders to provide misleading disclosures which might have persuaded borrowers that their loans were more affordable than they would turn out to be. Perhaps as a result, many borrowers seem to have taken on loan obligations that were inappropriate for their circumstances. Had borrowers better appreciated their loan terms, some would not have assumed payment obligations they could not meet, fewer borrowers would have defaulted, and the economic crisis might have been less severe. The remainder of this introduction fleshes out this story, and the balance of the article substantiates the claims made in this introduction, and suggests changes in the law to address the problem.

In the years preceding the economic crisis, consumers entered into ill-fated loans for many reasons. Some borrowers, who may actually have understood their obligations, gambled that home prices would continue rising, thus enabling them to repay their loans by selling at a profit. Some may have been crooks, intending to defraud lenders into making loans that would never be repaid. But others did not understand their payment obligations, and entered into loans that they did not understand they could not repay, with dreadful consequences for themselves, their families, communities, and the economy. Those consequences include about 1.7 million foreclosures by June 30, 2009 in nonprime loans originated from 2000 through 2007, or about 12% of those loans. More than a quarter of the borrowers on those loans were seriously delinquent, defined as either in foreclosure proceedings or at least 90 days behind in payments, while less than two-thirds were current on their payments. Commentators have estimated the number of foreclosures in 2009 alone as 2.4 million, with as many as 13 million through 2014.

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1 At least some subprime borrowers appear to have been speculators. See Todd J. Zywicki, The Law and Economics of Subprime Lending, --- Colo. L. Rev. --- (forthcoming), available at http://ssrn.com/abstract_id=1106907 (HMDA data shows that "since 2000 the percentage of subprime loans that are for non-owner-occupied home loans—i.e., to fund the purchase of rental or vacation homes—has doubled from about eight percent of all subprime loans to over 16 percent" and suggesting that many defaulters bought for speculation).
2 See generally Mortgage Asset Research Institute, Ninth Periodic Mortgage Fraud Case Report to Mortgage Bankers Association (2007); Carolyn Said, Mortgage Meltdown; Plenty of Blame for Lending Mess, S.F. Chronicle, Feb. 3, 2008 (no documentation loans "were dubbed 'liar loans' for a reason. Janitors claimed six-figure salaries and were able to buy half-million-dollar homes.").
3 See infra notes – and accompanying text.
5 Id.
6 Center for Responsible Lending, Subprime Spillover: Accelerating Foreclosures to Cost Neighbors $502 Billion in 2009 Alone; 69.5 Million Homes Lose $7,200 on Average 1 (May 2009);
As the economic crisis demonstrates, society as a whole has an interest in insuring that loans are repaid. One check on whether consumers can repay a loan is the consumer himself. But when consumers do not understand their payment obligations, and so underestimate them, that check disappears. That would matter less if lenders could predict with complete certainty which consumers will default and so would deny loans to borrowers unlikely to repay them. But the economic crisis makes clear that models for predicting which consumers will default are not sufficiently reliable or that some lenders were willing to lend to those at significant risk of being unable to repay their loans or both.8 For example, in 2007, an official at one of the nation’s largest subprime mortgage lenders, Countrywide Financial, testifying before a congressional committee about hybrid adjustable rate mortgages (“ARMs”) that carried an initial low rate but would later switch to an adjustable rate, estimated that “about 60 percent of the people who do qualify for the hybrid ARMs would not be able to qualify at the fully indexed rate.”9 In other words, Countrywide anticipated that many borrowers would not be able to make their payments once the temporary teaser rates expired, unless the borrowers’ financial circumstances

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8 See Federal Res. Sys., Truth in Lending Final Rule; Official Staff Commentary, 73 Fed. Reg. 44,522 (July 30, 2008) (“the recent sharp rise in serious delinquencies has made clear that originators were not adequately assessing repayment ability, particularly where mortgages were sold to the secondary market and the originator retained little of the risk.”)

9 Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs on Mortgage Markets, March 22, 2007, available at 2007 WL 892889 (FDHC) (testimony of Sandy Samuels, Executive Managing Director of Countrywide Financial Corporation). See also Illinois Department of Financial and Professional Regulation, Findings from the HB 4050 Predatory Lending Database Pilot Program 1 (2007) (review of data collected by counseling agencies in Chicago in mandatory counseling program found that “in the majority of cases [in which borrowers obtained adjustable rate loans] borrowers were being approved for financing solely on the basis of the initial or ‘teaser’ rate, without regard to the borrower’s ability to afford the loan when the rate adjusted.”); Ellen Schloemer, Wei Li, Keith Ernst, & Kathleen Keest, Center for Responsible Lending, Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners 5, 26 (2006) (“Subprime lenders who market exploding ARMs and other high-risk loans often do not adequately consider whether the homeowner will be able to pay when the loan’s interest rate resets, even if rates stay constant. . . . Subprime lenders’ public disclosures indicate that some are qualifying borrowers at or near the initial start rate, even when it is clear from the terms of the loan that the interest rate can rise significantly, giving the borrower a higher monthly payment’’); Option One Prospectus, Option One MTG LN TR ASSET BK SER 2005 2 424B5, pp.S-5, S-50, Securities and Exchange Comm’n Filing 05794712 (May 3, 2005) (prospectus stating that “In determining the ability of the applicant to repay the loan, a rate . . . has been created under the Option One Underwriting Guidelines that generally is equal to the lesser of the fully indexed interest rate on the loan being applied for or one percent above the initial interest rate on such loan.” The fully indexed rate on many loans will exceed one percent above the initial interest rate, and in fact the Prospectus also indicates that for one set of loans the weighted average initial rate adjustment cap of the adjustable-rate mortgage loans was 2.988%, which obviously exceeds 1%); Statement of Doug Duncan, Senior Vice President and Chief Economist, Mortgage Bankers Association, at the Federal Reserve Board Public Hearing, Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 121 (July 11, 2006) (“a significant portion of loans are not underwritten at the fully indexed rate.”); Paul Leonard & Michael Calhoun, Center for Responsible Lending, Calculated Risk: Assessing Nontraditional Mortgage Products, Community Investments 15, 15-16 (Dec. 2006). But see Government Accountability Office, Alternative Mortgage Products: Impact on Default Remains Unclear, but Disclosure of Risks to Borrowers Could be Improved 6 (2006), reporting that “OCC and Federal Reserve officials told us that most lenders qualify payment-option ARM borrowers at fully indexed rates, not at introductory interest rates, to help ensure that borrowers have financial resources to manage future mortgage increases . . . .” This contrasts with an example used earlier in the GAO report, discussed infra note ---, in which the GAO noted that a borrower’s payments would increase to an amount 44% higher than the monthly payment used to qualify the borrower.
improved dramatically—something which seems unlikely to happen to 60% of their hybrid ARM borrowers—or interest rates were to fall substantially, another risky bet. No doubt Countrywide anticipated that home loan prices would increase enough to support refinancing, something that of course did not occur and that hindsight makes clear could not have continued indefinitely.\(^\text{10}\) Indeed, some loans seemed virtually to invite default. Thus, a Countrywide manual approved the making of loans that left consumers as little as $550 a month to live on, or $1,000 for a family of four.\(^\text{11}\)

Under those circumstances, the ability of consumers to decline loans they cannot repay becomes the only restraint on unwise lending.\(^\text{12}\) In a sense, lending decisions contain a built-in comparative advantage mechanism. Lenders are able to predict which borrowers will default based on their extensive experience with lending and their computer models, and that gives lenders some advantages in predicting who will default. But borrowers know something about themselves, their needs, their expectations, their spending habits, and so on—giving them an advantage in predicting whether they can meet loan obligations based on information not included in lenders’ computer models, perhaps because it is too expensive to ascertain.\(^\text{13}\) As a result, borrowers have some capacity to predict that they will not be able to repay loans. But they cannot exercise that capacity if they do not understand the loan terms well enough to measure them against their knowledge. Accordingly, policy-makers should adopt rules that will ensure that consumers understand their payment obligations well enough to permit them to decline unwise loans. Existing law does not accomplish that for enough borrowers.

This article is based on three assumptions: first, that many consumers will not deliberately assume loan obligations they know they will not be able to discharge; second, that consumers need aid in determining loan terms and why they should attend to them; and third, that it is possible to reconstruct disclosure laws to provide that aid. The first assumption is obviously not true of dishonest borrowers. In addition, some speculators may have been willing to assume a substantial risk of default. But it appears likely that a significant number of consumers would not have willingly set off down the path to foreclosure if they had understood what they were binding themselves to do. Of course, even if that assumption is wrong, disclosure laws are valuable for other reasons, including those recognized in TILA itself: they are intended to help consumers choose

\(^{10}\) For discussions of how some predicted that housing prices would fall and that they were in a bubble, see Joseph E. Stiglitz, Freefall: America, Free Markets, and the Sinking of the World Economy (2010) (arguing that rise in housing prices was unsustainable because median incomes were stagnant).


\(^{13}\) As discussed below, what borrowers know may sometimes lead them to excessive optimism, and so this may not be a perfect restraint, though there may be ways to counteract the optimism bias. See note – and accompanying text infra.
among competing offers and at least theoretically produce more efficient transactions. As a result, improving consumer comprehension of loan terms seems, all other things being equal, a worthy goal.

Part II of the article attempts to provide empirical support for the second assumption and also to demonstrate that the laws in place during the years in which the subprime loan buildup occurred did not provide the aid consumers needed in making borrowing decisions. Part II opens by demonstrating how existing disclosures are misleading. It then reports on a survey of mortgage brokers that suggests that borrowers do not take account of federally-mandated disclosures of their final loan terms in deciding whether to borrow and that many spend too little time with those disclosures to understand their loan terms well enough to make appropriate decisions. Part II also relies on existing scholarship to support the conclusion that law-makers must provide borrowers more help if borrowers are to make optimal borrowing decisions—the kinds that will keep them from assuming loan obligations on which they will later default.

Part III discusses some strategies to test the third assumption. Specifically, Part III suggests ways to increase the probability that consumers contemplating borrowing substantial sums pay sufficient attention to and understand their payment obligations well enough to make appropriate judgments about whether they can meet those obligations. It first suggests a reform that is unlikely to be adopted but that offers a better solution to the problem than the current disclosure regime. Specifically, the paper suggests switching to a comprehension regime, in which lenders would be obliged to demonstrate that a certain percentage of their borrowers understood their loan terms, and gives lenders some flexibility in determining how to convey those terms. Such a regime has the benefit of changing the incentives lenders face from one in which they are largely indifferent to whether consumers make appropriate borrowing decision—as long as the lenders can demonstrate that they have made the required disclosures—to one in which lenders have an incentive to ensure that borrowers actually comprehend loan terms, which should enable consumers to make appropriate decisions. It also enables consumers to benefit from the power of lenders to convey information to consumers—something at which lenders have considerable skill, as their advertising campaigns indicate—as opposed to the current regime which depends on governmental agencies which are not themselves involved in the lending transactions to figure out how best lenders should communicate loan terms to consumers.

14 TILA’s purpose is stated in 15 U.S.C. section 1601:

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 . . . .

Commentators have identified many other goals for TILA. For a list of 38 such goals, see Thomas A. Durkin & Gregory Elliehausen, Disclosure as a Consumer Protection in The Impact of Public Policy on Consumer Credit 114 (Thomas A. Durkin & Michael E. Staten, eds., 2002).
On the assumption that converting to a comprehension regime is politically impossible, Part III next explores some strategies that would increase the likelihood that disclosures benefit consumers. First, the paper draws on Cass Sunstein and Richard H. Thaler’s book Nudge to suggest that consumers need a “nudge” to read loan disclosure forms; for example, a short video that would bring home to consumers the pain caused by foreclosure might encourage them to read the forms. Second, the paper suggests that consumers be tested on their comprehension of their loan terms. Those who demonstrate comprehension can then proceed to closing, assuming that they still wish to. Those who fail the test will be barred from borrowing until a disinterested loan counselor—not a mortgage broker—certifies that the would-be borrower understands the loan terms. Part III then justifies this paternalistic approach to lending regulation and explains why it is preferable to the current disclosure regime.

II: The TILA Disclosures Misled Borrowers and Did Not Give Borrowers the Tools They Needed to Keep From Borrowing Unwisely

A. The Loan Terms Themselves

TILA was inspired in part by a view that consumers needed aid in understanding loan terms to make optimal borrowing decisions. The reasons for this position became, if anything, stronger in the decades after TILA’s enactment, as loan terms became even more complex, with, for example, such innovations as ARMs and payment option ARMs. Consider, for example, the following term, taken from a note for a 2004 “2/28 loan”—a common type of subprime loan, under which borrowers pay a low “teaser” rate for the first two years, after which the loan becomes adjustable for the remaining 28 years, often with an adjustment every six months.

15 See supra note ---.
16 Adjustable rate loans are loans in which the interest rate, and consequently the monthly payments, shift from time to time. “In payment option loans the borrower can choose to pay a minimum payment which does not include all accrued interest and does not include payment of principal... The accrued and unpaid interest is then added to the principal. However, when the outstanding balance reaches a certain threshold—typically 115% of fair market value [of the mortgaged property]—then the payment option expires and the loan is recast to require monthly payments of both interest and principal.” Vincent DiLorenzo, Mortgage Market Deregulation and Moral Hazard: Equity Stripping Under Sanction of Law, available at http://ssrn.com/abstract=1488293 (2009).
4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates
The interest rate I will pay may change on the first day of June, 2006, and on that
day every sixth month thereafter. Each date on which my interest rate could
change is called a “Change Date.”

(B) The Index
Beginning with the first Change Date, my interest rate will be based on an Index.
The “Index” is the average of interbank offered rates for six-month U.S. dollar-
denominated deposits in the London market ("LIBOR"), as published in The Wall
Street Journal. The most recent Index figure available as of the date 45 days
before the Change Date is called the “Current Index.”

If at any point in time the Index is no longer available, the Note Holder will
calculate a new index that is based upon comparable information.. The Note
Holder will give me notice of this choice.

(C) Calculation of Changes
Before each Change date, the Note Holder will calculate my new interest rate by
adding six percentage point(s) (6.000 %) to the Current Index. The Note Holder
will then round the result of this addition to the nearest one-eight [sic] of one
percent (0.125%). Subject to the limits stated in Section 4(D) below, this rounded
amount will be my new interest rate until the next Change Date. The Note Holder
will then determine the amount of the monthly payment that would be sufficient
to repay the unpaid principal that I am expected to owe at the Change Date in full
on the Maturity Date at my new interest rate in substantially equal payments. The
result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes
The Interest rate I am required to pay at the first Change Date will not be greater
than 8.300 % or less than 6.300%. Thereafter, my interest rate will never be
increased or decreased on any single Change Date by more than One percentage
point(s) (1.000%) from the rate of interest I have been paying for the preceding
six months. My interest rate will never be greater than 12.300 % or less than
6.300 %.

(E) Effective Date of Change.
My new interest rate will become effective on each Change Date. I will pay the
amount of my new monthly payment beginning on the first monthly payment date
after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes
The Note Holder will deliver or mail to me a notice of any changes in my interest
rate and the amount of my monthly payment before the effective date of any
change. The notice will include information required by law to be given me and

mortgage (ARMs) loans and the so-called “2/28” or “3/27” mortgages are the dominant product.”).
According to the Federal Reserve, “[a]pproximately three-quarters of securitized originations in subprime
pools from 2003 to 2007 were 2-28 or 3-27 ARMs . . . .” Federal Reserve Board, Truth in Lending, 73 Fed.
Reg. 44,522, 44,525-26 (July 30, 2008).
also the title and telephone number of a person who will answer any question I may have regarding the notice.\textsuperscript{18}

It is not clear how many borrowers actually read such terms, much less understand them, especially since borrowers might see them for the first time at the closing, when they are also confronted with numerous other legal documents, and perhaps urgings from others present to sign the documents as quickly as possible. But borrowers—and readers of this article—who struggled through that language may be dismayed to learn that it is often superseded by an adjustable rate rider appended to the note, which provided still another term for calculating the monthly payments.\textsuperscript{19} Whatever the number of borrowers who read the original term, probably even fewer then proceeded to read through the adjustable rate rider. No doubt some borrowers found it unnecessary to read either term on the theory that the TILA disclosures made doing so unnecessary. But as will be discussed below, those disclosures are misleading, and in any event many borrowers gave them little attention.

B. The TILA Disclosures

Most subprime loans carry adjustable rates and so this section explains the mandated disclosures for adjustable rate loans.\textsuperscript{20} Because by definition, adjustable mortgage loan rates and monthly payments vary from time to time with fluctuations in interest rates, it is impossible for the disclosure forms provided at the closing to state what the payments will be once the loan reaches the first date when the rates and payment amounts change. The Federal Reserve Board, which is charged with interpreting and implementing TILA, therefore came up with a three-step approach for dealing with these products. First, lenders were obliged to provide two sets of documents to consumers contemplating taking out an adjustable rate loan (“the early disclosures”). The first of these was a booklet published by the government called the Consumer Handbook on Adjustable-Rate Mortgages, commonly called the CHARM booklet.\textsuperscript{21} The second early disclosure is a set of materials about any program consumers inquire into. The Federal Reserve’s Model Form for these program disclosures for variable loan clauses appears in Figure One. The program disclosures, as in Figure One, are obliged to include a historical example of how payments shift over time.\textsuperscript{22} In addition, in some cases, within

\textsuperscript{18} For an example of a case quoting a note using some of this language, see Leisy v. First Eastern Corp. 1991 WL 1179813 (Fed. Dist. Ct. M.D. Pa. 1991). See also the note appended to the complaint in Frazile, v. EMC Mortgage Corp., available at http://w3. lexis.com/research2/attachment/popUpAttachWindow.do?_m=fc739b9b19fa7400186a097e587f508b&wchp=dGLbVlz-zSkAl&md5=07a3bfc6c52e270c527290f6874fd999.

\textsuperscript{19} For an example of cases involving a note including such a rider, see O’Donnell v. Bank of America, 2009 WL 765670 (Fed. Dist. Ct. N.D.Cal. 2009); Frazile, v. EMC Mortgage Corp., available at http://w3. lexis.com/research2/attachment/popUpAttachWindow.do?_m=fc739b9b19fa7400186a097e587f508b&wchp=dGLbVlz-zSkAl&md5=07a3bfc6c52e270c527290f6874fd999.

\textsuperscript{20} See supra note --.

\textsuperscript{21} The CHARM booklet is available at http://www.federalreserve.gov/pubs/arms/arms_english.htm.

\textsuperscript{22} See 12 C.F.R. Section 226.19. At the time many subprime loans were taken out, lenders were not required to provide such GFEs for refinancings, only for loans used to purchase homes. The Fed has since amended section 226.19 to extend the disclosure requirements to refinancings as well. See 73 FR 44522-01 (July 30, 2008).
three days after the borrower submitted a loan application, originators were obliged to supply good faith estimates ("GFEs") of loan terms. Finally, mortgage originators were required to provide the final set of disclosures by the time of consummation; that is, before the papers were signed and the loan was agreed to.\footnote{See 12 C.F.R. Sections 226.2(a)(13), 226.17(b).} Unfortunately, the early disclosures were of only limited value to borrowers, and the final disclosures were outright misleading.\footnote{Originators are also required to supply certain disclosures pertaining to settlement costs under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. section 2601 et seq., implemented by Regulation X, 24 C.F.R. Part 3500. These disclosures include good faith estimates provided within three days of the borrower’s application and final disclosures, now provided three days before closing but at the time of the subprime run-up, the final disclosures, known as the HUD-1, could be provided at the closing. For illustrations of the current RESPA forms, see 24 C.F.R. Part 3500 App. A.}

Why were the early disclosures of only limited value? The utility of the CHARM booklet is perhaps best explained by noting that the Federal Reserve has proposed that lenders should no longer be required to supply it to borrowers.\footnote{See Federal Reserve System, Truth in Lending; Proposed Rule, 74 Fed. Reg. 43,231 (Aug. 26, 2009). The Federal Reserve has however, stated that the booklet should continue to be available on line.} As for the early program disclosures, as Figure One indicates, the form has at least two defects from the point of view of someone attempting to determine what their payment obligations will be.\footnote{The form appears in 12 C.F.R. Part 226, App. H.} First, the form need not state the actual figures for the borrower’s loan. Thus, the model form ungrammatically notes “This is a margin we have used recently, your margin may be different.” As a result, borrowers attempting to determine what their monthly payments will be cannot rely on the numbers provided in the form.\footnote{According to ICF Macro, a “large number [of participants in focus groups and interviews] misinterpreted the historical example table in the disclosure; for example, some thought that the historical rates shown in the table would apply to their loans in the future.” ICF Macro, Summary of Findings: Design and Testing of Truth in Lending Disclosures for Closed-end Mortgages (2009).} Second, the form is based on a $10,000 loan, rather than on the actual amount the consumer intends to borrow. Of course, few, if any, mortgage loans are for $10,000. While the form includes instructions on how to multiply and divide to convert the $10,000 amount financed to the consumer’s mortgage amount, it is not clear how many borrowers go through that exercise, or for that matter, how many can,\footnote{See infra note – and accompanying text.} or that they regard the information in the form as useful given that their own loan terms may vary. In short, the early disclosures do not give borrowers the information they need to determine if they can afford the monthly payments. Thus, the early disclosures did not prevent a practice observed by the Federal Reserve in 2008: “In some cases, originators mislead borrowers into entering into unaffordable loans by understating the payment before closing and disclosing the true payment only at closing (‘bait and switch’).”\footnote{Federal Res. Sys., Truth in Lending Final Rule; Official Staff Commentary, 73 Fed. Reg. 44,522 (July 30, 2008). For more on the program disclosures, see ICF Macro, Summary of Findings: Design and Testing of Truth in Lending Disclosures for Closed-end Mortgages (2009): None of the participants [in focus groups or interviews], including those who had recently shopped for an ARM, remembered ever receiving anything similar to the ARM loan program disclosure they were shown. Participants overwhelmingly indicated they would not find the program}
But if the early disclosures are insufficiently helpful, the final disclosure is outright misleading. Because of the inability to tell at the time of closing how rates will shift in the future, the Fed’s Commentary directs originators to assume that interest rates at the time of future change dates will be identical to the rates at the time the transaction closes. To understand just how this command can deceive borrowers, consider the disclosure form for a “2/28 loan” shown in Figure Two. The disclosure statement correctly indicates that the monthly payment for the first two years—when the teaser rate applies—is stable. After two years, under the note, the rate and monthly payment can shift every six months. But the disclosure statement shows that the monthly payment will change only once—at the two year point—and then remain the same for the remaining 28 years, because, again, the lender is to assume that rates do not change for those 28 years. Of course, rates change frequently—which is one reason lenders find it desirable to use adjustable rate loans, because it imposes the risk of rate changes on borrowers—and it is inconceivable that rates will remain the same for 28 years. Accordingly, borrowers who read such disclosure statements may be misled into thinking that their payment obligations will be more stable than they are.

But that problem pales beside the fact that the disclosure statement states a specific monthly payment for the last 28 years, a monthly payment that again depends for its accuracy on something that is not so: interest rates remaining the same for 28 years. In fact, depending on how rates fluctuate, the actual monthly payment—one of the two most important factors for borrowers in shopping among loans—may be substantially higher than that shown in the disclosure form. That is especially likely to be true if rates are low when the borrower takes out the loan. And, unlike the early program disclosure, the final TILA disclosure does not carry a warning that the actual numbers disclosure useful and that if given the form, they would probably not read it. Upon looking at the form, the first reaction of many participants was one of confusion. Several complained that it was very difficult to read due to the terminology that was used.

30 See TILA Commentary ¶ 226.17(c)(1)-8, 12 C.F.R. Part 226 Supplement I:

8. Basis of disclosures in variable-rate transactions. The disclosures for a variable rate transaction must be given for the full term of the transaction and must be based on the terms in effect at the time of consummation. Creditors should base the disclosures only on the initial rate and should not assume that this rate will increase. For example, in a loan with an initial rate of 10 percent and a 5 percentage points rate cap, creditors should base the disclosures on the initial rate and should not assume that this rate will increase 5 percentage points.

31 The form shows a slightly different payment for the final payment because of the amount of the principal due at that time.

32 See ICF Macro, Summary of Findings: Design and Testing of Truth in Lending Disclosures for Closed-end Mortgages (2009) (“Interest rates and monthly payment were by far the two most common terms that focus group and interview participants compared between lenders or brokers when shopping.”); Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Penn. L. Rev. ----, n. 154, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=113781 (2008) (“To many consumers, the single most salient feature of the loan is the monthly payment.”).

33 The same is also true for other numbers on the disclosure form that depend on interest rates, including the finance charge and the APR.
may vary from those reported. This played into the hands of originators who wish to present loans as affordable. Oren Bar-Gill and Elizabeth Warren have charged that such lenders “manipulate their product design to present a low monthly payment.” But in fact the lenders need not do so, because the Fed’s Commentary did it for them.

In short, the disclosure form is worse than useless for borrowers. It provides a governmentally-mandated bait and switch: the bait consists of false numbers on which borrowers may rely in determining whether the loan is affordable while the switch is to the actual payment obligations which borrowers may not be able to meet. No wonder 42% of the short-term subprime hybrid ARM's were at least 90 days delinquent or in

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34 This problem was partly addressed by the Mortgage Disclosure Improvement Act of 2008, Pub. L No. 110-289, 122 Stat. 2654 (2008), which will require lenders to provide a “worst-case” scenario showing what the payments would be if interest rates went to the highest amount permitted under the note. But that provision will not take effect until the Fed promulgates implementing regulations. The Federal Reserve has proposed such amendments. See Federal Reserve System, Truth in Lending; Proposed Rule, 74 Fed. Reg. 43,231 (Aug. 26, 2009).

35 See infra notes – and accompanying text.


37 The problem was not limited to 2-28 loans, but in fact applied to any adjustable loan. See, e.g, Statement of Michael Faust, vice-president of government affairs committee, National Association of Mortgage Brokers, at Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice, Public Hearing on the Home Equity Lending Market, Federal Reserve Bank of San Francisco 132-33 (June 16, 2006) :

Now let’s take it to the option ARM. . . . if someone paid essentially the 15-year payment, the amount financed would be one number. The fully indexed 30, that’s a different number. Interest only, potentially that’s a different number. And when you get to neg am, especially if the thing recasts somewhere down the road, that’s a completely different number.

As for whether borrowers were confused by the disclosures, see ICF Macro, Summary of Findings: Design and Testing of Truth in Lending Disclosures for Closed-end Mortgages (2009):

Participants [in focus groups and interviews] were generally confused by the payment schedule shown on the current TILA statement. For example, in examining a TILA statement for a hybrid ARM, several participants incorrectly assumed that the fact that payments in the table varied over time meant that they already reflected future changes in interest rates.

* * *

Testing clearly showed that the current TILA payment schedule is ineffective at communicating to consumers what could happen to their payments.

38 Cf. Richard Bitner, Confessions of a Subprime Lender 133 (2008) (“The government, for all its efforts in [mortgage lending], has done more to create confusion than to protect the consumer.”).


[With imperfect information and imperfect rationality, credit may seem less costly than it really is. Accordingly, more consumers will want to borrow. The economy will respond by shifting resources to meet this increased demand—a shift that, given the mistakes underlying the increased demand, leads to allocative inefficiency (since there are better uses for these resources).
foreclosure proceedings by June 30, 2009.\(^\text{40}\) Ironically, borrowers wishing to know their payment obligations would have done better to try to read the note setting forth their original obligations than to read the disclosure form.

Empirical testing of TILA disclosures has also found them unhelpful to consumers. Thus, a 2007 study by the Federal Trade Commission found that many borrowers were not able to determine their loan terms or the cost of their loans from the disclosures in use at the time of the study.\(^\text{41}\) Many consumers were confused about loan terms that bore directly on their ability to repay their loans.\(^\text{42}\) The study authors noted that “even respondents who understood that they had adjustable rates did not understand the potential increases they could incur. Respondents generally did not know the maximum possible interest rates that were allowed by their loans.”\(^\text{43}\) Similarly, a study of


\(^{41}\) James M. Lacko & Janis K. Pappalardo, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE MORTGAGE DISCLOSURE FORMS ES-6, 11-12 (2007) (hereinafter “FTC Study”) (“in-depth consumer interviews [of 36 consumers] found that many borrowers were confused by the current mortgage cost disclosures and did not understand key terms in the disclosure forms, such as the APR, amount financed, and discount fees. Many borrowers also did not understand important costs and terms of their own recently obtained mortgages. Many had loans that were significantly more costly than they believed, or contained significant restrictions, such as prepayment penalties, of which they were unaware. . . . [C]urrent mortgage disclosures fail to convey key mortgage costs to many consumers.”  

\(^{42}\) Id.  

\(^{43}\) FTC Study at 28.  

The Study elaborated at p. 122:

About a fifth of the respondents viewing the current disclosure forms could not correctly identify the APR of the loan, the amount of cash due at closing, or the monthly payment (including whether it included escrow for taxes and insurance). Nearly a quarter could not identify the amount of settlement charges. About a third could not identify the interest rate or which of two loans was less expensive, and a third did not recognize that the loan included a large balloon payment or that the loan amount included money borrowed to pay for settlement charges. Half could not correctly identify the loan amount. Two-thirds did not recognize that they would be charged a prepayment penalty if in two years they refinanced with another lender (and a third did not even recognize that they “may” be charged such a penalty). Three-quarters did not recognize that substantial charges for optional credit insurance were included in the loan. Almost four-fifths did not know why the interest rate and APR of a loan sometimes differ. And nearly nine-tenths could not identify the total amount of up-front charges in the loan.

And at p. 123, the authors commented that consumers “may become obligated for payments they cannot afford, such as property taxes and homeowners’ insurance that are not included in the monthly payment, or a large balloon payment they failed to recognize.”  

See also Statement of Peter Orszag, CBO budget Director, State of the US Economy and Implications for the Federal Budget: Hearing Before the H. Comm on the Budget, 110\(th\) Cong., 6, n.3 (Dec. 5, 2007) (“Certain ARMs may have been among the more difficult mortgages for first-time borrowers to understand. Many of these mortgages made in recent years included teaser rates, which may have confused some borrowers about the eventual size of their mortgage payments.
borrowers in certain Chicago zip codes found that “the overwhelming majority” of those who received adjustable-rate loans had thought their loans were for fixed rates.\footnote{44}{Illinois Department of Financial and Professional Regulation, Findings from the HB 4050 Predatory Lending Database Pilot Program 3-4 (2007).}

These empirical finding are echoed in anecdotal reports that indicate that some borrowers entered into loans without understanding their terms.\footnote{45}{See, e.g., Gretchen Morgenson, Looking for the Lenders’ Little Helpers, N.Y. Times, July 12, 2009 (borrowers allege that lender promised fixed-rate loan when loan was actually adjustable, something borrowers did not discover until two years later; initial monthly payments consumed 45% of borrowers’ income and later rose); Carolyn Said, Mortgage Meltdown; Plenty of Blame for Lending Mess, S.F. Chronicle, Feb. 3, 2008 (“Many home buyers say they were misled or didn’t understand the terms of their loans, particularly the ‘exploding ARMs’ that adjusted to stratospheric rates after a low introductory period.”); Bob Herbert, Lost in a Flood of Debt, N.Y. Times, Nov. 24, 2007 (“To this day Ms. Levey does not understand what she and her husband of more than half a century had agreed to. The terms might as well have been written in Sanskrit. . . . I heard the same story again and again — decent people enticed, sometimes fraudulently, into loans they never understood and couldn’t afford.”); Bob Herbert, A Swarm of Swindlers, N.Y. Times, Nov. 20, 2007 (“predatory lenders have . . . pushed overpriced loans and outlandish fees on hapless victims who didn’t understand — and could not possibly have met — the terms of the contracts they signed. . . . A lawyer, William Spielberger. . . . said [mortgage originators ] . . . were fully aware that the two women did not know what they were getting into.”); Carolyn Said, Living the American Nightmare Foreclosures on the Rise, S.F. Chronicle, July 29, 2007; Lisa Prevost, The Fallout of Subprime Loans, N.Y. Times, July 15, 2007 (“A ‘staggering number’ of homeowners who are reaching out to the Consumer Law Group, a law firm in Rocky Hill, Conn., for help in avoiding foreclosure don’t understand their loans’ terms, said Daniel Blinn, managing attorney at the firm.”); Statement of Karen Brown, Home Defense Program, Atlanta Legal Aid Society, at the Federal Reserve Board Public Hearing, Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 201-04 (July 11, 2006) (describing how borrower with credit score considered prime was given adjustable rate mortgage she thought was fixed; payments increased to $215 while her monthly income is $541); Rick Brundrett, How Mounting Loans Devastated 87-Year-Old, Columbia State-Record (Columbia SC), Feb. 24, 2002.}

Indeed, even an economics reporter for the New York Times, who had written articles about mortgages, took out a mortgage without comprehending his loan terms.\footnote{46}{See Edmund L. Andrews, My Personal Credit Crisis, N.Y. Times Mag., May 17, 2009: The paperwork was so confusing that I was never exactly sure who was paying what. I hazily understood that I was paying most of the fees, one way or another, but I couldn’t figure out how, and I couldn’t see any better alternatives.}

C. The Survey of Mortgage Brokers
In July 2009, in an effort to determine how borrowers use the TILA disclosures, I had my research assistant, Sabihul Alam, conduct a telephone survey of mortgage brokers. Ultimately he spoke to 102 brokers, who reported that they had collectively attended more than 58,125 closings. The brokers were virtually unanimous in saying that borrowers never withdrew from a loan after reading the final disclosures at the closing, and never used those disclosures for their stated purpose of comparison shopping for loans. At the time of the survey, the only binding TILA disclosures were provided at the closing. In other words, reading or hearing the only disclosures provided to consumers that contained their final loan terms did not ever prompt consumers to back out of their loans—no matter what the terms were. Assuming that the experiences of

47 The number of closings reported probably understates the actual number. Brokers who did not initially answer the question were prompted “More than 100? More than 1000?” Probably some stated that they had attended more than 1,000, say, even though the number may have been much larger. During the pre-survey research stage, I spoke to a mortgage broker who reported attending more than 50,000 closings (hereinafter, the “50,000 closing broker”). Because that broker was not called as part of the survey, and was asked slightly different questions from those posed in the survey, the broker’s responses are not included in the survey response, but are referred to in the footnotes when they are relevant.

48 See supra note ---. Only one broker reported encountering customers who withdrew from the closing and did not later proceed with the loan. The 50,000 closing broker, see supra note ---, shared the view that borrowers did not use the TILA disclosure forms for comparison-shopping. These findings are consistent with the report of ICF Macro of the findings it drew from its focus groups:

Even among participants who shopped for mortgages, the shopping process almost always ended at the point of loan application. . . . once a loan application was completed and accepted, very few participants ever revisited the shopping process and talked to other lenders—even after they learned that the loan they had been offered had terms they did not like, or that the terms of the offer had changed.

* * *

The most frequent reason mentioned [for not withdrawing despite reservations] was that they did not feel they had any options at that point in time—particularly in the case of home purchase loans. In other cases, participants accepted loans because they believed, or were advised by lenders, that they could easily refinance to better terms in the near future. Finally, several participants said they felt intimidated and rushed during the closing process and as a result found it difficult to object or raise questions.


49 Effective July 30, 2009, lenders were obliged to furnish final disclosures no later than three days before the closing if the final disclosures differ materially from the good faith estimates. See 74 Fed. Reg. 23,289 (May 19, 2009), amending 12 C.F.R. section 226.19.

50 See also Federal Reserve Board, Truth in Lending, 73 Fed. Reg. 44,522 (July 30, 2008):

Borrowers who consider the disclosure may nonetheless feel constrained to close the loan, for a number of reasons. They may already have paid substantial fees and expect that more applications would require more fees. They may have signed agreements to purchase a new house and sell the current house. Or they may need to escape an overly burdensome payment on a current loan, or urgently need the cash that the loan will provide for a household emergency.

Furthermore, many consumers in the subprime market will accept loans knowing they may have difficulty affording the payments because they reasonably believe a more affordable loan will not be available to them. . . . limited transparency of prices, products, and originator incentives reduces a borrower’s expected benefit from shopping further for a better option. Moreover, taking
these brokers were typical—which may not have been true, including for reasons discussed below—it seems clear that whatever benefit the disclosures conferred upon consumers, they did not help consumers to recognize and withdraw from loans on which they would later default.\footnote{One broker indicated that some borrowers had rescinded loans after the closing, but not because of the TILA disclosures. A flaw in the study was that it did not expressly ask about post-closing rescissions. Some borrowers would have had a right to rescind under 12 C.F.R. 226.23(a)(1), which gives borrowers a three-day right of rescission “in a credit transaction in which a security interest is or will be retained or acquired in a consumer’s principal dwelling . . . “ The regulation excepts from this right certain refinancings as well as residential mortgage transactions, defined as the mortgage used to acquire or construct the home. Sections 226.23(f)((1), (2); 226.2(24). Thus, borrowers in some unknown number of the loans would have had a right to rescind, but other borrowers would not have. Consequently, it is possible that some borrowers completed the closing but rescinded within the three-day cooling off period, because of the TILA disclosures. This possibility seems unlikely, however, for several reasons. First, brokers might well have volunteered information about rescissions had they occurred, as one broker did; the fact that other brokers did not suggests that they were not aware of such rescissions. Second, consumers rescinding after the closing face the extra burden of “unwinding” the transaction, and so it would be more likely that someone with reservations would withdraw from the closing than rescind later. Third, consumers often experience the “endowment effect,” see note --- and accompanying text infra, and so face some psychological barriers to rescinding. But it at least remains a theoretical possibility that some consumers did go through the closing and later rescinded.}

The survey is less helpful in explaining why consumers fail to use the disclosures for the purpose of deciding whether the loan is suitable, though it is possible to speculate. First, it is possible that the brokers who responded to our questions were not typical of brokers generally, and in particular did not include many brokers that originated the loans that later defaulted. For every broker who answered our survey, nearly four declined.\footnote{Because of a communication glitch, the number of brokers called was not recorded until 14 brokers had already been surveyed. To obtain the remaining 88 respondents, 390 were called, for a response rate of 22.6%}

It makes intuitive sense that brokers conscientious enough to answer survey questions would also be scrupulous enough to avoid originating loans that carried a high risk of default, and that brokers who would originate such loans would not trouble themselves to answer survey questions from which they would derive no great benefit. Conceivably, less altruistic brokers might not answer our questions, might be less meticulous in dealing with their borrowers, and might have some who withdraw upon seeing the disclosures at the closing.

Second, though the survey was not designed to ask how many of the borrowers were familiar with the disclosures before the closing, many of the survey respondents volunteered that borrowers were already familiar with the loan terms. Obviously, borrowers who knew the terms before coming to the closing would not be surprised to learn the terms at the closing and so could not be expected to pull out at that point. It is possible to infer from these reports that some brokers kept their borrowers apprised of the loan terms, again suggesting a level of care that exceeds that of some other brokers. Borrowers who took out purchase mortgage loans or loans to construct homes may also
have learned of the loan terms from the required good faith estimates;\(^{53}\) to the extent that the estimated disclosures did not change before the closing—which can be true if a borrower “locks in” a rate—the borrower will learn the final terms from the good faith estimates. But there is also reason to believe that many customers were not familiar with the TILA disclosures before the closing. Some brokers noted that final terms sometimes do deviate from the estimated terms.\(^{54}\) Significantly, many brokers reported that borrowers often asked at the closing why the Annual Percentage Rate ("APR") disclosure was higher than the stated interest rate. Many apparently feared that they were being charged a higher interest rate than they had expected.\(^{55}\) Presumably borrowers familiar with the TILA APR disclosure from an earlier disclosure or even from reading the good faith estimate would have asked that question when they first encountered the APR and so would not need to ask it at the closing. Another frequent source of questions at the closing was the “Total of Payments” disclosure, which informs borrowers how much they will pay over the life of the loan in interest and principal. This disclosure seemed to inspire a sort of sticker shock; again, borrowers who were already familiar with the disclosures should not have experienced shock at seeing the disclosures at the closing.

Of course, borrowers may fail to use the disclosures for reasons that have nothing to do with the brokers. They may already be committed, psychologically or otherwise, to

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\(^{53}\) At the time the survey was conducted, originators were not required to supply consumers applying for refinancings with good faith estimates. The regulations were amended effective – to require originators to provide good faith estimates to applicants for refinancings.

\(^{54}\) See also Statement of Patricia McCoy, Univ. Conn. School of Law, at the Federal Reserve Board Public Hearing, Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 155 (July 11, 2006) (“in actual cases that I’ve looked at, the prices on subprime loans often turned out to be a moving target. A lender or broker might have the customer apply for one type of loan, price A, say a fixed rate loan; changed the loan during underwriting to an adjustable rate mortgage, price B; and then finally change the loan at closing to something different at price C, say an interest only mortgage.”); Statement of Jack M. Guttentag, University of Penn. Wharton School of Business, at the Federal Reserve Board Public Hearing, Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 135 (June 9, 2006) (“the prices in this market are volatile. They change every day.”); Bob Tedeschi, New Law May Cause Delays for Borrowers, N.Y. Times, Aug. 16, 2009 (“Borrowers can see their interest rates change from the initially quoted rate for many reasons. If their credit score was lower than they first thought, or if they are required to pay mortgage insurance on the loan because their down payment money ran low, for instance, the rate can easily rise by more than one-eighth of a point.”). For illustrations of how quickly mortgage rates change, visit [www.mtgprofessor.com](http://www.mtgprofessor.com).

\(^{55}\) Cf. ICF Macro, Summary of Findings: Design and Testing of Truth in Lending Disclosures for Closed-end Mortgages (2009):

Several [participants in focus groups and interviews] were confused by the fact that the interest rate was not included on the current TILA statement, or incorrectly assumed that the [APR] was the interest rate.

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The meaning of the APR was generally not understood by participants. Almost all either assumed that this rate was the same as their interest rate, or understood that the two terms were different but could not explain how.

** * * *

Participants had various misinterpretations of the APR, such that it reflected how the rate would adjust in the future, or that it was the maximum possible rate.
the loan by the time they see the disclosures, and so it is possible that nothing could make them pull out of the loan at that point.\textsuperscript{56}

Many of the brokers reported that they explained the disclosures to their borrowers at the closing. This, again, suggests that the respondents were more conscientious than some. Though the survey was not designed to find out why brokers engaged in this behavior, it is possible to speculate. As already noted, our respondents may simply have been biased towards more meticulous brokers. But other explanations are possible. Some brokers stated that they explained the disclosures because they were required to do so by law, and so they thought they had no choice in the matter. In fact, federal law does not so require. Some brokers reported that it was their firm’s policy to explain the disclosures, though of course that begs the question of why the firms require such an explanation. A cynical explanation might be that because consumers never withdraw from the closing after hearing the disclosures, the brokers have nothing to lose (besides time) in walking borrowers through the disclosures. An even more cynical explanation is that by talking borrowers through the forms, the broker can spin the information contained therein in a way to keep the borrower from withdrawing. For example, to ameliorate the perceived sticker shock, brokers can point out the Total of Payments disclosure, and then observe that it is relevant only to those who intend to stay in their homes without refinancing for the full mortgage term—often thirty years—something that few borrowers may expect to do. Another possibility is that brokers have learned that borrowers inquire about the difference between the APR and the interest rate if they are not told, and they wish to forestall such questions.

The survey also asked what percentage of consumers spent more than a minute reading the TILA disclosures. As it became clear that many brokers explained the disclosure to their customers, this question was broadened to cover the situation in which the customer spent more than a minute with the disclosures, either because the broker explained them for that period of time, or because the borrower read them, or both. Of the 102 brokers surveyed, 53, or just over half, reported that less than 10% of their borrowers spent more than a minute with the disclosures. An additional 20 stated that between 10 and 29% of their customers devoted more than a minute to the disclosures, meaning that more than two-thirds of the brokers reported that less than 30% of their borrowers spent more than a minute with the disclosures.\textsuperscript{57}

A minute to understand the disclosures—and it may be less than that—does not seem like very much time considering that mortgages are typically the largest and

\textsuperscript{56} See Baher Azmy, \textit{Squaring the Predatory Lending Circle}, 57 FLA. L. REV. 295, 351 – 52 (2005) (stating that on the day of the loan closing “a borrower has psychologically committed herself to the loan”). See also \textit{supra} note ---. As discussed \textit{infra}, Congress has moved the disclosure date forward to three days before the closing takes place. See note --- \textit{infra} and accompanying text.

\textsuperscript{57} This is consistent with the Fed’s comment that “At the closing table, many borrowers may not notice the disclosure of the payment amount or have time to consider it because borrowers are typically provided with many documents to sign then.” Federal Reserve Board, Truth in Lending, 73 Fed. Reg. 44,522 (July 30, 2008). The 50,000 closing broker, see \textit{supra} note ---, reported that 90% of the time borrowers spend far less than a minute on the TILA disclosures, and that half spend less than thirty seconds on the form.
longest-term obligation a consumer ever assumes. Because consumers rarely shop for mortgages, they typically lack the experience needed to make sense of loan terms. And mortgage terms are complex. That is, after all, the reason Congress enacted TILA in the first place. For example, Oren Bar-Gill has noted that option ARMs offer four different options for each monthly payment—and that’s only one loan term. Or imagine how much time would be needed to explain to a borrower the 2/28 mortgage payment term quoted above. It seems improbable that consumers unfamiliar with such transactions could comprehend the consequences of such terms based on an explanation of a minute or less. Moreover, borrowers may not focus on those terms at all. Instead, as already noted, it appears that many brokers and customers devoted their time to discussing the discrepancy between the APR and the interest rate, and the Total of Payments disclosure, all of which merit attention, but are not the only disclosures that borrowers should attend to.

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58 See also ICF Macro, Summary of Findings: Design and Testing of Truth in Lending Disclosures for Closed-end Mortgages (2009):

Many [participants in focus groups and interviews] commented that because they were shown so many papers at closing they did not read any of them carefully—including their TILA and HUD-1 statements.

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Participants who did recognize the TILA statement were asked whether they had found the document useful when they received it previously. Most indicated that they had not, either because they had not understood it or because they had not paid attention to it at loan closing.

59 Oren Bar-Gill, The Law, Economics and Psychology of Subprime Mortgage Contracts 45 [SSRN]; Ren S. Essene & William Apgar, Understanding Mortgage Market Behavior: Creating Good Mortgage Options for all Americans iii (Jt. Ctr. for Housing Studies, Harvard Univ. 2007); Statement of Loretta Abrams, Vice President of Consumer Affairs, HSBC North America, at the Federal Reserve Board Public Hearing, Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 164-65 (June 9, 2006) (HSBC survey found that 78% of consumers “stated that they are not, at all, very knowledgeable about how to take out a mortgage loan, they actually spend very little time reviewing mortgage options, . . . . 34 percent of consumers told us that they researched their mortgage options for less than a week, and people spend months looking for just the right home, and then they spend less than a week making sure they’ve got just the right mortgage . . . .”).

60 Oren Bar-Gill, The Law, Economics and Psychology of Subprime Mortgage Contracts 24 [SSRN]. Bar-Gill continues:

[T]hese payment options are not predetermined sums. Nontrivial calculations are necessary to figure out what the options are. Moreover, these contracts, while allowing negative amortization, typically cap the level of permissible negative amortization, recasting the loan, even before the end of the introductory period, if this cap is reached.

In O’Donnell v. Bank of America, 2009 WL 765670 (Fed. Dist. Ct. N.D.Cal. 2009), the court described an option ARM in the following terms:

The loan product has an initial low teaser interest rate with correspondingly low initial payments. . . . The interest begins to adjust approximately one month into the loan . . . . While the interest rates are adjusting on the loan, the scheduled payments, which are set to correspond with the initial rate, are subject to a 7.5% annual increase until the loan reaches a "Reamortization Date."

61 The brokers’ reports are consistent with surveys reported in Thomas A. Durkin & Gregory Elliehausen, Disclosure as a Consumer Protection in The Impact of Public Policy on Consumer Credit 129 (Thomas A.
When combined with the erroneous disclosures, the survey produces ironic results. It may not matter that the forms are misleading, because few borrowers attend to them. And it may not matter that few borrowers attend to them, because the forms are misleading. Indeed, because borrowers cannot be misled by forms they ignore, borrowers who spend little time with their TILA disclosure forms may be better off than those who studied them closely. And perhaps the cruelest irony is that the resources poured into fashioning and providing the forms to borrowers for decades appears to have been largely wasted and even worse than wasted because it created the illusion of consumer protection—just as it created the illusion of accurate disclosures—where none existed.

In sum, it appears that TILA failed to help the subprime borrowers understand the terms of the loans they were entering into at a useful time, and the consequences those terms would have for them. This can be inferred first, from the misleading nature of the forms themselves, and second, from two of the survey responses: (1) that many borrowers spent so little time with the disclosures despite their complexity and (2) that borrowers never withdrew from loans at the closing, even though many seemingly saw the final TILA disclosures for the first time at the closing—and learned for the first time at the closing what those forms said their loan terms would be. It seems inconceivable that nearly every consumer, upon learning the final loan terms for the first time, concluded that they were satisfactory.

It is tempting to blame the borrowers themselves for their behavior. They could, after all, withdraw from loans with unfortunate terms, and they could insist on taking more time with the disclosures. The loans on which consumers defaulted were all consensual transactions. But when we know that borrowers behave in predictable ways that are not in their best interests, are not in society’s best interests, and that, as discussed below, unscrupulous lenders take advantage of, blaming consumers as an excuse for not changing the rules governing the transactions only permits the undesirable behavior to continue. A better approach would find ways to forestall the undesirable behavior while minimizing the costs of doing so. Part III discusses some ways to accomplish that goal. But first, Part II continues exploring the reasons why consumers may act unwisely.

D. Other Evidence that TILA Failed

Durkin & Michael E. Staten, eds., 2002). Those surveys conducted in 1977 (in that year, the Survey of Consumer Finances), 1981 (in that and later years, the Survey of Consumers), 1994, and 1997, showed that, depending on the year, 27 to 34% of consumers strongly disagreed with the statement that “Most People Read Their Truth-in-Lending Statements Carefully,” while 33 to 38% disagree somewhat with that statement.

62 See also Ren S. Essene & William Apgar, Understanding Mortgage Market Behavior: Creating Good Mortgage Options for All Americans 45 (Jt. Ctr. for Housing Studies, Harvard Univ. 2007) (claiming that disclosure documents are often signed without being understood).

63 Indeed, if so many consumers are giving the disclosures too little attention to make appropriate decisions, it could be argued that the reasonable consumer so behaves.
Others have noted that consumers entered into loans without understanding their terms. Such claims also find support in evidence that some borrowers pay more than other similarly-situated borrowers, which implies a market failure. Thus, one study concluded that “younger adults and older adults borrow at higher interest rates and pay more fees than middle-aged adults controlling for all observable characteristics . . . .” Similarly, another study found that “borrowers with a bachelor’s degree pay their brokers

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64 See generally President George W. Bush, White House Press Conference, Aug. 9, 2007, available at http://georgewbush-whitehouse.archives.gov/news/releases/2007/08/20070809-1.html (“We’ve had a lot of really hardworking Americans sign up for loans, and the truth of the matter is they probably didn’t fully understand what they were signing up for.”); Federal Reserve Board, Truth in Lending, 73 Fed. Reg. 44,522, 44,525-26 (July 30, 2008) (”Consumers who do not fully understand such terms and features, however, are less able to appreciate their risks, which can be significant. For example, the payment may increase sharply and a prepayment penalty may hinder the consumer from refinancing to avoid the payment increase. Thus, consumers may unwittingly accept loans that they will have difficulty repaying.”); Statement of Peter Orszag, CBO budget Director, State of the US Economy and Implications for the Federal Budget: Hearing Before the H. Comm on the Budget, 110th Cong., 6 (Dec. 5, 2007) (“The rise in defaults of subprime mortgages may also reflect the fact that some borrowers lacked a complete understanding of the complex terms of their mortgages and assumed mortgages that they would have trouble repaying.”); Michael S. Barr, Sendhil Mullainathan, & Eldar Shafir, Behaviorally Informed Financial Services Regulation 8 (2008) (“While the causes of the mortgage crisis are myriad, a central problem was that many borrowers took out loans that they did not understand and could not afford.”); Elizabeth Renuart and Diane E. Thompson, The Truth, The Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth in Lending on SSRN (“The lender-created complexity of mortgage loans now exceeds what most consumers, even highly educated consumers, are capable of comprehending.”); Todd J. Zywicki, The Law and Economics of Subprime Lending, --- Colo. L. Rev. --- (forthcoming), available at http://ssrn.com/abstract_id=1106907 (“Mortgages, whether in the prime or subprime market, are inherently complex products about which a consumer knows and can know little. First-time homebuyers are generally overwhelmed at the complexity and amount of loan documentation that accompanies a home purchase and their lack of opportunity to fully read and ask questions about their mortgage terms. Having gone through the experience once, second-time homebuyers rarely even closely examine their loan documents. Nor is it likely that even if they did take the time to examine their documents, as we have seen, most borrowers would be unable to comprehend most of their terms.”); Allen J. Fishbein & Patrick Woodall, Exotic or Toxic? An Examination of the Non-Traditional Mortgage Market for Consumers and Lenders 2 (Consumer Federation of America 2006) (“more vulnerable consumers—first time homebuyers, unsophisticated financial consumers, and consumers traditionally underserved by the mortgage market, especially lower-income and minority consumers . . . .are less likely to understand . . . the complexity of the mortgage vehicles they are offered . . . .”); Kathleen C. Engel and Patricia A. McCoy A Tale of Three Markets: The Law and Economics of Predatory Lending, 80 Tex. L. Rev. 1255, 1286 (2002) (“the victims of predatory lenders sign documents without having a clear sense of the terms of the contracts, how much they borrowed, what they purchased, the terms of repayment, or the risks they assumed.”); Statement of Ken Logan, Chairman-Elect, National Home Equity Mortgage Association, at the Federal Reserve Board Public Hearing, Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 92 (July 11, 2006) (“few borrowers fully understand the residential transaction or the disclosures.”); Richard Bitner, Confessions of a Subprime Lender 133 (2008) (former mortgage lender estimated that half of mortgage borrowers did not understand “what they were doing”).

65 Sumit Agarwal, John C. Driscoll, Xavier Gabaix, & David Laibson, The Age of Reason: Financial Decisions Over the Lifecycle 2, 46, 49 (2009), available at http://ssrn.com/abstract=973790 (“for home-equity lines of credit, 75-year olds pay about $265 more each year than 50-year olds, and 25-year olds pay about $295 more. . . . middle-aged adults borrow at relatively lower interest rates and pay relatively lower fees than their younger and older counterparts. Our analysis suggests that this pattern is not explained by age-dependent risk factors. For example, in our proprietary data set of prime borrowers, the middle-aged borrowers have lower (worse) FICO scores and higher default rates than adults in the younger and older age buckets.”).
Perhaps the most dramatic instance of this effect comes from the ability of lenders to steer borrowers who could have qualified for prime loans to higher-cost subprime loans. Thus, Wells Fargo loan officers have reported in affidavits filed in a case brought by the City of Baltimore against Wells Fargo that they persuaded loan applicants to settle for subprime loans even though the applicants could have obtained lower-cost loans. Wells Fargo’s representatives were able to do so by telling applicants, for example, that the subprime loans required less paperwork or could be processed more quickly. Given the substantially greater costs of subprime loans, which can amount to many thousands of dollars in higher interest payments, such strategies could work only in a dysfunctional market.

To see why this is so, imagine a grocery store that attempted to persuade consumers to purchase milk at $30 a quart by promising reduced paperwork or faster service. Such a store would not sell much milk. But in a market in which consumers do not comparison-shop with the actual terms, such as our survey indicates is true of the home lending market, consumers are not able to discover that they can obtain financing at lower cost.

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66 Susan E. Woodward, Consumer Confusion in the Mortgage Market, Sand Hill Econometrics, Working Paper (2003), available at www.sandhillecon.com/pdf/consumer_confusion.pdf. The author also found that the borrower’s race and broker’s sex affect the broker’s fee. Id. at 2.

67 See Marsha J. Courchane, Brian J. Surette, & Peter M. Zorn, Subprime Borrowers: Mortgage Transitions and Outcomes, 29 J. Real Estate Fin. & Econ. 365, 381 (2004) (“Our results suggest that borrowers may inappropriately receive subprime mortgages . . . .”); Illinois Department of Financial and Professional Regulation, Findings from the HB 4050 Predatory Lending Database Pilot Program 5 (2007) (study of Chicago borrowers finds that many of the borrowers could have qualified for a “a more affordable loan had they been better informed about what was available to them”); Statement of Margot Saunders, National Consumer Law Center, at the Federal Reserve Board Public Hearing, Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 37 (July 11, 2006) (“the high price is obtained from borrowers from whom they can be obtained from and the losses that result from those loans are used as the justification for the high price. I have seen dozens and dozens of loans with very high prices made to people who had very high credit ratings. I think those people were just more vulnerable.”); Michael S. Barr, Credit Where It Counts: the Community Reinvestment Act and Its Critics, 80 N.Y.U.L.Rev. 513, 556 (2005); Gretchen Morgenson, Inside the Countrywide Lending Spree, N.Y. Times, Aug. 26, 2007 (“Countrywide’s “incentive system also encouraged brokers and sales representatives to move borrowers into the subprime category, even if their financial position meant that they belonged higher up the loan spectrum.”). Cf. Howard Lax, Michael Manti, Paul Raca, & Peter Zorn, Subprime Lending: An Investigation of Economic Efficiency, 15 Housing Policy Debate 533, 566 (2004) (“More than two-fifths of subprime borrowers do not think they got the mortgage that was best for them, nearly nine times more than prime borrowers who express this kind of discontent.”).

68 Affidavit of Elizabeth M. Jacobson in City of Baltimore v. Wells Fargo. See also Affidavit of Ton Paschal in City of Baltimore v. Wells Fargo (“I . . . regularly saw minority customers who had good credit scores and credit characteristics in subprime loans who should have qualified for prime or [Fair Housing Act] loans.”).

69 See Edward M. Gramlich, Subprime Mortgages 19 (2007) (“it is complicated and confusing for borrowers to search out all their available options, to understand all the terms of the loans, and to avoid getting misallocated into a lower credit category than may be appropriate. In the end the process by which rates are set is regulated by the borrower’s ability to shop around, and prospective borrowers may not know where to shop, what to ask, or how to evaluate their own credit-worthiness . . . .”).

70 Confusion about loan terms may also contribute to defaults. For example, the added costs incurred by borrowers who end up with more expensive loans than they might have qualified for may tip the loan over into being unaffordable, with the result that the borrower defaults even though the borrower might have been able to meet her payment obligations on a more appropriate loan. See Statement of Margot Saunders,
Still other evidence that consumers have not made wise decisions is found in the number of borrowers who seem to have entered into loans inappropriate for their situation. The federal Department of Housing and Urban Development takes the position that a household’s housing is unaffordable if housing costs consume more than 30% of the household income; housing is considered severely unaffordable if the housing absorbs more than half the household’s income. By that standard, in 2006, nearly a third of U.S. households could not afford their housing, and more than a tenth had severely unaffordable housing. It seems unlikely that so many families assumed such obligations fully understanding the consequences, but then, our survey and the TILA forms themselves raise doubts about whether they did. Similarly, as Oren Bar-Gill has observed, loans which provide for a low initial interest rate followed by higher rates are designed for those who have reason to expect a dramatic jump in their incomes, such as students who can anticipate a lucrative career upon graduation. Yet the millions of borrowers who took out such loans surely exceed the number of people who fit that description.

Additional evidence that borrowers did not understand their payment obligations and their consequences can be found in the number of borrowers who defaulted quickly on those obligations. Thus, studies have found that “the age of subprime loans at

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Joint Ctr. for Hous. Stud. of Harvard Univ. The State of the Nation’s Housing 2008, at 40. See also Daniel A. Mico, Financial Literacy—Yeah, Gimme Some of That, Credit Union Magazine 2A (2008) (“more than one-third of U.S. homeowners spend [30%] or more [of their gross income] on housing. Worse, one of seven homeowners spends 50% or more of pre-tax income on shelter.”).  

Probably some of these borrowers suffered financial reversals which reduced their income, thereby placing them in these categories, but it is unlikely that most of them did.  

foreclosure[] is generally 2 years or less . . . .” 75 While some early defaulters may have been crooks who never intended to repay loans, and others speculators, and still others unfortunates who encountered a run of bad luck, others seemingly did not understand their obligations or overestimated their abilities to meet those obligations 76

E. Why has TILA Failed?

Why have the TILA disclosures been so unhelpful? Some causes of the problem may be structural. TILA, in common with many disclosure statutes, suffers from mandating a communication that the sender—the originator—often does not have an interest in being received, and, in the case of unscrupulous originators, may have an interest in obscuring or spinning in a particular way, a point amplified upon below. Lenders who plan to retain the loan have a stake in the borrower understanding the loan terms if the borrower will first, prove unable to make the payments at some point, and second, would so realize upon understanding the loan terms. But if the lender plans both to make and retain the loan, the lender must expect that the borrower will be able to make the loan payments. Consequently, the lender may believe that it has little to gain if the borrower fully appreciates the loan terms—especially since if the lender thinks the borrower can make the loan terms, but the borrower withdraws from the closing anyway, the lender has lost a sale. Originators who plan to sell loans to others have even less of a stake in borrowers understanding loan terms. Because they will not retain the loan, they do not bear the risk of a default. If the borrower pulls out of the loan, such an originator loses a sale and has no offsetting reduction in risk. Such an originator has nothing to gain by the borrower withdrawing from the loan and much to lose. In short, often the people who must present the disclosures may not perceive that they have anything to gain if borrowers understand them. As a result, unscrupulous originators lack an interest in eliminating distractions, providing clarifications, learning from experience how to improve the communication or fixing the disclosures. Instead, that role is left to


76 While this finding, to some extent, undermines the significance of the misleading nature of the TILA disclosures for 2/28 loans, because changes in the monthly payments were less significant to borrowers who defaulted before reaching the first change date, it does not render it without importance for several reasons. First, many borrowers did not default until after the first change date. Second, the 2/28 mortgage was only one type of loan. Other loans provided for adjustment much earlier than the second year, and so borrowers with such loans may have defaulted precisely because of unexpected payment increases. Third, even some of those who defaulted before their payments increased might have been dissuaded from taking out the loans if the disclosure forms had conveyed to them the amounts to which their monthly payments could have risen, thereby helping them to understand better the risk they were taking. Fourth, others may have been able to take advantage of loan modification programs that kept their payments from soaring in accordance with the loan terms. Fifth, many borrowers continued making payments after their monthly payments leaped to unexpected amounts, but those higher payments may have placed great stress on their household budgets, and some may default in time. See Chris Mayer, Karen Pence, and Shane M. Sherlund, The Rise of Mortgage Defaults 12 (Working Paper 2008) (“Mortgage rate resets may yet cause difficulties going forward: households trying to refinance hybrid short-term mortgages in 2008 and later face an environment of stagnant to falling house prices and tightened underwriting standards.”).
government officials. But government suffers from inherent disabilities in playing that role.

The TILA disclosures are partly dictated by Congress, through TILA itself, and the Federal Reserve Bank, which implements TILA through Regulation Z and the accompanying Commentary. This two-headed arrangement makes the drafting of effective disclosures difficult. Members of Congress have so many concerns besides TILA that they can only rarely afford TILA the attention it requires while the leaders of the Fed are chosen not for their expertise in consumer protection, much less consumer disclosure regulation, but for their knowledge of macroeconomics (quite rightly, in light of the important role the Fed plays in managing the economy). It is, therefore, hardly surprising that the original version of former Fed Chair Alan Greenspan’s memoir, The Age of Turbulence, almost completely overlooked TILA, while including entire chapters on each of China, Russia, and Latin America, areas of the world for which the Fed has no formal responsibility, unlike TILA. Thus, Oren Bar-Gill and Elizabeth Warren have commented that “The Federal Reserve does not view consumer protection as its core mission.” The result is that TILA may not get the attention it merits. That the Fed has not itself conducted a survey of the type described herein and took twenty years to propose changes in its misleading disclosures for adjustable-rate mortgages offers further support for that proposition.

But TILA’s failure cannot be attributed solely to the fact that it is administered by an agency devoted to monetary policy. The effectiveness of disclosure itself has limits, as illustrated by a series of tests conducted by Macro International for the Federal Reserve Board in 2008. Macro had consumers read disclosures stating that mortgage brokers had an incentive to arrange for loans with higher interest rates, because that would increase broker compensation. Macro’s report of its finding stated:

Nearly all participants were surprised to read about the brokers’ conflict. . . . Shortly after reading the disclosure, about half of the participants made statements that directly contradicted what they had read in the agreement about broker incentives. Several, for example, stated late in their interviews that they would expect the broker to show them the loans with the best terms available. However, the disclosure they had just read specifically pointed out that brokers would in fact have incentives not to do so.


79 Macro Int’l, Consumer Testing of Mortgage Broker Disclosures 12 (2008). Others have noted that borrowers suffer from this misconception. See, e.g., Federal Res. Sys., Truth in Lending Final Rule; Official Staff Commentary, 73 Fed. Reg. 44,522 (July 30, 2008) (“Anecdotal evidence indicates that consumers in both the prime and subprime markets often believe, in error, that a mortgage broker is obligated to find the consumer the best and most suitable loan available.”).
So Macro disclosed the conflict more explicitly. The following paragraph describes the result:

As in [the earlier round], most participants understood upon their first reading of the agreement that the broker would have a financial incentive to provide them with higher-interest rate loans. Again, however, participants’ preconceived belief that brokers were working in the best interest of borrowers made this conflict difficult to accept. As a result, many became confused or reverted to their prior assumptions. * * *\(^{80}\)

And, Macro found, the revised disclosures led to other misconceptions.\(^{81}\) In short, even under perfect conditions, when no one is attempting to distract consumers from focusing on disclosures, deceive them, or rush them into a particular transaction, disclosures may not be useful to consumers when they create cognitive dissonance. As Fed Chairman Ben S. Bernanke has noted “not even the best disclosures are always adequate . . . . some aspects of increasingly complex products simply cannot be adequately understood or evaluated by most consumers, not matter how clear the disclosure.\(^{82}\)

In addition, disclosures do not appear to be unique in failing to elicit consumer attention. Recent studies have tended to confirm the long-suspected intuition that often consumers merely skim contracts or do not read them at all—and of course such habits may carry over to how consumers treat mandated disclosures, including TILA disclosures.\(^{83}\) Thus, one survey found that significant majorities of consumers reported that they did not read certain standard form contracts before entering into the

\(^{80}\) Macro Int’l, Consumer Testing of Mortgage Broker Disclosures 22 (2008).
\(^{81}\) Macro Int’l, Consumer Testing of Mortgage Broker Disclosures 26 (2008).
\(^{83}\) See Macro International Inc., Design and Testing of Effective Truth in Lending Disclosures 6, 11 (2007) (“Participants indicated that they would be unlikely to read a change-in-terms insert that was included with their periodic statement, and would probably throw it away . . . . Participants paid very little attention to the [credit] cardholder agreement; only a few participants looked at it at all, and these only skimmed it briefly. When asked, a vast majority of participants indicated that they generally do not look at their cardholder agreements. Most participants indicated that the reasons they do not read their agreements are that the types size is very small and they find them difficult to understand.”); Debra Pogrund Stark & Jessica M. Choplin, A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities 18, 26, 27 (2009) (footnotes omitted);
transaction.\textsuperscript{84} Other researchers decided to test whether consumers read disclosures by giving study participants a consent form described as follows:

The second paragraph was a long-winded explanation of informed consent, but buried three quarters of the way through this paragraph, was a sentence suggesting that participants should not sign this consent form as its terms were clearly not in their best interests. * * * Buried within the fifth paragraph [were] clauses [that] committed participants to administering electric shocks to fellow participants, if instructed to do so, even if that participant screamed, cried, and asked for medical assistance. It also required participants to do push-ups, if the experimenter required them to do so. * * *\textsuperscript{85}

More than 95% of the participants signed the form, and most did so without even skimming it.\textsuperscript{86} The experimenters then explained that the consent form had been a fake and asked participants to sign a genuine consent form. More than a third of those who had signed the bogus form signed the actual consent form without reading it while only 21.8% read the entire form; the average time spent looking at the actual form was sixteen seconds.\textsuperscript{87} The lesson for those designing disclosures seems clear: many consumers will not read forms even after learning that they have been deceived by failing to read such a form.

The TILA disclosures also face other impediments at conveying loan terms, as discussed in the next subsection.\textsuperscript{88}

\textsuperscript{84} Shumel I. Becher & Esther Unger-Aviram, \textit{Myth and Reality in Consumer Contracting Behavior} 12 (2009) available at \texttt{http://ssrn.com/abstract=1117422}. The three contracts at issue were for a car rental, laundry services, and opening a bank account. The exception, which doesn’t seem analogous to mortgage loan papers, was for a nursery school placement. Many consumers did claim, however, that they would skim the contracts before signing them. Factors reported to most strongly influence the likelihood that a consumer would read a contract included costs of transaction, the possibility of changing or improving contract terms, and length of the contract. Id. at 18. See also Debra Pogrund Stark & Jessica M. Choplin, \textit{A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities} 40-44 (2009) (22.9\% of sample acknowledged not reading purchase agreement when buying home; 6.1\% of those with mortgage admitted not having read any terms in loan documents; of those who reported reading loan documents, 77.4\% stated they had not read all the terms; authors concluded the “self-reported level of the public reading all of the terms of their loan documents is highly unlikely to be accurate” and noted that a research assistant who had formerly been a mortgage broker took over three hours to real all the terms for a typical home loan; the percentage of consumers who reported they did not read all the terms in the following types of contracts appears after the type of contract on the following list: car rental contracts: 71\%; packaged food terms: 89\%; terms on downloading software: 95\%; apartment rental agreement: 43\%).

\textsuperscript{85} Debra Pogrund Stark & Jessica M. Choplin, \textit{A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities} 30 (2009).

\textsuperscript{86} Debra Pogrund Stark & Jessica M. Choplin, \textit{A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities} 31 (2009).

\textsuperscript{87} Debra Pogrund Stark & Jessica M. Choplin, \textit{A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities} 32 (2009).

\textsuperscript{88} See generally Testimony of Michael D. Donovan Partner Donovan Searles, LLC Philadelphia, PA 19103 also on behalf of The National Consumer Law Center and The National Association of Consumer Advocates Before the Senate Comm. on Banking, Housing, & Urb. Aff. Jan. 25, 2007:
F. Other Problems for Borrowers

Scholars have identified several conditions that impair consumers’ ability to make optimal borrowing decisions. Among these are that many consumers lack the financial sophistication to understand loan documents. In Judge Posner’s words, “not all persons are capable of being careful readers.” Other borrowers either do not realize they need

Disclosures are only useful for consumers when all of the following conditions exist –
• The consumer has the opportunity to read the disclosures fully;
• The disclosures are unambiguous and understandable;
• The disclosures are true and apply to the entire term of the contract;
• The consumer has the knowledge and sophistication to understand the meaning of the information provided in the disclosures;
• The consumer has the opportunity to make choices based on the information gained through the disclosures.

The TILA disclosures seemingly fail on all of these counts.


90 See, e.g., Ren S. Essene & William Appar, Understanding Mortgage Market Behavior: Creating Good Mortgage Options for all Americans iii-iv (Jt. Ctr. for Housing Studies, Harvard Univ. 2007) (“Given that the mortgage transaction has multiple time and cost dimensions, consumers often are unable to determine what actual risks they face over time. . . While standard economic theory assumes that consumers shop for the best available price and terms, even the most sophisticated borrowers often find it difficult to effectively shop for mortgages.”); Kathleen C. Engel and Patricia A. McCoy A Tale of Three Markets: The Law and Economics of Predatory Lending, 80 Tex. L. Rev. 1255, 1280 (2002) (“the typical victims of predatory lenders are unsophisticated about their options”); Lauren E. Willis, Decisionmaking and the Limits of Disclosure The Problem of Predatory Lending: Price, 65 Md. L. Rev. 707, 728 (2006) (“subprime loan pricing and structure are nontransparent to many consumers, creating information asymmetries between borrowers and loan sellers that can be exploited by the latter.”); Government Accountability Office, Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending 97 (2004) (“Even a relatively clear and transparent system of disclosures may be of limited use to borrowers who lack sophistication about financial matters, are not highly educated, or suffer physical or mental infirmities.”); Consumer Federation of America, Press Release, Lower-Income and Minority Consumers Most Likely to Prefer and Underestimate Risks of Adjustable Rate Mortgages July 26) 2004).

Significant numbers of consumers are financially illiterate. Annamaria Lusardi, Financial Literacy: An Essential Tool for Informed Consumer Choice? 2 NBER Working Paper No. W14084 (2008) at http://ssrn.com/abstract=1149331 (“most individuals cannot perform simple economic calculations and lack knowledge of basic financial concepts . . . ignorance about basic financial concepts can be linke to . . . poor borrowing behavior.”); Lewis Mandell, Consumer Knowledge and Understanding of Consumer Credit, 7 J. Consumer Affairs 23 (1973) (“with the exception of those who are well educated and fairly affluent, most consumers have great gaps in their knowledge and understanding of the credit market.”). See also Madhubalan Viswanathan, Jose Antonio Rosa, & Julie A. Ruth, Emerging Lessons, Wall St. J., Oct. 20, 2008 (reporting that 14% of Americans are estimated to be functionally illiterate).

91 Emery v. American Gen. Fin., 71 F.3d 1343 (7th Cir. 1995). See also Thomas A. Durkin & Gregory Elliehausen, Disclosure as a Consumer Protection in The Impact of Public Policy on Consumer Credit 128 (Thomas A. Durkin & Michael E. Staten, eds., 2002) (“There can be little doubt, however, that understanding credit disclosures is daunting for most recipients and beyond the capabilities of some to absorb the information.”).
to know more, or do not wish to incur or cannot afford the cost of acquiring more information. The result is described by a former mortgage lender: “On many occasions, I’ve seen borrowers at the closing table develop that deer in the headlights look.” When borrowers cannot appreciate the significance of loan terms, lenders are free to do with those terms what they will. Indeed, some lenders have sought out unsophisticated borrowers because of their inability to recognize the unsuitability of loan offers while others may target borrowers experiencing financial stress who may consequently be less able to give loan terms their full attention. Some of these lenders employ high-pressure tactics which further diminish the ability of borrowers to think through their decisions.

The complex loans typical in subprime lending also worsen the problem by making it more difficult for borrowers to understand their loan terms. Thus, the

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92 Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, --- U. Penn. L. Rev. --- (2009) (“Consumers do not seek to acquire more information because they are not aware that they need more information or that more information is available for them to acquire. Put differently, an imperfectly rational consumer might not be aware that she is uninformed.”).

93 Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, --- U. Penn. L. Rev. --- (2009) (“Consumers are uninformed because information is costly to acquire.”)

94 Richard Bitner, Confessions of a Subprime Lender 133 (2008)

95 See Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1207 (2003) (“When a contract term is non-salient to most purchasers, the market check on seller overreaching is absent, and courts should be suspicious of the resulting term. Put slightly differently, whenever a term in a form contract is non-salient to most purchasers, those purchasers are incompetent to protect their interests vis-à-vis that term.”). Cf. Shumel I. Becher & Esther Unger-Aviram, Myth and Reality in Consumer Contracting Behavior 3 (2009) available at http://ssrn.com/abstract=1117422 (“Where consumers are not aware of the content of their contracts, sellers have a profit incentive to provide contractual terms of the lowest quality possible.”).

96 See, e.g., Kathleen C. Engel and Patricia A. McCoy A Tale of Three Markets: The Law and Economics of Predatory Lending, 80 Tex. L. Rev. 1255, 1281-83 (2002) (describing how predatory lenders identify unsophisticated borrowers and noting "hard-sell tactics capitalize on . . . borrowers’ lack of experience with this new breed of lenders and their complex products.").

97 Lauren E. Willis, Decisionmaking and the Limits of Disclosure The Problem of Predatory Lending: Price, 65 Md. L. Rev. 707, 770 (2006) (“Subprime home lender marketing strategies attempt to reach potential borrowers at times of stress, when the borrowers are more likely to truncate their reasoning. One method is to target marketing efforts to consumers whom sellers know to be in some financial crisis.”).


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.

99 See, e.g., Michael S. Barr, Sendhil Mullainathan, & Eldar Shafir, Behaviorally Informed Financial Services Regulation 8 (2008) (“How many borrowers really understand how the teaser rate, introductory rate and reset rate relate to the London interbank offered rate plus some specified margin, or can judge whether the prepayment penalty will offset the gains from the teaser rate?”); Ren S. Essene & William Apgar, Understanding Mortgage Market Behavior: Creating Good Mortgage Options for all Americans i, 15 (Jt. Ctr. for Housing Studies, Harvard Univ. 2007) (“many consumers have a limited ability to evaluate complex mortgage products and they often make choices which they regret after the fact * * * Unlike simple products that typically have a single price component, loan pricing is a combination of interest rates,
Government Accountability Office found that disclosures for complex mortgage loans “were generally written with language too complex for many adults to fully understand,” as is surely true of the loan term quoted above. Oren Bar-Gill and Elizabeth Warren have observed that “comparison among [mortgage contracts] is challenging even for a professional.” Choosing among different types of loans, even from the same lender, requires understanding many such terms. Consumers are points, fees, prepayment penalties and other factors. Moreover, features such as interest rates and prepayment penalties vary constantly in response to changing economic conditions. This makes it difficult for consumers to track, no less learn how the various components of price relate to one another.

See also Lauren E. Willis, Decisionmaking and the Limits of Disclosure The Problem of Predatory Lending: Price, 65 Md. L. Rev. 707, 766 (2006) (“Because subprime loan structures are more complicated than prime loan structures, subprime borrowers must attend to even more loan features than prime borrowers to assess loan price, and thus they are more likely to become overloaded when attempting the task.”); Ren S. Essene & William Appar, Understanding Mortgage Market Behavior: Creating Good Mortgage Options for all Americans 11 (Jt. Ctr. for Housing Studies, Harvard Univ. 2007); Christopher L. Peterson, Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act, 55 Fla. L. Rev. 808, 890-91 (2003) (describing how high cost lenders strategically try to keep price hidden as long as possible and how one way they do so is by making their products complex to hinder understanding; “The result is that there is no single easily comparable figure which describes the price a borrower will pay for financing. but, to the casual observer it looks like there is.”); Todd J. Zywicki, The Law and Economics of Subprime Lending --- Colo. L. Rev. --- (forthcoming), available at http://ssrn.com/abstract_id=1106907. (“The difference in outcomes between the prime and the subprime market then does not appear to be the result of different levels of sophistication or education among borrowers, but that subprime loans are simply more complex than prime mortgages, both in the complexity of the individual terms (e.g., adjustable versus fixed rates) and the total number of relatively complex terms.”); Government Accountability Office, Alternative Mortgage Products: Impact on Default Remains Unclear, but Disclosure of Risks to Borrowers Could be Improved 2 (2006) (Alternative mortgage products “often have complicated terms and features” and so consumers may not fully understand their risks); Oren Bar-Gill, The Law, Economics and Psychology of Subprime Mortgage Contracts 24 [SSRN]

AMP disclosures generally did not conform to leading practices in the federal government, such as key “plain English” principles for readability or design. Most of the disclosures also used small, hard to read typeface, which when combined with an ineffective use of white space and headings, made them even more difficult to read and buried key information.
barraged with an assortment of fees, further distracting them from contemplating whether the loan is beyond their reach. All this impairs the ability of consumers to shop for more favorable loan terms.

Many consumers do so little searching for mortgages when they do seek one that they are not likely to acquire the needed expertise even then. The Fed has concluded that “Disclosures themselves, likely cannot provide this minimum understanding for transactions that are complex and that consumers engage in infrequently.” Because advertising often focuses on price options not available to all consumers, it may add to, rather than dispel confusion.

Consider a borrower facing a 2-28 hybrid and an Option ARM. The 2-28 has an introductory period and an initial rate. The Option ARM has a different introductory period during which four different payment options are available. The 2-28 specifies an index and a margin for the post-introductory period with certain caps on rate adjustments. The Option ARM specifies a different index, a different margin and different adjustment caps. And in reality the borrower must choose between more than two products.

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105 See Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 Fla. L. Rev. 808, 890-91 (2003) (“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.”).

106 Jinkook Lee & Jeanne M. Hogarth, *Consumer Information Search for Home Mortgages: Who, What, How Much, and What Else*, 9 FIN. SERV. REV. 277, 285, 288 (2000) (reporting that 40% of consumers seeking mortgages “claimed to do almost no searching or only a little searching: about one-third (32%) reported doing a moderate amount of search and over one-fourth (28%) claimed to do a lot or a great deal of searching. . . the median number of loans compared was 3 and the median number of terms and features considered was 6. . . . One out of seven refinancers (15%) reported that they did not compare any terms and one-fourth (26%) of other mortgage borrowers reported not comparing any terms.”). ICF Macro, *Summary of Findings: Design and Testing of Truth in Lending Disclosures for Closed-end Mortgages* (2009) (“Only about half of [focus group members] consulted more than one lender or broker when looking for a mortgage loan.”). See also Federal Res. Sys., *Truth in Lending Final Rule; Official Staff Commentary*, 73 Fed. Reg. 44,522 (July 30, 2008):

In this environment of limited transparency, consumers—particularly those in the subprime market—may reasonably decide not to shop further among originators or among loan options once an originator has told them they will receive a loan, because further shopping can be very costly. Shopping may require additional applications and application fees, and may delay the consumer’s receipt of funds.


108 See Statement of Patricia McCoy, Univ. Conn. School of Law, at the Federal Reserve Board Public Hearing, *Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice*, 155, 156 (July 11, 2006) (lenders quote “their best prices in general advertisements, even if most of their subprime customers would not qualify for those prices, * * * many of these ads are affirmatively misleading. They’ll have a low teaser rate, very low, that is really a prime market teaser rate. And then, say, bad credit, no problem in the same ad. That lures people in. There will be no disclaimer that the interest rate could go up, according to your credit worthiness.”); Ren S. Essene & William Apgar, *Understanding Mortgage Market Behavior: Creating Good Mortgage Options for all Americans* 16 (Jt. Ctr. for Housing Studies, Harvard Univ. 2007).;
Consumers lacking the ability to understand their loan terms may turn to mortgage originators for help.\(^{109}\) Thus, the FTC study explained: “Many of the respondents who said that they understood the disclosures reported that they had not been able to understand the disclosures on their own, but had relied on their originators or closing agents to explain them.”\(^{110}\) Again, that is consistent with the finding in our study that most brokers explained the disclosures to their borrowers. But another study found that not all borrowers were satisfied with the ensuing results.\(^{111}\) While it is undoubtedly the case that many loan originators offer excellent advice, others clearly do not. Because mortgage brokers are typically compensated for arranging for loans, and not for counseling against borrowing, they have an incentive to encourage consumers to borrow,\(^{112}\) and in fact some critics claim that some originators actively mislead borrowers. Kathleen C. Engel and Patricia A. McCoy have reported that “Some lenders resort to out-and-out fraud. Other, more sophisticated lenders make truthful disclosures as required by law, but use a variety of hard-sell tactics.”\(^{113}\) Thus, Michael Hudson described the experiences of loan officer Philip White in these words:

\(^{109}\) Kellie K. Kim-Sung & Sharon Hermanson, Experiences of Older Refinance Mortgage Loan Borrowers: Broker- and Lender-Originated Loans, AARP PPI Data Digest no. 43 at 3 (2003) (study finds 70% “of older borrowers with broker-originated refinance loans reported that they relied ‘a lot’ on their brokers to find the best mortgage for them . . . “); Jinkook Lee & Jeannie M. Hogarth, Consumer Information Search for Home Mortgages: Who, What, How Much, and What Else? 9 Fin. Serv. Rev. 277, 285 (2000) (“Lenders, specifically, banks, savings and loans, and credit unions were the most popular sources for information.”); Federal Res. Sys., Truth in Lending Final Rule; Official Staff Commentary, 73 Fed. Reg. 44,522 (July 30, 2008) (“consumers may rely more on their originators to explain the disclosures when the transaction is complex.”).

\(^{110}\) FTC Study at 31. See also id. at ES-6 (“Other [borrowers] relied primarily on their loan officer or mortgage broker to explain the loan terms . . . rather than examining and verifying the loan terms themselves.”). Cf. Lauren E. Willis, Decisionmaking and the Limits of Disclosure The Problem of Predatory Lending: Price, 65 Md. L. Rev. 707, 766 (2006) (“many borrowers think they do not have to price shop because they are paying a broker or loan officer to do that for them.”).

\(^{111}\) See Kellie K. Kim-Sung & Sharon Hermanson, Experiences of Older Refinance Mortgage Loan Borrowers: Broker- and Lender-Originated Loans, AARP PPI Data Digest No. 43 at 4 (2003) (21% of older borrowers in study “reported that they did not receive a loan that was best for them;” 23% said they did not feel the rates and terms of their mortgage were fair; and 19% felt they had not received “accurate and honest information about their loans. . . .”)

\(^{112}\) Oren Bar-Gill, The Law, Economics and Psychology of Subprime Mortgage Contracts 46 [SSRN] (“Borrowers commonly seek the advice of mortgage brokers who face an incentive structure that prevents them from being loyal agents of the borrower.”); Federal Res. Sys., Truth in Lending Final rule; Official Staff Commentary, 73 Fed. Reg. 44,522 (July 30, 2008) (“some originators may have incentives to misrepresent the disclosures so as to obscure the transaction’s risks to the consumer; and such misrepresentations may be particularly effective if the originator is face-to-face with the consumer.”).

\(^{113}\) Kathleen C. Engel and Patricia A. McCoy, A Tale of Three Markets: The Law and Economics of Predatory Lending, 80 Tex. L. Rev. 1255, 1283 (2002); see also Government Accountability Office, Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending 94 (2004) (“abusive lenders and brokers may use high-pressure or ‘push marketing’ tactics—such as direct mail, telemarketing, and door-to-door contacts—that are unfair, deceptive, or designed to confuse the consumer.”); Edward M. Gramlich, Subprime Mortgages 33 (2007) (predatory lenders often “have loan quotas to meet, regardless of whether the loans would do the borrowers any good, and their salespeople use high-pressure techniques to meet their quotas.”).
He entered a world, he says, where cunning and deception were standard tools of the trade, where customers were routinely snowed by confusing paperwork and sleight-of-hand salesmanship. . . . White, who eventually rose to assistant branch manager, claims customers were also misled about upfront points and other finance charges. The attitude was: “If you had to lie about the points that we charged, lie to ‘em. They’re stupid anyway.”

And a predatory lender testified before Congress:

I’ve seen finance company employees commit forgery on a massive scale. These employees have forged everything from insurance forms, RESPA documents, income verification forms, and even entire loan files. . . . I can get around any figure on any loan sheet. . . . The customers believe what I tell them.

Similarly, the authors of one study of borrowers in certain Chicago zip codes, after noting that the “overwhelming majority” of borrowers with adjustable rate loans believed that they had fixed rate loans, observed: “In every case where borrowers were surprised to be told they were receiving an adjustable rate loan, the Loan Originator had told the borrower that the rate was ‘fixed’ but neglected to mention that the terms for which the rate was ‘fixed’ was limited to 12 to 36 months.” It thus appears that some consumers believe what they are told rather than what they read—if they read—in disclosure.

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114 Michael Hudson, Signing Their Lives Away: Ford Profits from Vulnerable Consumers, in MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY 42 (Michael Hudson ed., 1996). See also id. at 42 (reporting on experiences of loan officer Philip White: “Many customers didn’t—or couldn’t—read their loan documents. . . . White says they frequently never saw forms disclosing broker’s fees, and loan officers often added in hundreds, even thousands of dollars in charges for credit insurance—without asking them if they needed it. White says higher-ups told him, ‘If you don’t have to tell ‘em and they don’t ask, don’t tell ‘em. Just get ‘em to initial it. They’re big people. They can read—most of them anyway.’”); Ted Janusz, Kickback: Confessions of a Mortgage Broker Ch. 4 (2006) (describing how his firm employed attractive scantily-clad closing agents to distract borrowers from reading the numbers at the closing so the firm could manipulate the figures); Affidavit of Elizabeth M. Jacobson in City of Baltimore v. Wells Fargo (stating that loan officers told customers that pre-payment penalties could be waived when in fact they could not be and that some loan officers falsified loan applications); Affidavit of Ton Paschal in City of Baltimore v. Wells Fargo (“it was implied in trainings that Wells Fargo loan officers should not mention that subprime loans included a prepayment penalty if the borrower paid off or refinanced his loan before the prepayment penalty period ended or that the monthly payments on the ARM loans would substantially increase. When an applicant asked a loan officer about prepayment penalties or monthly payment increases, the loan officer would tell the applicant not to worry because Wells Fargo would later be able to refinance him into a prime or an FHA loan.”).

115 Hearing before the Senate Special Committee on Aging on March 16, 1998, “Equity Predators: Stripping, Flipping and Packing Their Way to Profits” (Testimony of “Jim Dough”) (pseudonym). See also FTC Study at 29-30 (Borrowers’ “various misunderstandings also suggest that loan originators, at least in some cases, may have misled borrowers about the features of their loans, and that the current disclosures were not sufficient to overcome these deceptions.”); Illinois Department of Financial and Professional Regulation, Findings From the HB 4050 Predatory Lending Database Pilot Program 4 (2007) (“Borrowers tend to trust what they are told by their Loan Originator or Mortgage Broker rather than reading and understanding what is written in the Disclosures given to them.”).

Lenders who engage in such tactics find easy prey in those who cannot understand their loan terms and so lack the capacity to discover that they are being deceived.

Even originators who will not stoop to outright fraud may find it both useful and possible to confuse borrowers as to loan costs, by, for example, increasing the transaction costs borrowers incur in deciphering loan terms. Thus, originators may manipulate fees to complicate disclosures. As the Government Accountability Office

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117 Statement of John C. Kozup, Director, Center for Marketing and Public Policy, Villanova Univ., at the Federal Reserve Board Public Hearing, Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 166 (July 11, 2006) (“I was on the phone this morning with a member of my advisory board who runs a bank. He says, I’ve closed thousands of real estate loans. They don’t read [disclosures]. I cannot think of a handful of times when the customers came in with questions about it. He said, they trust me.”).

118 FTC Study at 123:

Consumers who do not recognize key loan costs also will be more vulnerable to deceptive lending practices that aim to hide or misrepresent loan costs. The failure of the current disclosures to convey key loan costs to many consumers may make it easier for some lenders to engage in deceptive practices. Many of the FTC’s deceptive lending cases have involved loan terms that the current disclosure forms have particular difficulty conveying to consumers, such as optional credit insurance, balloon payments, prepayment penalties, and the financing of high fees and optional charges in the loan amount. Lenders in these cases may have used deceptive practices to take advantage of the inability of many consumers to recognize these terms in the current disclosure forms.

See also Todd J. Zywicki, The Law and Economics of Subprime Lending, --- Colo. L. Rev. --- (forthcoming), available at http://ssrn.com/abstract_id=1106907. (“In short, due to the complexity and sheer volume of documentation associated with a home mortgage, there is a large information asymmetry between borrowers and lenders that makes borrowers highly vulnerable to fraud and oppression by lenders.”); Government Accountability Office, Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending 97-98 (2004) (“revised disclosure requirements would not necessarily help protect consumers against lenders and brokers that engage in outright fraud or that mislead borrowers about the terms of a loan in the disclosure documents themselves.”).

119 Ren S. Essene & William Apgar, Understanding Mortgage Market Behavior: Creating Good Mortgage Options for All Americans ii (Jt. Ctr. for Housing Studies, Harvard Univ. 2007) (“some marketing and sales practices appear to cross the line. Instead of supporting informed choices, aggressive and misleading marketing can play on consumer fears and lack of knowledge. In fact, some individuals and firms on the market’s supply side use their considerable knowledge of consumer behavior to aggressively ‘push market;’ inappropriate mortgage products.”); Statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corp., Improving Federal Consumer Protection in Financial Services before the U.S. H. Rep. Financial Services Comm. (June 13, 2007) (“In addition to the complexity of the underlying product, aggressive or misleading marketing can have a negative impact on the ability of borrowers to make informed credit decisions. Without complete and balanced information, consumers may not realize that they may be unlikely to afford the required monthly payments of credit products—particularly when a loan includes an initial teaser interest rate that will expire.”).

120 See generally Jeff Sovern, Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs, 47 Wm. & Mary L. Rev. 1635 (2006).

observed, advertising for alternative mortgage products (AMPs) “sometimes emphasizes the benefits of AMPs over their risks” leading to confusion. Oren Bar-Gill and Elizabeth Warren have added that “sellers design their products to exploit consumers’ imperfect information and imperfect rationality.”

Of course, many originators eschew all of these tactics. But that does not mean that they view it as their role to convey to borrowers the risks they will assume by agreeing to a mortgage. New York Times reporter Edmund Andrews quoted loan officer Bob Andrews of the now-defunct American Home Mortgage Corporation:

I am here to enable dreams,” he explained to me . . . Bob’s view was that if I’d been unemployed for seven years and didn’t have a dime to my name but I wanted a house, he wouldn’t question my prudence.” Who am I to tell you that you shouldn’t do what you want to do? I am here to sell money and to help you

Increased complexity may be attractive to lenders, as it allows them to hide the true cost of the loan in a multidimensional pricing maze. . . . For example, if the tax certification fee and the late payment fee are not salient to borrowers, lenders will raise the magnitude of these price dimensions. Increasing these prices will not hurt demand. On the contrary, it will enable the lender to attract borrowers by reducing more salient price dimensions. This strategy depends on the existence of non-salient price dimension. When the number of price dimensions goes up, the number of non-salient price dimensions can also be expected to go up. Lenders thus have a strong incentive to increase complexity and multidimensionality.


Mortgage borrowing is much more complex because lenders have disaggregated fees. The cost of borrowing money now includes a number of fees, such as origination fees (including document-preparation fees, underwriting-analysis fees, tax escrow fees) that are often not disclosed until late in the purchasing process. It is as if a person purchasing a car discovered only at the time of sale that there would be additional charges for paint, for a bumper, and for tires. Such additional charges would likely be omitted from the buyer’s initial estimates of affordability and would escape inclusion as the buyer compared different loan options.


For example, one advertisement we reviewed promoted a low initial interest rate and low monthly mortgage payments without clarifying that the low interest rate would not last the full term of the loan.

In other cases, promotional materials emphasized the benefits of the AMPs without effectively explaining the associated risks. Some advertising, for example, emphasized loans with low monthly payment options without effectively disclosing the possibility of interest rate changes or mortgage payment increases. One print advertisement we reviewed for a payment-option ARM emphasized the benefits of a low initial interest rate but noted in small print on its second page that the low initial rate applied only to the first month of the loan and could increase or decrease thereafter.

Brokers are also said to discourage borrowers from speaking to other brokers, thus reducing the likelihood that borrowers will learn of better terms. \(^{125}\)

In addition, borrowers may suffer from cognitive disabilities that interfere either with their understanding of loan terms or their ability to appreciate their significance. \(^{126}\)

Information overload famously degrades decision-making. \(^{127}\) In addition, studies have have
demonstrated that consumers suffer from systematic tendencies to optimism. As Oren Bar-Gill has observed, optimistic borrowers may underestimate future payment hikes, overestimate future income, and assume that housing prices will rise so that future payment increases will not matter because they will be able to refinance. Originators eager to make loans may exacerbate these tendencies. In consequence, borrowers may not give sufficient consideration to future payment increases.

Consumers in the late stages of taking out a loan may also experience a variant of the endowment effect, the tendency of consumers to want to retain possessions they have had, however briefly. Though, strictly speaking, a loan is not a possession, the proceeds of the loan enable consumers to obtain a possession: a house, or in the case of a refinancing, perhaps home renovations or additional purchases. While the consumer will not possess those proceeds until the closing, perhaps the anticipation functions just as the

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The endowment effect is illustrated by a series of experiments reported in Jack Knetsch, The Endowment Effect and Evidence of Nonreversible Indifference Curves, in CHOICES, VALUES, AND FRAMES 171-179 (2000) (Daniel Kahneman & Amos Tversky, eds.). In one experiment, subjects were given a coffee mug and invited to trade it for a candy bar; 89% preferred the mug. Another group of subjects were provided with a candy bar and invited to exchange it for a mug; 90% of that group preferred the candy bar. Id. at 172-73. In other words, the subjects preferred ownership of an object they had possessed even fleetingly over something they did not yet have. See also Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, 98 J. Political Econ. 1325, 1342 (1990) (“instant endowment effect”); Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, 5 J. Econ. Perspectives 193 (1991) (additional experiments).
endowment effect does: to increase the desire of the consumer to retain the item they have dreamed of.

In short, consumers contemplating borrowing may encounter originators with an interest in persuading them to borrow—an interest that sometimes drives originators to act badly—but our existing system does not provide borrowers with anyone with a contrary interest or a neutral perspective to expose them to the arguments against borrowing. Those arguments are theoretically displayed in the TILA disclosure statement, in the form of monthly payments which may exceed the borrower’s ability or desire to pay, but as we have seen, those payments may be understated, are likely to be ignored, may be beyond consumers’ ken, and, finally, borrowers can be persuaded to disregard them.

G. Attempts to Fix TILA

In 2008, Congress amended TILA to address some of its problems. Regulators also amended lending regulations in 2008 and 2009 and undoubtedly more such amendments are on the way. These amendments changed both the content and the timing of the disclosures; as for the timing, until July 30, 2009 (the month our survey was conducted), disclosures were due no later than the loan closing, when they might have been lost in a mountain of forms, while now lenders are obliged to let borrowers know of changes in key loan terms at least three days before the closing. Congress also directed the Federal Reserve to include in the disclosures for adjustable loans a “worst-case” scenario showing what the highest-possible monthly payment might be. Changes to Regulation X, implementing the Real Estate Settlement Procedures Act (RESPA), which went into effect on January 1, 2010, also include information about loan terms, including, on page three, for borrowers who make it that far, the maximum monthly payment. These are certainly improvements. But it is not clear how effective the timing changes are, nor how effective the TILA worst-case scenario disclosure will be once it is implemented. The same consumers who did not walk away from inappropriate loans at

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136 RESPA appears at 12 U.S.C. section 2601 et seq. Regulation X can be found at 24 C.F.R. Part 3500. The Settlement Statement provided at the closing, known as the HUD-1, indicates on page three whether the interest rate can rise, by how much over the life of the loan, when the first change date is, how frequently change dates occur, how much the interest rate can rise at each change date, and how much the monthly payments can rise. See 24 C.F.R. Part 3500 App. A.
137 An early report on the new RESPA disclosures stated that “some brokers say that borrowers are asking more questions, and are very likely becoming better informed as a result, if a bit frustrated at times. Others report a mere shift in the nature of borrower confusion.” Bob Tedeschi, New ‘Good Faith’ Takes Hold, N.Y. Times, Feb. 14, 2010.
the closing may be unwilling to cancel the transaction if they discover that the terms are not to their liking three days earlier.

Nor can we be sure that consumers will take enough time with the disclosures three days before the closing to understand them. To be sure, the changes may indeed help some consumers who learn through reading forms to understand their obligations better. Thus, the FTC Study found that improved disclosures generated improved understanding. But even these improved disclosures had their limits: some consumers could not answer questions correctly even with the enhanced disclosures in front of them. In addition, the FTC Study may have produced higher comprehension rates than occur in genuine transactions, as its authors noted. Real world borrowers face time pressures, stresses, and originators who may be unscrupulous, unlike the consumers in the study. Interviewees in the study also resided in a more affluent, better-educated county than is typical. All had recently taken out mortgages and so were already at least partway up the mortgage learning curve. True, perhaps even better disclosures than those tested in the FTC Study might improve comprehension rates still further. But in all probability, even better disclosures will fail to address some of the problems discussed above. Some consumers need more than written disclosures. Those who are

138 FTC Study at 12.

139 Even with an improved disclosure form, borrowers answered an average of 20% of the questions incorrectly, suggesting that the improved form would not solve all the problems. FTC Study at ES-7-8. In some cases, the numbers were worse. "Forty-one percent of prototype form respondents, for example, could not identify the amount of prepayment penalties . . . and 50 percent did not recognize that the loan included a large balloon payment . . . ." Id. at ES-9.

140 FTC Study at 122:

These findings may be even stronger in real-world transactions. Although in real-world transactions borrowers will have greater incentive to understand loan costs, because their homes and savings are at risk, they also may face a number of factors that make it more difficult to understand their loan costs. The consumer testing was conducted in a quiet, experimental setting. Respondents did not face the time pressure of a loan closing, a large stack of other closing paperwork, or deceptive tactics aimed at obscuring loan costs, all of which are likely to aggravate the difficulties consumers have understanding their loan terms. These difficulties may be especially acute for refinance loans, for which the TILA disclosures need not be provided until closing.

141 FTC Study at 14-15.

142 See Kathleen C. Engel and Patricia A. McCoy, A Tale of Three Markets: The Law and Economics of Predatory Lending, 80 Tex. L. Rev. 1255, 1309 (2002):

[I]ncreased disclosure is not enough because lenders will always find ways to evade disclosure requirements. Furthermore, most victims of predatory lending already find current disclosures incomprehensible. For naïve borrowers, piling on more disclosures will not help. The high-pressure nature of closings only exacerbates that confusion, by discouraging borrowers from reading loan documents at closing or asking questions when they do. Because most borrowers are not represented at closing, moreover, questions are likely to result in self-serving answers by title company officials or lenders. More disclosure would simply compound the confusion that currently exists.

See also Statement of Ken Logan, Chairman-Elect, National Home Equity Mortgage Association, at the Federal Reserve Board Public Hearing, Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 92 (July 11, 2006) ("it is our conclusion that tweaking the disclosure regimen
financially illiterate will simply not learn from even perfect written disclosures while predatory lenders seem unlikely to be defeated by mere paper disclosures no matter how wonderful or well-timed they are. Similarly, educators have discovered that different people learn differently. Some learn well through reading while others learn better through listening. Congress would do better to understand that some consumers simply lack the ability to learn from written disclosures, and that such consumers require a completely different approach to understand their loans.

In sum, existing consumer protection law seems unlikely to prevent future borrowing binges of the sort that led to the 2008 economic crisis. Accordingly, the paper now explores some possible alternatives.

[Even if meaningful disclosure rules can be created, sellers can undermine whatever before-the-fact or ex ante disclosure rule is established, in some contexts simply by “complying” with it: “Here’s the disclosure form I’m supposed to give you, just sign here.” . . . While an ex ante rule provides certainty to creditors, whatever gave the discloser incentives to confuse consumers remains in the face of the regulation. While officially complying with the rule, there is market pressure to find other means to avoid the salutary effects on consumer decisions that the disclosure was intended to achieve.

Elaine Kuznar, Grace Falciga, Linda Wood, & Judith Frankel, Learning Style Preferences: A Comparison of Younger and Older Adult Females, 10 J. Nutrition for the Elderly 21, 22 (1991) (“Learning styles are an individual’s characteristic way of processing information, feeling, and behaving in a learning situation . . . .”).

See e.g., Rita Dunn & Joanne Ingham, Effects of Matching and Mismatching Corporate Employees’ Perceptual Preferences and Instructional Strategies on Training Achievement and Attitudes, 11 J. Applied Bus. Res. 30 (1995):

Employees with an auditory preference who were taught with a lecture and visuals obtained significantly higher test scores than when taught with the tactual/kinesthetic approach and visuals. . . . Employees with a tactual/kinesthetic preference who were taught with the tactual/kinesthetic method produced higher (.01) test scores than when they were taught with the lecture supplemented with visuals. In addition, the mismatch of preference and method generated significantly lower test scores.

See also Sharon Marie Hoffer, Adult Learning Styles: Auditory, Visual, and Tactual-Kinesthetic Sensory Modalities iv (1986) (“adults do possess a dominant sensory modality through which they learn more effectively across subject matter . . . .”).
III. Fixing the Problem

Obviously, the misleading disclosures described above should be fixed so that they accurately convey the consumer’s payment obligations, and Congress has begun that effort. 146 But even if the disclosure forms had been perfect—even if, for example, lenders could accurately predict future interest rate fluctuations and so disclose at the time of closing what the borrower’s future payments would be—disclosure forms that consumers ignore would still be of little value. Consequently the paper now turns to some different approaches to the problem.

A. Moving From a Disclosure Regime to a Comprehension Regime

TILA’s ultimate goal is to enable understanding of loan terms. That understanding serves many purposes, including increasing the likelihood that consumers will act in accordance with their preferences so that credit markets will function appropriately. Indeed, if consumers understand their loan terms, it becomes less necessary for government to proscribe objectionable loan terms. 147 When consumers fail to become aware of or understand loan terms, government must intervene to bar overreaching contract terms because consumers are unable to do protect themselves. 148 But when consumers understand loan terms, they at least theoretically have a greater ability to seek competing offers from lenders that offer better terms. Disclosure, on the other hand, is an intermediate step on the path to comprehension. 149 Consequently, if understanding is the goal, it makes sense to focus on that goal rather than an intermediate

146 See supra note – and accompanying text. For one proposal for what the disclosures should look like, see Patricia A. McCoy, Rethinking Disclosure in a World of Risk-Based Pricing, 44 Harv. J. on Legis. 123, 153-54 (2007).


Knowledgeable consumers who make informed choices are essential to an effective and efficient marketplace. In classical economics, informed consumers provide the checks and balances that keep unscrupulous sellers out of the market. For instance, consumers who know the full range of mortgage interest rates and terms in the marketplace, who understand how their credit-risk profile and personal situation fit with those rates and terms, and, consequently, who can determine which mortgage is best for them make it difficult for unfair or deceptive lenders to gain a foothold in the marketplace.

148 For example, in the Credit CARD Act of 2009, Publ. L. No. 111-24, 123 Stat. 1734, Congress outlawed certain provisions in credit card contracts; if consumers understood those terms and preferred alternatives, classic economic theory predicts that some credit card lenders would offer them to entice more customers, but this seems not to have happened, perhaps because consumers lacked the financial acumen to comparison-shop for such terms. See, e.g. 15 U.S.C. section 1666i-1 (limiting power of credit card issuer to increase interest rates and fees for balances).

step that has proved to lead only imperfectly to comprehension and has permitted consumers to borrow unwisely.150

How can we move from a disclosure regime to a comprehension regime? Ideally, policymakers would come up with a scheme under which lenders wanted consumers to understand their loan terms. Doing so would result in those who are best able to convey loan terms to consumers having a stake in the process of communicating the relevant information. Originators are the best able to convey loan terms because they actually deal with consumers, have a measure of control over the presentation of information at the closing and before, can observe what works and what doesn’t, and then improve the methods for conveying information. One way to do so is simply to impose on lenders a requirement that borrowers understand their loan terms; that is to say, bar lenders from completing loans until they could demonstrate that a significant proportion of their borrowers understood the terms of their loans.

Doing so would cure many of the problems with TILA. First, it would shift the incentives of lenders so that they have an interest in insuring that consumers understand their payment obligations, rather than, as in some cases, obscuring those payment obligations. Second, it would get the government out of the business of deciding how to communicate to borrowers—an enterprise that the government does not appear well-equipped to engage in, especially given that the government is not a party to the loans and does not deal directly with borrowers—and shift that burden to lenders, who are already communicating with borrowers and have considerable experience in judging how best to further that communication.

If lenders are required to care about whether consumers understand the information, they can be expected to take steps to insure that consumers are not distracted by differences between the APR and the interest rate when they receive the information and that borrowers receive the forms in a way they enable them to absorb the information the forms contain. They presumably would take as much time as is required to convey the terms, rather than devoting only a minute or less to them. In short, focusing on understanding rather than the mechanical task of supplying disclosures sharply increases the probability that the information will be understood. Lenders might respond by increasing the readability of loan forms, using the same attention-getting strategies that their marketing arms use to sell their services. They might even abandon incomprehensible terms if the cost of using such terms exceeds the benefits.

A somewhat less politically unrealistic alternative would focus on creating competition to increase the likelihood that consumers would read forms. For example, if regulators required lenders to conduct consumer testing of their forms and then publicize the results, lenders might compete for higher comprehension scores. That is to say, lenders might prefer not to disclose worse comprehension scores than their competitors, and so might increase the intelligibility of their forms. For example, a lender might not wish to disclose that, say, half of its borrowers could not understand its forms when other

150 Michael S. Barr, Sendhil Mullainathan, & Eldar Shafir, Behaviorally Informed Financial Services Regulation 2 (2008)
lenders reported that 80% of their customers understood their forms. Again, lenders might respond not only by increasing the comprehensibility of their forms, but also by eliminating terms that borrowers could not understand.

Such a requirement might discourage lenders from lending to less financially literate or poorly-educated borrowers—the borrowers who would benefit the most from an increased focus on comprehension, rather than disclosure. Obviously, it is not desirable to deter lenders from lending to creditworthy but unsophisticated borrowers. Accordingly, it might be necessary to devise some way of taking into account in the comprehension grades borrower sophistication to avoid this disincentive.

What kinds of terms ought to be covered by such a comprehension requirement? Essentially, any term that might materially affect the consumer’s payment obligation. In identifying the relevant terms, it is best to start with a broad standard and then give examples of some such terms. The alternative—of identifying the terms that consumers should understand—risks repeating one of the problems with TILA. The original TILA disclosures were chosen at a time when most mortgages consisted of twenty- or thirty-year fixed-rate loans—so called “plain vanilla” loans. Disclosures created in such an environment were not well-suited to the far more complex products lenders created later, such as loans with fixed rates for the first two or three years, and adjustable rates thereafter, payment option ARMs, interest-only loans, or negative-amortization loans. No doubt the lack of fit between TILA’s plain vanilla disclosures and the more complicated loan terms in use in the last decade contributed to the failure of consumers to understand their payment obligations. Any regime that applies to specified terms without having the flexibility to incorporate others as lending changes risks becoming outmoded by those changes. It also risks encouraging predatory lenders to create new loan products that generate excessive returns for lenders while evading consumer understanding of the products. Requiring comprehension of terms that might materially affect the consumer’s payment obligation avoids those risks. But to give guidance to lenders and avoid litigation over precisely what must be disclosed, a statute should also give concrete examples of what consumers must understand.  

A comprehension regime may not work perfectly, however. First, consumers might not care about the scores, and so publication of the scores might not have any impact. It is impossible to know without some form or testing. Second, as discussed above, some evidence exists to indicate that even when consumers understand information, to the extent that the information conflicts with what they believe, they will not absorb and act upon it. That evidence remains to be confirmed, but if it is confirmed, to the extent that consumers would need to act on information that conflicts with their beliefs, even understanding the information might not prevent them from acting.

151 Such examples should include, at a minimum, the current disclosures required for mortgages. See 12 C.F.R. § 226.18.
The Fair Debt Collection Practices Act uses a similar structure. For example, 15 U.S.C. § 1692e proscribes “false, deceptive, or misleading representations,” and also identifies in sixteen paragraphs specific practices that violate that prohibition.

152 See supra note – and accompanying text.
inconsistently with their best interests. In such cases, an outright ban on certain terms might be necessary.

A comprehension regime represents a dramatic departure from the current disclosure approach and is unlikely to become law any time soon. Consequently, in Subsection B, the paper considers ways to increase the probability that consumers benefit under the existing regime.

B: Enhancing Understanding within a Disclosure Regime

The purpose of this subsection is to suggest reforms that will increase the effectiveness of a disclosure regime. In a sense, the goal is to identify strategies that lenders might adopt in a comprehension regime and then impose them on a disclosure regime. That is to say, instead of focusing solely on disclosure, policymakers might ask how a lender which genuinely wished to inform consumers of loan terms might proceed, and then select from among those possibilities choices that offer easy enforceability. Such a lender would test to verify that its strategies worked, and so the suggestions described herein should also be subjected to consumer testing—which might demonstrate that they are ineffective, in which case they should be scrapped.

Many reasons may contribute to the little attention given to TILA forms. Disclosure forms are not fun to read. This is hardly surprising given their content and provenance. Further reducing consumer eagerness to peruse them is that they must compete with other claims on consumer attention. In addition, lenders who wish to obscure unfavorable terms might affirmatively act to reduce the likelihood that consumers attend to them. Moreover, disclosure forms present information that some consumers might not be interested in learning. To the extent that disclosure forms convey information that consumers might interpret as bad news, consumers might not want to take that information in. For example, adjustable rate loan disclosure forms that communicate that monthly payments might increase to unaffordable amounts in the future might be unwelcome. Such forms also compete with the optimism bias which empirical researchers have demonstrated cause consumers to overlook negative information, creating cognitive dissonance. Accordingly, just to get borrowers to read and take account of the information in disclosure forms might be a challenge.

Consequently, regulators must come up with a method to give consumers an incentive to read the forms, or more precisely, make consumers aware of why they have an interest in reading the forms. The book Nudge by Cass Sunstein and Richard Thaler describes how to change “choice architecture” so that consumers are able to make better decisions—but still retain the freedom to make those decisions, and so this section draws on their work.

153 Of course, these suggestions might also help if Congress switched to a comprehension regime. 154 Omri Ben-Shahar, *The Myth of the “Opportunity to Read” in Contract Law* (2008) available at [http://www.law.uchicago.edu/lawecon/index.html](http://www.law.uchicago.edu/lawecon/index.html). (Reading standard form contracts “is boring, incomprehensible, alienating, time consuming, but most of all pointless.”).

155 See *supra* note – and accompanying text.
One way to do so is to use a nudge. For example, if applicants for credit are obliged to watch a video showing the pain default brings, applicants might be more attentive to the disclosure forms. The video could list the cost of default and foreclosure, including late fees, collection fees, legal fees, loss of a home, the need to find a new home and the costs of moving, prepayment penalties (if the borrower is able to sell the home), damage to the consumer’s credit rating, loss of whatever equity the consumer had in the home, and the possibility of loss of other assets in states that permit lenders to satisfy deficiencies out of such assets. Families can suffer severe disruptions, ending up homeless, living in tent cities, or in overcrowded quarters.

The video could explain the emotional toll of foreclosure. According to Dr. Robert Gifford, an environmental psychologist, foreclosure can be “deeply traumatic.” Gifford claims that it undermines “a key part of well-being; perceived control over your life.” Gifford adds that when people lose their home, “It’s like their planet blew up.” Clinical psychologist Rosalind Dorlen reports that losing a home can cause depression and anxiety.

Anecdotal reports in the media may make the point more salient for borrowers. For example, Bob Herbert of the New York Times described one borrower’s experiences:

* * * Dorothy Levey, a 79-year-old widow . . . sits alone inside the small house

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Consumers will be motivated to attend to and process disclosure information if the information if personally relevant. That is, the information pertains to the specifics of their financial—their financial situation. In addition, consumers will be motivated to utilize disclosure information if they perceive a high level of risk in the transaction. Consumers will perceive a higher degree of risk if the communication suggests that substantial financial, social, or other interests are at stake.

* * *

So how do we motivate consumers to use disclosure information? One way is to introduce disclosure information with personally relevant statements that communicate risk information. The statements that introduce the disclosure of specific terms may be as important as the terms themselves. For example, with this loan you will owe more than you do now, and you may fact higher monthly payments as a sort of introductory statement.

* * *

[I]f you start out by sort of scaring them, that is, with some negative information and then you allow the consumer to control the flow of information, what you’ve done is give them the information and give them a reason to sort of take steps on their own to read the fine print or go to another part of the disclosure.

157 Piling In With a Relative, N.Y. Times, Oct. 23, 2008 (describing how after family abandoned their home, they sleep six to a bed and seven in a room); Taking Tenants, Just to Get By, N.Y. Times, Oct. 23, 2008.
159 Id.
160 Id.
161 Id.
she has lived in for 41 years, afraid to answer the telephone or the door.

She has every reason to be worried. The monthly note on her house in the city of Markham, just outside Chicago, is approximately 100 percent of her meager monthly income. Broke and behind in her payments, Ms. Levey expects a foreclosure notice to show up any day, followed by a visit from “the sheriff, or whoever they send to tell you to get out of your own home.”

* * *

She kept trying to meet her obligation. She exhausted her savings. She lost her car. She stopped buying clothes and cut back on food. But there was no way to keep up with the payments.

“I had to go to the state and tell them I was hungry,” she said.162

But the video should not explain only the costs of foreclosure. It could also make the risks of foreclosure more salient for consumers. For example, the video could explain that adjustable rate loans may bring with them future increases in payments, and the possibility that housing prices would not increase sufficiently to permit refinancing. The goal would be to increase the likelihood that borrowers would take such risks into account in their planning.

Nudges can also be used to cause consumers to attend to particularly problematic contract clauses. For example, if terms associated with an increased risk of foreclosure—such as hybrid ARMs, prepayment penalties and balloon payments—included bold-print legends such as “This term increases the risk of foreclosure. You should not enter into this loan without verifying that this term is appropriate for you,” consumers might be

162 Bob Herbert, Lost in a Flood of Debt, N.Y. Times, Nov. 24, 2007. See also Bob Herbert, A Swarm of Swindlers, N.Y. Times, Nov. 20, 2007:

[Another borrower] told me her story in the freezing living room of the house on Merrill Avenue, which no longer has a working furnace and is growing shabbier by the day. It’s all she has left. Her mother and her older sister are dead now. Her only income is about $1,300 a month from Social Security — less than the monthly note on the house, which is in foreclosure proceedings.

* * *

“I’m terrified,” Ms. Dailey told me as she wrapped a sweater tightly around her to ward off the cold. “I can’t sleep anymore. They’re trying to take the house away from me, and I wanted to stay here until I died. That was what I was really trying to do.”

* * *

I asked Rosa Dailey yesterday how she’d be spending her Thanksgiving. She said her money for the month had run out, so she wouldn’t be doing anything special.

“I’ll be right here,” she said. “I’ve got some corn flakes and canned vegetables. That’ll be my Thanksgiving.”
more likely to explore other options. A note indicating the percentage of borrowers in a recent year who defaulted on loans containing such terms might also generate more attention.

Another step is to require consumers to draft a budget that brings home to them how much (or little) money they will have available after meeting their housing expenses under the loan. The act of constructing a budget should force the applicant to read the form and increase the likelihood that she masters its contents. In addition, with loans that offer the possibility of future increases in monthly payments, the applicant should also be obliged to prepare budgets for future years on the assumption that the monthly payments have increased to their maximum level. Doing so should help the consumer understand the worst-case scenario and the risks the borrower is taking that he will run short of funds and lose the home. Presumably the Countrywide borrowers who took

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163 See Ellen Schloemer, Wei Li, Keith Ernst, & Kathleen Keest, Center for Responsible Lending, Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners 5, 21 (2006) (noting that terms that increase risk of foreclosure include “adjustable interest rates, balloon payments, prepayment penalties, and loans with limited documentation of borrowers’ loan qualifications.” The study reports that the foreclosure risk of ARMs is 62 to 123% higher than fixed-rate mortgages; balloon payments increase the risk by 14 to 86%; and low- or no-documentation loans carry a 5 to 64% greater risk.). See also Roberto Quercia, Michael A. Stegman, & Walter R. Davis, The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments 1, 25-26 (UNC at Chapel Hill Center for Community Capitalism Kenan Institute for Private Enterprise 2005):

We find that [prepayment penalties and balloon-payment requirements] lead to a significant increase in mortgage foreclosure risk, even after controlling for other risk factors. For instance, refinance loans with prepayment penalties and those with balloon payments are more likely to experience a foreclosure than loans without these characteristics—by about 20 percent and 50 percent, respectively . . . . we estimate that the use of prepayment penalties and balloon payment requirements in 1999 refinance originations increased foreclosure-related losses by about $465 and $127 million nationally, respectively.

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[Adjustable-rate mortgages have 50% greater odds of foreclosure than fixed-rate loans. Others have identified mandatory arbitration clauses as a clause that creates difficulties for borrowers, because it may make class-action suits prohibitively expensive. See Edward M. Gramlich, Subprime Mortgages 67 (2007).

164 Michael S. Barr, Sendhil Mullainathan, & Eldar Shafir, Behaviorally Informed Financial Services Regulation 7 (2008) suggests what the authors call an ex post standards-based disclosure requirement that asks “whether the disclosure would have, under common understanding, effectively communicated the key terms of the mortgage to the typical borrower.” This approach differs from the one suggested herein in that this paper focuses on the subjective understanding of the actual borrower while the Barr, Mullainathan, Shafir paper looks to whether a reasonable consumer would have understood the major loan terms.

165 Oren Bar-Gill has argued that “ensuring robust competition in the subprime mortgage market” will not solve the problem of borrowers taking out loans that provide for low initial rates and excessive payments later in the life of the loan because some borrowers irrationally prefer such loans and lenders eager to make loans will accommodate such preferences. Oren Bar-Gill, The Law, Economics and Psychology of Subprime Mortgage Contracts 8 [SSRN]. My hope is that the kind of nudges this paper suggests will counteract that tendency.

166 Cf. Patricia A. McCoy, Rethinking Disclosure in a World of Risk-Based Pricing, 44 Harvard Journal on Legislation (“it is essential that all borrowers, including subprime borrowers, understand the worst case payment scenario before they take out I-O and option ARMs.”).
out loans that would reset at unaffordable levels within two or three years would have been less eager to do so if they had understood what they were risking.

An example may bring home the value of constructing a budget. In 2006, a Government Accountability Office report on alternative mortgage products explored the problem of “payment shock” on a $400,000 payment-option adjustable rate mortgage. Assuming rising interest rates, a borrower who made only the minimum monthly payments on the loan would experience a 128 percent increase in payments after five years, from $1,287 to $2,931. As Vincent DiLorenzo has observed, “Many borrowers would be unable to pay the higher payments required of them, particularly if their ability to repay was based on the low initial interest rate.” But until the borrower constructs a budget, the borrower may not realize that. Creation of a budget would force the consumer to contemplate what changes the consumer would make in her other expenditures in response to such a jump—and consequently whether the loan is unaffordable.

The importance of creating a budget is also emphasized by the fact that nearly a third of United States homeowners are thought to live in unaffordable housing, and more than a tenth have severely unaffordable housing. Preparation of a budget might have brought home to these homeowners how such large housing expenditures would impair their ability to meet other expenses.

Preparing a budget—indeed, even understanding the disclosure forms—will nevertheless be beyond some loan applicants. Some borrowers are financially illiterate. But these borrowers should not be barred from borrowing if they are able to meet their obligations. They may require a neutral credit counselor—not a mortgage broker who benefits from securing them a loan—to advise them. Several studies have demonstrated the efficacy of counseling for the populations studied.

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167 Government Accountability Office, Alternative Mortgage Products: Impact on Default Remains Unclear, but Disclosure of Risks to Borrowers Could be Improved 4-5 (2006). The GAO assumed an initial 1% interest rate, “a 7.5 percent annual payment increase cap, and a 10 percent negative amortization cap.”


169 See supra note – and accompanying text.

170 See supra note – and accompanying text.

171 See Lauren Willis, Against Financial Literacy Education, 94 Iowa L. Rev. (2008) (“Consumers generally do not serve as their own doctors and lawyers and for reasons of efficient division of labor alone, generally should not serve as their own financial experts.”).

172 See Abdighani Hirad & Peter Zorn, Prepurchase Homeownership Counseling: A Little Knowledge Is a Good Thing, in LOW INCOME HOMEOWNERSHIP at 146, 146-47. (Nicolas P. Retsinas & Eric S. Belsky, eds. 2002) (“We find statistical evidence that counseling does, in fact, mitigate credit risk. Borrowers who receive prepurchase homeownership counseling under the [program studied] are, on average, 19 percent less likely to become ninety-day delinquent on their mortgages than borrowers with equivalent observable characteristics who do not receive counseling. . . . All things equal, the ninety-day delinquency rate of borrowers who received individual counseling was reduced by 34 percent . . . .”);
experiment in Chicago provides additional guidance. Chicago required residents of ten of its zip codes seeking high-risk mortgages to submit to credit counseling. Here is how one study characterized the results:

[C]ounseled borrowers obtained better mortgage terms and borrowed at lower leverage ratios. Importantly, loans originated by counseled borrowers during the treatment period experienced markedly lower ex post default rates. These results hold after controlling for improvements in the credit quality of the borrower pool and for changes in the composition of the pool of available lenders. On the other hand, counseling did not appear to cause the lowest-credit-quality borrowers to avoid the more ‘exotic’ mortgage products: adjustable rate, interest only, or teaser mortgages.

Another review found the counseling “helped borrowers better understand the costs and terms of their loans, leading to better-informed decision-making.” Tellingly, the same review found that “[m]ore than half of the borrowers referred for [counseling] could not afford the loan they were being given by their mortgage broker/loan originator” while 38% of the borrowers had been given loans with debt-to-income ratios exceeding half their income.

Valentina Hartarska & Claudio Gonzalez-Vega, Evidence on the Effect of Credit Counseling on Mortgage Loan Default by Low-Income Households, 15 J. Housing Econ. 63, 63 (2006) (finding “some evidence that counseled borrowers defaulted less often than non-counseled borrowers”); Valentina Hartarska, Claudio Gonzalez-Vega & David Dobos, Credit Counseling and the Incidence of Default on Housing Loans by Low-Income Households (2002) (finding “that cash flow-based counseling can decrease the incidence of default. Counseled borrowers exhibit one-half the hazard rate of non-counseled borrowers. . . . counseling also helps both borrower and lender to more precisely establish the levels of debt that the borrower will be able to bear. . . . The positive impact of counseling most likely emerges from the more accurate measurement of repayment capacity that results from the counseling process and from the abandonment of rigid income-to-debt ratios in screening potential borrowers.”).

The program was instituted under the authority of 765 ILCS section 77/70 et seq. and is commonly known as HB 4050.

Sumit Agarwal, et al. Can Mandated Financial Counseling Improve Mortgage Decision-Making? Evidence from a Natural Experiment 3-4 (2008), at http://ssrn.com/1285603. The authors also concluded “that mandatory counseling limited both the demand for new mortgages and the supply of credit, and hampered real estate market activity in the treated areas.” Id. at 3. The authors were unable to determine whether the results were attributable to borrowers acting more wisely or lenders “responding to the threat of external review,” id. at 4, but in either case the results seem caused by the counseling.

Illinois Department of Financial and Professional Regulation, Findings from the HB 4050 Predatory Lending Database Pilot Program 1 (2007).

Id. at 1. The definition of unaffordable used was a ratio of debt to income of more than 40%. Id. at 2-3. In contrast, the Department of Housing and Urban Development standard is 30%. See supra note --- and accompanying text.

Illinois Department of Financial and Professional Regulation, Findings from the HB 4050 Predatory Lending Database Pilot Program 3 (2007). In only 12% of the cases were no issues found with the loan. “‘No issues’ meant that the information entered by the Loan Originator matched the information verified by the HUD-certified Counseling Agency; there were no indicia of fraud that the borrower appeared to understand the transaction; that the loan had a ‘market rate;’ and that it was ‘affordable.’” Illinois Department of Financial and Professional Regulation, Findings from the HB 4050 Predatory Lending Database Pilot Program 3 (2007). The agencies also found that 22% of the loans exceeded the market rate, which the agencies defined as exceeding 9.186% when fixed rates were no more than 6.4%. Id.
It thus appears that credit counseling offers hope of reducing defaults and reducing the use of onerous terms. 178 Credit counselors can also counter the claims of predatory lenders. 179 But credit counselors cost money, and it seems pointless to require those who don’t need a credit counselor to spend that money. Consequently, some measure should be taken to distinguish those who need a counselor from those who can understand the disclosures without one. Regulators should take a page from college placement exams and require borrowers who wish to avoid retaining a credit counselor to demonstrate understanding of their loan terms and budget by requiring them to take a test: those who pass can dispense with a credit counselor, though of course they would always be free to retain one, while those who fail should not be permitted to borrow until a credit counselor certifies that they understand the loan terms and the consequences those terms will have for them. The “placement test” should include questions drawn from the video—to insure that borrowers understand the consequences of poor-decisionmaking—the specific loan terms the borrower is contemplating assuming, and the effect those terms may have on the borrower’s budget—to insure that the borrower fully appreciates the significance of her decision.

At the end of the day, however, disclosure is not a complete remedy. Some terms may be too complex to be conveyed to ordinary consumers. Consumers may simply refuse to believe others. 180 Accordingly, as Federal Reserve Chairman Ben S. Bernanke has noted, “[i]n those cases direct regulation, including the prohibition of certain practices, may be the only way to provide appropriate protections.” 181

C The Paternalism Argument

178 But counselors may not be a perfect solution. See Government Accountability Office, Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending 95 (2004) ("counseling may be ineffective against lenders and brokers that engage in fraudulent practices, such as falsifying applications or loan documents, that cannot be detected during a pre-purchase review of mortgage loan documents. Finally, the quality of mortgage counseling can vary because of a number of factors. For example, one federal official cited an instance of a mortgage company conducting only cursory telephone counseling in order to comply with mandatory counseling requirements."); Government Accountability Office, Reverse Mortgages: Product Complexity and Consumer Protection Issues Underscore Need for Improved Controls Over Counseling for Borrowers (2009) ("GAO’s undercover participation in 15 . . . counseling sessions found that while the counselors generally conveyed accurate and useful information, none of the counselors covered all of the topics required by HUD . . . ."). Accordingly, at a minimum, it would be necessary to have rigorous training and oversight for counselors.

179 See Lauren Willis, Against Financial-Literacy Education, 94 Iowa l. Rev. 197, 269 (2008) ("Affordable expert advice, provided through a publicly funded, accessible system of neutral, financially trained intermediaries, akin to pro bono legal advice, could equalize the positions of consumers and sellers and reduce consumer anxiety about financial decisions.").

180 See supra note --- and accompanying text.

These measures are unquestionably paternalistic. They will bar some consumers from borrowing at the moment when they wish to, though the borrowers may later be able to obtain a loan. They require borrowers to satisfy additional requirements, such as taking a test and viewing a video, in what is already a time-consuming and tiresome process. Borrowers who already fully understand the risks of borrowing and understand their loan terms will be required to demonstrate that fact, thereby incurring costs and delays that do not benefit them. Not only do such delays postpone borrowers’ ability to move into a new home, they may also increase the cost of locking in interest rates. How can this be justified in a private transaction, such as that between lender and borrower?

The answer is that the transaction is not truly private. Society has a stake in avoiding foreclosures. The subprime crisis precipitated the worst economic decline since the Great Depression, one that some claim is itself a lesser depression, and has earned the sobriquet “the Great Recession.” According to the Center for Responsible Lending, subprime foreclosures in 2009 alone will cause more than 69.5 million nearby homes to decline in value an average of $7,200 producing a $502 billion drop in property values. Dan Immergluck and Geoff Smith have cataloged some of the costs foreclosures impose on communities: “Foreclosures, particularly in lower-income neighborhoods, can lead to vacant, boarded-up, or abandoned properties. These properties, in turn, contribute to physical disorder in a community, create a haven for criminal activity, discourage the formation of social capital, and lead to further disinvestment.” And William C. Apgar

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182 Opinions differ as to whether the Chicago mandatory counseling program caused delays. Compare Illinois Department of Financial and Professional Regulation, Findings from the HB 4050 Predatory Lending Database Pilot Program 2 (2007) (“There were no documented delays in the closing of loans because of a lack of counselors or delays in providing the [counseling]. From this perspective, HB 4050 had no adverse effect on either the mortgage lending or real estate sales processes.”) with Lisa K. Bates & Shannon Van Zandt, Illinois’ New Approach to Regulating Predatory Lending: Unintended Consequences of Borrower Triggers and Spatial Targeting 23 (Univ of Ill. Spatial Policy Analysis Research Consortium 2007).


185 Center for Responsible Lending, Subprime Spillover: Accelerating Foreclosures to Cost Neighbors $502 Billion in 2009 Alone; 69.5 Million Homes Lose $7,200 on Average (May 2009); see also Vicki Been, External Effects of Concentrated Mortgage Foreclosures: Evidence from New York City 10, Testimony before the U.S. H. Rep., Committee on Oversight and Government Reform, Subcommittee on Domestic Policy, May 21, 2008 (also finding that foreclosures reduce value of nearby properties, though less so than the CPR study, and noting “Our research shows that the foreclosure crisis is affecting not just the homeowners who are unable to pay their mortgages, but also is imposing significant costs upon the neighbors and tenants of those owners, as well as the communities in which the properties going into foreclosure lie.”)

186 Dan Immergluck & Geoff Smith, The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values, 17 HOUSING POL’Y DEBATE 57, 57 (2006) (conservatively estimating that each conventional foreclosure results in a decline of 0.9 % in value of single-family homes within an eighth of a mile). See also Ren S. Essene & William Apgar, Understanding Mortgage Market Behavior: Creating Good Mortgage Options for all Americans 2 (Jt. Ctr. for Housing Studies, Harvard Univ. 2007) (“foreclosed properties can remain vacant for a prolonged period of time, depressing property values and contributing to neighborhood instability and stigma.”); Dan Immergluck &
and Mark Duda have explained “Foreclosures are not only expensive to borrowers and lenders, but [in Chicago] they involve more than a dozen agencies and twice as many specific municipal activities, and generate direct municipal costs that in some cases exceed $30,000 per property.”\textsuperscript{187} The lost jobs, lost wealth, shuttered businesses, damaged communities, and general decline in societal well-being means that society has an interest in preventing repetitions of the behavior that led to the economic slide. Indeed, in recognition of that interest, Congress has enacted a series of statutes designed either to ameliorate the severity of the slump or prevent its repetition. In that light, paternalistic legislation seems justified.

In addition, most of the suggested interventions are only marginally paternalistic; indeed, they constitute examples of what Thaler and Sunstein call “libertarian paternalism;” that is, an intervention that does not bar the consumer from pursuing his desired action but helps the consumer make a better decision. Alternatively, the interventions could be justified as “asymmetric paternalism,” which has been defined as an approach that “creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational.”\textsuperscript{188} Thus, those who can pass the test can avoid much delay and expense, while those who cannot would derive large benefits from taking the test.

\textsuperscript{187} William C. Apgar & Mark Duda, Collateral Damage: The Municipal Impact of Today’s Mortgage Foreclosure Boom 4, (Report for the Homeownership Preservation Foundation, 2005) at \texttt{http://www/hpfonline.org/press/Apgar-Duda\%20Study\%20Final.pdf}. The authors expounded:

For municipalities, foreclosures trigger significant direct expenditures for increased policing and fire suppression, demolition contracts, building inspections, legal fees, and expenses associated with managing the foreclosure process (e.g., recordkeeping/updating). Police officials interviewed for this study also cited the damage to quality of life from empty, foreclosed properties, including gang activity, drug dealing, prostitution, arson, rape, and murder. Even after the foreclosure process is completed, costs continue to accrue in cases where the municipality inherits responsibility for securing and/or demolishing the unit, clearing trash from the lot, and keeping weeds under control.

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When foreclosure leads to demolition, the municipality faces additional property tax losses because it must remove the assessed value of the structure from its tax roles [sic]. Municipal revenues are also reduced by delayed and uncollected taxes and unpaid service fees for water, gas, and electricity. More generally, to the extent that foreclosures make urban neighborhoods less attractive to households and businesses, municipal sales and income tax receipts also suffer.

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Complicating matters is the fact that nonprime foreclosures tend to cluster in ways that generate significant spillover effects as vacant properties become magnets for crime and other social ills. In fact, extreme rates of loan failure suggest that foreclosures are “contagious,” with one loan failure increasing the likelihood of another.

Critics of the Chicago counseling program complained that it was racist. But that seems to have more to do with the fact that the program, a pilot program, was confined to area codes that were disproportionately populated by people of color. A program that was not so confined should not be subject to such concerns.

D. Cost

The measures suggested above will increase the cost of borrowing and slow it down. This subsection argues that those costs are worth incurring.

The video may be costly to create, but once it is created the marginal cost of showing it to additional borrowers is trivial. When the cost of the video is amortized over millions of loan applicants, it seems likely to add only an insignificant amount to each individual loan.

Perhaps the most costly suggested intervention, in terms of out-of-pocket costs, is the credit counseling. The Chicago ordinance mandated a $300 charge. Beyond the out-of-pocket charge, those receiving counseling must invest time, disclose their financial circumstances, and, if they later sue the lender for, say, unconscionability, may encounter greater difficulty in claiming that they did not understand their loan terms. But probably many borrowers will be able to “place out” of the credit counseling. In addition, Congress does not seem to find the cost of credit counseling too daunting, because it has already required credit counseling in other contexts. Thus, consumers filing for bankruptcy, even if represented by attorneys, must demonstrate that they have received counseling. Before emerging from bankruptcy, debtors must undergo still more counseling, in the hope that they will learn to avoid the behavior that caused them financial difficulties. If the cost of counseling is worth imposing not just once but twice on those who have the least resources, it is surely worth requiring for those whose financial circumstances are strong enough for them to obtain credit and who risk failures that might impose significant costs on society, not to mention themselves. Nor is

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189 Cf. Todd J. Zywicki, The Law and Economics of Subprime Lending, --- Colo. L. Rev. --- (forthcoming), available at http://ssrn.com/abstract_id=1106907 ("Heightened protections for borrowers that increase the cost or risk of lending will raise the cost of lending and result in either higher interest rates for borrowers or reduced access to credit."). The Chicago program led to differing views about the effect of mandatory counseling on access to credit. Compare Illinois Department of Financial and Professional Regulation, Findings from the HB 4050 Predatory Lending Database Pilot Program 1 (2007) ("Counseling agencies did not find that HB 4050 limited borrowers’ access to credit within the Pilot Program Area or that the Pilot Program Area was considered unattractive to new homebuyers. More than 300 different Illinois mortgage licensees originated loans for borrowers in the Pilot Program Area during the Pilot Phase.") with Lisa K. Bates & Shannon Van Zandt, Illinois’ New Approach to Regulating Predatory Lending: Unintended Consequences of Borrower Triggers and Spatial Targeting 5 (Univ of Ill. Spatial Policy Analysis Research Consortium 2007) ("Several lenders suspended lending in the targeted areas, citing concerns about liability.").


required counseling limited to bankruptcy. Fannie Mae and Freddie Mac require homeownership education, with a financial focus, for some of their affordable mortgage programs.\textsuperscript{193} Some state anti-predatory lending statutes require credit counseling.\textsuperscript{194} And applicants for reverse mortgages must get counseling.\textsuperscript{195}

Even if the cost is significant—and it probably will not be—that cost pales in comparison to the cost the subprime fiasco has imposed on society.\textsuperscript{196} The cost of \textit{ex ante} comprehension is also likely to be less than the cost of \textit{ex post} litigation that might stem from some alternative suggestions for addressing the problem, such as imposition of a fiduciary duty on mortgage originators or a requirement that lenders offer only loans suitable for the particular borrower.\textsuperscript{197}

If the program is successful, it is likely to reduce the number of consumers who take out loans. That in turn may reduce the demand for purchasing homes, with numerous consequences for the economy. Some reports suggest that the Chicago pilot project reduced home sales.\textsuperscript{198} But the events of 2008-09 suggest that that is no cost at

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\textsuperscript{194} See, e.g. N.C. Gen Stat. section 24-1.1E(c)(1).

\textsuperscript{195} See 24 C.F.R. section 206.41(a).

\textsuperscript{196} Robert J. Shiller, \textit{How About a Stimulus for Financial Advice?} N.Y. Times, Jan. 18, 2009, argues for “starting a major program to subsidize personal financial advice for everyone.” See also Lauren Willis, Against Financial Literacy Education, 94 Iowa L. Rev. 197 (2008): One way to increase the resources with which consumers face the market would be to establish a system of trustworthy expert intermediaries to advise consumers on welfare-enhancing financial products and services, akin to pro bono legal advice. Affordable expert advice might be provided through a publicly-funded, accessible system of neutral financially-trained intermediaries who would advise consumers on financial products and services. Expert financial advice not only would allow consumers to piggyback off of the financial literacy of a professional, creating the societal efficiencies inherent in specialization, but also would reduce consumer anxiety about making financial decisions on their own, alleviating stress and freeing up more mental resources to use to make the decisions well. Expert advice would narrow the choice set presented to individual consumers, simultaneously conserving consumer decisionmaking resources.


\textsuperscript{198} Lisa K. Btes & Shannon Van Zandt, Illinois’ New Approach to Regulating Predatory Lending: Unintended Consequences of Borrower Triggers and Spatial Targeting 5-6 (Univ of Ill. Spatial Policy Analysis Research Consortium 2007) (“a preliminary analysis of sales data [shows] that borrower-triggered interventions are having a dramatic negative effect on housing sales . . . .”); Lesley R. Chinn, Critics: HB 4050 is an Invasion of Privacy, Chicago Weekend, Nov. 8, 2006 (realtor attributed 80% decline in sales to HB 4050).
all. If consumers would not want loans if they were better informed, they should be given the tools to discover that fact. Society would be far better off today if more of the consumers who ended up in foreclosure had made such a judgment. Even the purported benefit of lending to subprime borrowers—increasing homeownership and creating an “ownership society”—has been a chimera. According to the Center for Responsible Lending, subprime lending has actually produced a drop in homeownership in light of the mountain of foreclosures. \(^{199}\) Similarly, while lenders may make fewer loans under the reforms suggested in this paper, that seems better than having them make the kinds of loans they made that triggered the economic crisis: loans that ended up in foreclosure, and forced many lenders into bankruptcy.\(^{200}\)

An arguable cost of the approach suggested herein is that it would discourage lenders from using incomprehensible terms that benefit borrowers. It is not clear, however, that terms that are both incomprehensible and beneficial to consumers exist. Barring the use of unintelligible terms might also raise the cost to lenders of developing new loan products, because any such products that increased term complexity might be more difficult to explain to consumers. But the loss of such products might not actually be a problem. In hindsight, the complexity of subprime loans was one of their drawbacks. Complexity has significant costs, including impairing comparison shopping, because complex loans are less easily compared to other loans, and it may be that any term that consumers cannot understand simply comes at too dear a price. And complexity need not mean incomprehensibility: if all the parties to a loan wish borrowers to understand particular loan terms, surely a way can be found to achieve that goal.

D. The First Assumption

This paper noted at the outset that it is based on an assumption that consumers will not knowingly assume obligations that they cannot discharge. If that assumption is not true, then the reforms suggested by this article will make no difference. The assumption is probably accurate as to some consumers but not as to others, but in truth, the assumption remains largely untested.

The subprime crisis might have presented one test of that assumption: borrowers might have been willing to take on loans which they would find unaffordable at some

\(^{199}\) Center for Responsible Lending, Subprime Lending: A Net Drain on Homeownership 2 (2007) (“Subprime loans made during 1998-2006 have led or will lead to a net loss of homeownership for almost one million families. In fact, a net homeownership loss occurs in subprime loans made in every one of the past nine years.”). See also Vincent DiLorenzo, Mortgage Market Deregulation and Moral Hazard: Equity Stripping Under Sanction of Law, available at http://ssrn.com/abstract=1488293 (2009) (“the evidence has actually revealed that there were no net societal benefits in the form of increased levels of homeownership in the long-term.”).  

\(^{200}\) Cf. Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue, & Matthew Rabin, Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,” 151 U. Penn L. Rev. 1211, 1220 (2003) (“we claim that any asymmetrically paternalistic policy that helps boundedly rational consumers make better choices must, on net, increase economic efficiency as measured by the sum of consumer and producer surplus. . . . To the extent that [asymmetric paternalism] policies succeed, they will result in superior social outcomes even if individual firms are hurt. However, it is not necessarily the case that firms will be hurt . . . .”).
point in the future if they were confident in their ability to refinance. Some consumers seemingly were persuaded to take out mortgages by claims that they would be able to refinance before the loans adjusted to a higher rate. The theory was that real estate prices would rise, thereby giving borrowers increased equity in their homes. They could then refinance at a lower rate because the increased equity would reduce the lender’s risk. Lenders found the prospect of short-term refinancing attractive because it enabled them to obtain additional fees within a fairly short period, especially for loans that provided for prepayment penalties.

But it is not clear that this is what happened. Considerable evidence suggests that borrowers did not understand their loan obligations and thus did not seriously consider the possibility that they would default on their loans.201 Indeed, even if home prices had continued to rise and borrowers had accumulated equity, borrowers might have found refinancing too costly because of the fees and prepayment penalties involved—something many borrowers apparently failed to realize, representing another TILA failure.202 Indeed, lenders would have had little need to deceive borrowers about their obligations—by, for example—presenting variable rate loans as fixed—203 if borrowers would have entered into those loans even if they had known the truth. A thought experiment makes the point. Suppose lenders had said to borrowers that the borrower would find the loan payments unaffordable relatively soon after the purchase, at which time the borrower would refinance, with the result that the borrower would have more affordable payments until the next change date and the lender would earn additional fees. If, however, for some reason, refinancing was impossible, the borrower could expect to default and be foreclosed upon. Some borrowers probably would have accepted that risk. But it is likely that many would not have. They might instead have purchased less expensive homes to reduce their risk or foregone buying altogether. The result would have been that the economic crisis would not have occurred or would have been less severe. But because it appears that many borrowers failed to appreciate the risk they were taking, this exercise must remain a thought experiment. Ideally, however, society will adopt reforms that will make it possible to conduct the experiment in more than just thought.

Conclusion

201 See supra notes --- and accompanying text.
202 The FTC Study found that a significant number of borrowers did not realize that refinancing would trigger a prepayment penalty. FTC Study at 36. See also Affidavit of Elizabeth M. Jacobson in City of Baltimore v. Wells Fargo (former Wells Fargo loan officer reports that loan officers told customers that pre-payment penalties could be waived when in fact they could not be); Affidavit of Ton Paschal in City of Baltimore v. Wells Fargo (“it was implied in trainings that Wells Fargo loan officers should not mention that subprime loans included a prepayment penalty if the borrower paid off or refinanced his loan before the prepayment penalty period ended or that the monthly payments on the ARM loans would substantially increase. When an applicant asked a loan officer about prepayment penalties or monthly payment increases, the loan officer would tell the applicant not to worry because Wells Fargo would later be able to refinance him into a prime or an FHA loan.”).
203 See supra note --- and accompanying text.
This paper demonstrates that TILA failed to convey to subprime borrowers their payment obligations. First, it explores the disclosure forms and argues that those forms contained misleading numbers for monthly payments for adjustable rate loan borrowers, making it difficult for borrowers who read the forms to determine whether they could make their payments. Second, the paper reports on a survey of mortgage brokers that indicates that virtually no borrowers withdraw from loans when they see the final loan terms at the closing and that many borrowers spend no more than a minute reviewing the Truth in Lending disclosures. It thus appears that consumer protection laws did not function to give borrowers what they needed to recognize that they were assuming loan obligations which they could not satisfy. The paper argues that society should switch from the regime mandated by the Truth in Lending Act in which government officials who do not participate in the lending process oblige lenders to make disclosures that they do not care about or may even wish to obscure to borrowers who may not appreciate the significance of what they are being given and so may overlook the disclosures. Instead, the paper suggests that society adopt a comprehension regime in which lenders are obliged to insure that borrowers understand their loan terms. Alternatively, lending markets should function better if lenders were required to disclose information about the percentage of consumers that understand their loan terms, which might spur competition to improve the intelligibility of loan terms and even lead to the abandonment of those that few consumers can comprehend.

Because that proposal is politically unfeasible, the paper next suggests some measures to improve the functioning of the existing disclosure regime. Specifically, the paper advocates adoption of “nudges,” after the book of the same name by Cass Sunstein and Richard H. Thaler. Among the nudges suggested by the paper are a video to make more salient to loan applicants the risk of default and foreclosure and disclosures that would convey the percentage of borrowers with particular loan terms who later defaulted. The paper also urges that loan applicants take the equivalent of a “placement test” on their loan terms; those whose answers revealed that they do not understand their loan terms would not be permitted to borrow until a neutral credit counselor certified that they understand their loan terms.
This disclosure describes the features of the adjustable-rate mortgage (ARM) program you are considering. Information on other ARM programs is available upon request.

**How Your Interest Rate and Payment Are Determined**

- Your interest rate will be based on [an index plus a margin] [a formula].

- Your payment will be based on the interest rate, loan balance, and loan term.

  - [The interest rate will be based on (identification of index) plus our margin. Ask for our current interest rate and margin.]

  - [The interest rate will be based on (identification of formula). Ask us for our current interest rate.]

  - Information about the index [formula for rate adjustments] is published [can be found] ________.

  - [The initial interest rate is not based on the (index) (formula) used to make later adjustments. Ask us for the amount of current interest rate discounts.]

**How Your Interest Rate Can Change**

- Your interest rate can change (frequency).

  - [Your interest rate cannot increase or decrease more than ___ percentage points at each adjustment.]

  - Your interest rate cannot increase [or decrease] more than ___ percentage points over the term of the loan.

**How Your Payment Can Change**

- Your payment can change (frequency) based on changes in the interest rate.

  - [Your payment cannot increase more than (amount or percentage) at each adjustment.]

  - You will be notified in writing ____ days before the due date of a payment at a new level. This notice will contain information about your interest rates, payment amount, and loan balance.

  - You will be notified once each year during which interest rate adjustments, but no payment adjustments, have been made to your loan. This notice will contain information about your interest rates, payment amount, and loan balance.

  - [For example, on a $10,000 [term] loan with an initial interest rate of ____ [(the rate shown in the interest rate column below for the year 19 ____)] [(in effect (month) (year)), the maximum amount that the interest rate can rise under this program is _____ percentage points, to _____%, and the monthly payment can rise from a first-year payment of $____ to a maximum of $____ in the _____ year. To see what your payments would be, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, the monthly payment for a mortgage amount of $60,000 would be: $60,000 ÷ $10,000 = 6; 6 × _____ = $____ per month.)]

**Example**
The example below shows how your payments would have changed under this ARM program based on actual changes in the index from 1982 to 1996. This does not necessarily indicate how your index will change in the future.

The example is based on the following assumptions:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Amount</td>
<td>$10,000</td>
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<tr>
<td>Term</td>
<td>_____</td>
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<tr>
<td>Change date</td>
<td>_____</td>
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<tr>
<td>Payment adjustment</td>
<td>(frequency)</td>
</tr>
<tr>
<td>Interest adjustment</td>
<td>(frequency)</td>
</tr>
<tr>
<td>[Margin]*</td>
<td>_____</td>
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<tr>
<td>Caps</td>
<td>_____ [periodic interest rate cap]</td>
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<td></td>
<td>_____ [lifetime interest rate cap]</td>
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<td></td>
<td>_____ [payment cap]</td>
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<tr>
<td>[Interest rate carryover]</td>
<td></td>
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<tr>
<td>[Negative amortization]</td>
<td></td>
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<tr>
<td>[Interest rate discount]**</td>
<td></td>
</tr>
<tr>
<td>Index</td>
<td>identification of index or formula</td>
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</tbody>
</table>

*This is a margin we have used recently, your margin may be different.

**This is the amount of a discount we have provided recently; your loan may be discounted by a different amount.]

<table>
<thead>
<tr>
<th>Year</th>
<th>Index (%)</th>
<th>Margin (Percentage points)</th>
<th>Interest Rate (%)</th>
<th>Monthly Payment ($)</th>
<th>Remaining Balance ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1982</td>
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<tr>
<td>1983</td>
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<tr>
<td>1988</td>
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</tr>
</tbody>
</table>
Note: To see what your payments would have been during that period, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, in 1996 the monthly payment for a mortgage amount of $60,000 taken out in 1982 would be: $60,000÷$10,000=6; 6×____=$____ per month.)
Figure 2: A Sample TILA Disclosure Form for a 2/28 Hybrid Adjustable Loan