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Truth in Lending Simplification and Reform Act: Changes Affecting Disclosure Requirements in Home Mortgage Transactions.

Susan C. Shank

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**TRUTH IN LENDING SIMPLIFICATION AND REFORM ACT:
CHANGES AFFECTING DISCLOSURE REQUIREMENTS IN
HOME MORTGAGE TRANSACTIONS**

SUSAN C. SHANK

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I. INTRODUCTION

The passage of consumer credit legislation in the last twelve years has resulted in promulgation of a myriad of federal disclosure requirements in credit transactions.¹ Pervasive in real estate transactions are the disclosures of credit terms required under the Consumer Credit Protection Act of 1968, commonly referred to as Truth in Lending (TIL).² The imple-

1. See Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617 (1974); Home Mortgage Disclosure Act, *id.* §§ 2801-2819 (1976); Consumer Credit Protection Act, *id.* §§ 1601-1641 (1968); Fair Credit Billing Act, *id.* §§ 1681a-1681t (1976); Equal Credit Opportunity Act, *id.* §§ 1691a-1691f (1976).

2. 15 U.S.C. §§ 1601-1641 (1976). The following disclosures presently are required under TIL for closed-end credit transactions such as home mortgages:

- a) the amount of credit extended (loan), *id.* § 1639(a)(1);
- b) itemized charges included in the loan which are not part of the finance charge, *id.* §§ 1605(d)-(e), 1639(a)(2);
- c) total amount to be financed, *id.* § 1639 (a)(3), 12 C.F.R. § 226.8(d)(1) (1980);
- d) finance charge expressed as an annual percentage rate (APR), 15 U.S.C. §§ 1606,

mental guidelines for TIL are found in Regulation Z,³ which delineates the method of lender compliance.⁴

Since its inception, TIL has been the source of extensive litigation with respect to both personal and real property credit transactions.⁵ Generally, a major drawback of disclosure regulation is the contrasting nature of the "means" and the "end." The end is to enable the average consumer to comparison shop for credit terms and make an informed decision based on pertinent information furnished in a uniform and intelligible fashion.⁶ The means to this end, however, is a multiplicity of regulations which are

1639(a)(5) (1976); 12 C.F.R. § 226.8(b)(2) (1980);

e) except in first home mortgages, the amount of the finance charge, 15 U.S.C. §§ 1605, 1639(a)(4) (1976); 12 C.F.R. § 226.8(b)(8) (1980);

f) accrual date of finance charge if different from date of transaction, 12 C.F.R. § 226.8(b)(1);

g) number, amount, and due date of payments and, except for first home mortgages, the total of payments, 15 U.S.C. § 1639(a)(6) (1976); 12 C.F.R. § 226.8(b)(3) (1980);

h) default or delinquency charges in event of late payment, and method of computation, 15 U.S.C. § 1639(a)(7) (1976), 12 C.F.R. § 226.8(b)(4) (1980);

i) description of any security interest held, 15 U.S.C. § 1639(a)(8) (1976); 12 C.F.R. § 226.8(b)(5) (1980);

j) description of prepayment penalty and method of computation, 12 C.F.R. § 226.8(b)(6)(7) (1980).

3. 12 C.F.R. § 226 (1980); *see* 15 U.S.C. § 1604 (1976) (Federal Reserve Board to promulgate implemental rules for TIL). Lengthy and complex, Regulation Z presently consists of rules, 12 C.F.R. §§ 226.1-15 (1980), supplements, *id.* §§ 226.40-80, official interpretations, *id.* §§ 226.101-1503, and staff correspondence, *id.* app. The proposed revision of Regulation Z incorporates many of the supplements and interpretations issued by the Board, and has been restructured to group related provisions together. *See* 45 Fed. Reg. 80,648, 80,649 (1980); *id.* at 29,702.

4. *See* 15 U.S.C. § 1632 (1976) (Board authorized to prescribe form of disclosures, including power to require additional information); *cf.* *Mourning v. Family Publication Serv., Inc.*, 411 U.S. 356, 369-70 (1972) (upholding statutory authority to promulgate implemental rules of Regulation Z as "reasonably related" to purposes of legislation). Administrative guidelines and interpretations of Regulation Z are given persuasive weight in adjudication of conflicts. *See, e.g., Ford Motor Co. v. Milhollin*, ___ U.S. ___, ___ 100 S. Ct. 790, 792, 63 L. Ed. 2d 22, 31 (1980) (Board's staff interpretations of Regulation Z accorded "high degree of deference"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (courts may properly look to agency interpretation for guidance); *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 976-77 (5th Cir. 1974) (important power of construction granted to Federal Reserve Board by Congress).

5. *See Kirkham, Problems of Complex Civil Litigation*, 83 F.R.D. 497, 501 (1980) (439% increase of TIL suits between 1972 and 1975); Willenzik & Leymaster, *Recent Trends in Truth in Lending Litigation*, 35 Bus. Law. 1197, 1197 (1980) (over 14,000 TIL suits filed in federal courts by end of 1979); *cf.* 45 Fed. Reg. 80,648, 80,732 (1980) (over 80% of banks not in strict compliance with TIL).

6. *See* 15 U.S.C. § 1601 (1976); H.R. REP. No. 1040, 90th Cong., 2nd Sess. 1, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962, 1963; 12 C.F.R. § 226.1(a) (1980).

necessarily complex.⁷ Not only do creditors have difficulty producing appropriate information in forms which meet all TIL and Regulation Z requirements,⁸ but consumers often suffer an "information overload" rendering the disclosures less than meaningful.⁹

A TIL violation occurs upon failure to disclose credit terms in the form prescribed,¹⁰ regardless of fraud or deception to the consumer.¹¹ The result is a great deal of litigation based solely upon technical infractions.¹²

7. Cf. *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 371-72 (1972) (Congressional emphasis on Board's authority to prevent creditor evasion in promulgating rules); 45 Fed. Reg. 80,648, 80,731-32 (1980) (noting the voluminous amount of TIL and Regulation Z materials).

8. See Landers, *Some Reflections on Truth in Lending*, 1977 U. ILL. L. F. 669, 672-76 (1977). Professor Landers notes that Regulation Z and the Federal Reserve Board interpretations gradually have expanded the scope of disclosure to include computational figures relevant to the underlying credit terms. *Id.* at 672-73. This led in turn to lengthier disclosure forms for creditors attempting full compliance with the steady stream of new Board interpretations. *Id.* at 675-76.

9. See Davis, *Protecting Consumers From Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841, 843-44 (1977) (consumer inundated with disclosures less likely to utilize information due to sheer intimidation); Landers & Rohner, *A Functional Analysis of Truth in Lending*, 26 U.C.L.A. L. REV. 711, 721-34 (1979) (disclosure statement virtually unreadable for average consumer); cf. Brandt & Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending*, 7 U. MICH. J. L. REF. 297, 308-13 (1974) (empirical study showing minimal effect of TIL disclosure on consumer shopping behavior). See generally Whitford, *The Function of Disclosure Regulation in Consumer Transactions*, 1973 Wisc. L. Rev. 400 (1973).

10. See 15 U.S.C. § 1640 (1976). Under section 1640(c), (e), and (f) a creditor may raise defenses of bona fide error, statute of limitations, and good faith compliance. Courts, however, have generally been rather strict in allowing defenses of bona fide error and good faith compliance. See, e.g., *McGowan v. King, Inc.*, 569 F.2d 845, 849 (5th Cir. 1978) (bona fide error defense available only for clerical errors and not for mistaken legal interpretations); *Pennino v. Morris Kirschman & Co.*, 526 F.2d 367, 370 n.3 (5th Cir. 1976) (unintentional error must be made in reliance on "rule, regulation, or interpretation" of Federal Reserve Board); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1166 (7th Cir. 1974) (intent to violate Act not requisite showing to establish liability).

11. See, e.g., *Smith v. Chapman*, 614 F.2d 968, 971 (5th Cir. 1980) (objective standard employed to determine TIL violation; consumer need not be misled by disclosures); *McGowan v. King, Inc.*, 569 F.2d 845, 849 (5th Cir. 1978) (deception of consumer not necessary to sue under TIL); *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 280 (S.D.N.Y. 1971) (no requirement that consumer prove deception to establish cause of action). *But cf.* *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230, 237 (10th Cir. 1975) (Act not to be used as instrument for harassment of creditors); *Andrucci v. Gimbel Bros., Inc.*, 365 F. Supp. 1240, 1243 (W.D. Pa. 1973) (not purpose of the Act to set traps for the unwary); *Shields v. Valley Nat'l Bank*, 56 F.R.D. 448, 451 (D. Ariz. 1971) (TIL should not be used as instrument of oppression or harassment).

12. Miller, *Truth in Lending Act*, 34 BUS. LAW. 1405, 1420-21 (1979); see, e.g., *Pennino v. Morris Kirschman & Co.*, 526 F.2d 367, 370 (5th Cir. 1976) (creditor's use of word "balance" instead of "new balance" on customer's statement of account was violation); *Powers v.*

While courts repeatedly have held the Act should be liberally construed to effect its purpose,¹³ the judiciary is duty-bound to promote standardization of disclosures by enforcing strict compliance.¹⁴ Consequently, courts attempting to properly enforce the Act have often subordinated the substance and purpose of the law to form.¹⁵

In March, 1980, Congress passed the first major revision of TIL, the Truth in Lending Simplification and Reform Act (TILSRA), to be effective April 1, 1982.¹⁶ New rules and regulations, as well as model disclosure forms are to be promulgated by the Federal Reserve Board by April 1, 1981.¹⁷ This comment addresses the changes TILSRA and revised Regulation Z will have on real estate credit transactions.

Sims & Levin Realtors, 369 F. Supp. 12, 20 (E.D. Va. 1975) (use of "total finance charge" instead of "finance charge" as required by Regulation Z was violation); Buford v. American Fin. Co., 333 F. Supp. 1243, 1247 (N.D. Ga. 1971) (failure to include one dollar notary fee in "finance charge" violated TIL); cf. Landers, *Some Reflections on Truth in Lending*, 1977 U. Ill. L. F. 669, 676-86 (1977). Professor Landers suggests that few consumers who sue under TIL initially know they have a TIL claim. The Act, therefore, has become an effective vehicle for a variety of consumer grievances not directly related to the legislation. See *id.* at 677, 686.

13. See McGowan v. King, 569 F.2d 845, 848 (5th Cir. 1978); N. C. Freed Co. v. Board of Governors of Fed. Reserve Sys., 473 F.2d 1210, 1214 (1973), *cert. denied*, 414 U.S. 827 (1973); Gardner & North Roofing & Siding Corp. v. Board of Governors of Fed. Reserve Sys., 464 F.2d 838, 841 (D.C. Cir. 1972).

14. See 15 U.S.C. § 1601 (1976); Pennino v. Morris Kirschman & Co., 526 F.2d 367, 370 (5th Cir. 1976); Powers v. Sims & Levin Realtors, 369 F. Supp. 12, 20 (E.D. Va. 1975).

15. See Sheffey, *Credit Life and Disability Insurance Disclosure Under Truth-in-Lending: The Triumph of Form Over Substance*, 8 FLA. ST. L. REV. 463, 477-90 (1980). "Form over substance" has worked against creditors and consumers alike. Compare Deselles v. Mossy Motors, Inc., 442 F. Supp. 897, 901 (E.D. La. 1978) (failure to disclose one of two creditors on face of disclosure statement was TIL violation, notwithstanding fact creditor was identified on reverse side of form and consumer had knowledge of identity) with Stavrides v. Mellon Nat'l Bank & Trust Co., 353 F. Supp. 1072, 1078-79 (W.D. Pa. 1973), *aff'd*, 487 F.2d 953 (3d Cir. 1973) (despite broad purpose of Act to encourage comparison shopping prior to consummation of transaction, disclosure at time of mortgage closing complied with statutory language). See also Smith v. Chapman, 614 F.2d 968, 972 (5th Cir. 1980) (attempt to distinguish between strict compliance, "sacramental" compliance, and substantial compliance).

16. The Act comprises Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980. See 15 U.S.C. §§ 1601-1641 (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 602, 94 Stat. 168.

17. See 15 U.S.C. § 1602 (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 602, 94 Stat. 168; 45 Fed. Reg. 80,648. An initial revision of Regulation Z was promulgated by the Board in May, 1980. See 45 Fed. Reg. 29,702 (1980). The Board received over 500 comments to the first revision, most of which supported the concept of simplification, but questioned the Board's format. *Id.* at 80,648. The provisions of Regulation Z outlined in this article are from the December revision, which still may be subject to change when this article goes to press. The reader should review the final revision of April, 1981, to determine any further changes.

II. THE REFORM LEGISLATION FOCUSES UPON FOUR AREAS

The new Act attempts to adjust the means—compliance with disclosure requirements—in order to realize the end more effectively—informed selection of appropriate credit terms. To accomplish this, the legislation focuses on four areas: (1) simplification of disclosure requirements to present information more meaningfully to consumers;¹⁸ (2) facilitation of easier creditor compliance;¹⁹ (3) adjustment of remedies and penalties;²⁰ and (4) strengthening of administrative enforcement.²¹

A. Simplification of Disclosures

TILSRA and revised Regulation Z require streamlined disclosure forms which retain information considered crucial to the shopping process.²² Congress thus sought to highlight key credit terms in a simpler, more understandable form for the consumer.²³

Less detailed information will be presented on disclosure forms for closed-end credit transactions, such as home mortgages.²⁴ The consumer

18. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 3, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 879. This is to be achieved by: (1) reducing the number of disclosures through elimination of certain itemizations; (2) segregating federal disclosures from all other information, including state disclosures; and (3) use of short descriptive phrases explaining credit terms. See *id.* at 3, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 879-80.

19. See *id.* at 6-7, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 882-83. Changes easing the compliance burden of creditors include: (1) promulgation of model disclosures forms, which if utilized will protect creditors from liability for violations contained in the forms; (2) allowance of variance tolerances for disclosures; and (3) designation of October 1 of each year as the effective date of administrative rulings. See *id.* at 6-7, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 882-83.

20. See *id.* at 7-8, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 883-84. Creditors' liability for civil penalties will be limited to disclosures of "material importance," with defense of "bona fide error" expanded to include mechanical and computer errors. See *id.* at 7-8, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 883-84.

21. See *id.* at 8, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 884. Increased administrative enforcement will require enforcement agencies to order creditors to provide refunds for those consumers who receive understated APR disclosures. See *id.* at 8, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 884.

22. See *id.* at 2, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 879; 45 Fed. Reg. 80,648, 80,731 (1980). This necessarily means elimination of less significant terms from the disclosure form, a compromise generating less than enthusiastic response from consumer groups. See *Truth in Lending Simplification and Reform Act: Hearing on S. 108 Before the Senate Committee on Banking, Housing, and Urban Affairs*, 1st Sess. 14 (1979) (statement of Ellen Broadman, Consumers Union); *id.* at 50 (statement of Gerald Hogan, Consumer Federation of America); *id.* at 53 (statement of James Boyle, Texas Consumer Association).

23. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 11, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 886; 45 Fed. Reg. 80,648 (1980). See generally O'Connor, *Truth in Lending Simplification*, 35 BUS. LAW. 1221 (1980).

24. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 16, reprinted in [1980] U.S. CODE CONG.

will be referred to the appropriate contractual document for itemized explanation of certain items such as nonpayment, default, right to accelerate maturity of the obligation, and prepayment penalties and rebates.²⁶ The existence of a security interest still must be disclosed,²⁶ but the creditor need not give a detailed description of the type taken.²⁷ Disclosures required by law,²⁸ but inapplicable to the particular transaction, may be deleted.²⁹

Consumers should expect to see short descriptive phrases accompanying five key disclosures.³⁰ These disclosures include: amount financed, annual percentage rate (APR), finance charge, total of payments, and total sale price.³¹ Amount financed, for example, will be explained as "the amount of credit provided to you or on your behalf."³² The Federal Reserve Board believes similar language addressed to the consumer will be more readily understandable.³³

State disclosures and other contractual information must appear separate from required federal disclosures.³⁴ An itemization of the amount

& AD. NEWS 878, 891; O'Connor, *Truth in Lending Simplification*, 35 BUS. LAW. 1221, 1224-25 (1980).

25. See 15 U.S.C. § 1638(a)(12) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 164(a)(12), 94 Stat. 168; 45 Fed. Reg. 80,707 (1980) (to be codified in 12 C.F.R. § 226.18(p)).

26. See 15 U.S.C. § 1638(a)(9), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(a)(9), 94 Stat. 168; 45 Fed. Reg. 80,707 (1980) (to be codified in 12 C.F.R. § 226.18(m)).

27. See 45 Fed. Reg. 80,648, 80,683, 80,707 (1980) (to be codified in 12 C.F.R. § 226.18(m)).

28. See 15 U.S.C. § 1638(a) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(a), 94 Stat. 168.

29. See Fed. Reg. 80,648, 80,679 (1980). One example would be a loan transaction where "total sale price" is irrelevant. *Id.* at 80,679.

30. See 15 U.S.C. § 1638(a)(2)(A), (a)(5) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(a)(8), 94 Stat. 168.

31. See 15 U.S.C. § 1638(a)(8) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(a)(8), 94 Stat. 168; 45 Fed. Reg. 80,707 (1980) (to be codified in 12 C.F.R. § 226.18(c), (d), (e), (h), (j)).

32. See 45 Fed. Reg. 80,648, 80,707 (1980) (to be codified in 12 C.F.R. § 226.18(b)).

33. See *id.* at 80,707. Other examples suggested by the Board are:

Finance charge - "the dollar amount the credit will cost you"

Annual percentage rate - "the cost of your credit at a yearly rate"

Total of payments - "the amount you will have paid when you have made all scheduled payments"

Total sale price - "the total price of your purchase on credit, including your down-payment of \$_____."

See *id.* at 80,707 (to be codified in 12 C.F.R. § 226.18(d), (e), (h), (j)).

34. See 15 U.S.C. § 1638(b)(1) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(b)(1), 94 Stat. 168. This requirement facilitates the "clear and conspicuous" requirement of TIL and Regulation Z.

financed,³⁵ unless expressly waived by the consumer,³⁶ must also appear separate from the federal disclosures.³⁷ Limited exceptions to this segregation requirement are provided by Regulation Z. Acknowledgment of receipt, consumer's name, and consumer's account number—three non-required disclosures—may appear with the federal disclosures.³⁸ On the other hand, creditor's identity, credit life or property insurance premium, and certain charges excludable from the finance charge—three required disclosures—may appear separate from the federal disclosures.³⁹ Placement of these items, of course, should not mislead or detract from the credit information.

B. Facilitation of Creditor Compliance

The Federal Reserve Board has proposed model disclosure forms.⁴⁰ Although use of such forms is optional, proper use by a lender results in compliance with the Act.⁴¹ Such model statements will eliminate many

35. See 15 U.S.C. § 1638(a)(2) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(a)(2), 94 Stat. 168; 45 Fed. Reg. 80,648, 80,707 (1980) (to be codified in 12 C.F.R. § 226.18(b)). The amount financed is computed by: (1) determining the principal amount of the loan, (2) adding charges which are not part of the finance charge, and (3) subtracting any prepaid finance charges. See 45 Fed. Reg. 80,648, 80,707 (1980). The creditor must also provide a written explanation of this procedure. *Id.* at 80,707. (to be codified in 12 C.F.R. § 226.18(c)); see *id.* at 80,720 (model form for itemization of finance charge).

36. See 15 U.S.C. § 1638(a) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(a)(2)(B), 94 Stat. 168; 45 Fed. Reg. 80,648, 80,707 (1980) (to be codified in 12 C.F.R. § 226.18(c)(2)). The creditor must provide a written statement of the consumer's right to receive a written itemization of the amount financed. The consumer will mark a space on the statement indicating whether he does, or does not, wish to receive the itemization. See 45 Fed. Reg. 80,648, 80,707 (1980) (to be codified in 12 C.F.R. § 226.18(c)(2)). If the creditor makes such disclosure as a matter of course, the statement of the consumer's right to this information is unnecessary. See *id.* at 80,680.

37. See 15 U.S.C. § 1638(b) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(b)(1), 94 Stat. 168; 45 Fed. Reg. 80,648, 80,677 (1980). Congress recognized that less information would be communicated to the consumer, but believed the less crowded form would help reduce "information overload." See S. REP. No. 96-73, 96th Cong., 2d Sess. 31, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 834, 864.

38. See 45 Fed. Reg. 80,648, 80,706 n.34 (1980) (to be codified in 12 C.F.R. § 226.17(b)).

39. See *id.* at 80,706 n.35 (to be codified in 12 C.F.R. § 226.17(b)).

40. See *id.* at 80,718-27 (to be codified in 12 C.F.R. § 226 app. G). Section 605 of the new Act amended 15 U.S.C. § 1605 to require the Federal Reserve Board to publish model disclosure forms and clauses. Congress believed such forms would facilitate easier creditor compliance and improved consumer understanding. See S. REP. No. 96-73, 96th Cong., 2d Sess. 11, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 886-87.

41. See 15 U.S.C. § 1605(b) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 605(b), 94 Stat. 168. Use of the form will comply

suits under TIL for technical violations in the same manner as the Uniform Statement under the Real Estate Settlement Procedures Act (RESPA) has done.⁴²

When multiple creditors are involved in a transaction, only one creditor need make disclosures.⁴³ Similarly, if a transaction involves more than one consumer, disclosures can be made to any consumer who is primarily liable on the debt.⁴⁴ If a transaction is subject to rescission, however, disclosures must be made to each consumer having the right to rescind.⁴⁵

To encourage early disclosure, the Federal Reserve Board has inserted a somewhat broad tolerance provision.⁴⁶ The current provision requiring new disclosures each time a credit term changed discouraged lenders from making disclosures until just before consummation of the transaction.⁴⁷ Under the new provision, creditors providing early, good faith estimates subsequently rendered inaccurate before consummation, will not be in violation of the Act.⁴⁸ An exception to this provision in the area of home mortgages will be discussed herein.⁴⁹

Finally, Congress has designated October 1 of each year as the effective date of administrative rulings.⁵⁰ Thus, creditors must make adjustments

with TIL requirements applying to disclosures other than numerical disclosures. *Id.*

42. Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617 (1976). This 1976 Act was passed in an attempt to reform real estate settlement procedures and eliminate abusive practices, such as kickbacks, by providing good faith estimates of settlement costs to consumers. *Id.* § 2601. The Act which applies to all federally related mortgages has not been without its problems. See generally Stoppello, *Federal Regulation of Home Mortgages Settlement Costs: RESPA and Its Alternatives*, 63 MINN. L. REV. 367 (1979).

43. See 15 U.S.C. § 1631(b) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 611(b), 94 Stat. 168; 45 Fed. Reg. 80,648, 80,706 (1980) (to be codified in 12 C.F.R. § 226.17(d)). The Board comment accompanying this provision does not specify which one of the multiple creditors must make disclosures. It does note, however, that this provision is not intended to excuse any creditor from liability for failure to make disclosures. Because the definition of "creditor" has been changed, the Board believes the number of multiple creditor transactions will be reduced, thus eliminating much uncertainty in this area. See 45 Fed. Reg. 80,648, 80,768 (1980).

44. See 15 U.S.C. § 1631 (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 611(a), 94 Stat. 168; 45 Fed. Reg. 80,648, 80,706 (1980) (to be codified in 12 C.F.R. § 226.17(d)).

45. See 45 Fed. Reg. 80,648, 80,706 (1980) (to be codified in 12 C.F.R. § 226.17(d)). Rescindable transactions are noted under section 226.23(a) of revised Regulation Z. *Id.* at 80,709.

46. See *id.* at 80,679, 80,706 (to be codified in 12 C.F.R. § 226.17(e)).

47. *Id.* at 80,679. The December revision of Regulation Z specifically solicited comment on whether the "good faith" standard effectively would avoid possible abuses. *Id.* at 80,679.

48. *Id.* at 80,679, 80,706 (to be codified in 12 C.F.R. § 226.17(e)).

49. See *id.* at 80,706-08.

50. See 15 U.S.C. § 1605(d) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 605, 94 Stat. 168.

to any changes only once a year.⁵¹

C. *Adjustment of Remedies and Penalties*

TIL presently provides for both damages⁵² and rescission⁵³ in the event of violation, but ambiguity in the provisions raised the question of whether the two remedies were mutually exclusive.⁵⁴ TILSRA clarifies this by providing that a consumer exercising his right to rescind may also sue the lender for other violations of the Act and thereby obtain damages.⁵⁵

1. *Civil Liability.* Under TILSRA, the scope of the lender's civil liability is limited to disclosures of material importance.⁵⁶ These disclosures include the amount financed, finance charge, annual percentage rate, rescission requirement, total of payments, schedule of payments, and security interest statement.⁵⁷ A lender now has sixty days in which to notify a borrower of error in disclosures and make necessary changes without being penalized.⁵⁸ Additionally, the defense of bona fide error has been expanded to include calculation, clerical, and computer errors.⁵⁹

By limiting civil liability for penalties to significant violations, Congress hoped to reduce the number of TIL suits brought on purely technical violations.⁶⁰ Consumer groups questioned the logic of requiring disclo-

51. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 11, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 887. If an administrative ruling comes out less than six months before October 1, the effective date becomes October 1 of the following year. This provision does not preclude creditors from complying with new requirements prior to the effective date. *Id.* at 11, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 887.

52. See 15 U.S.C. § 1640(a) (1976). Borrowers may recover actual damages, punitive damages, and attorney's fees. *Id.*

53. See *id.* § 1635(b). When a security interest is taken on the borrower's residence, other than a first mortgage, the borrower may rescind the transaction within three business days or upon receipt of required materials, whichever is later. See 12 C.F.R. § 226.2(kk) (1980).

54. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 15, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 890-91.

55. See 15 U.S.C. § 1635 (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 612(a)(6), 94 Stat. 168.

56. See 15 U.S.C. § 1640(a) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 615(b), 94 Stat. 168.

57. See 15 U.S.C. § 1640(a) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221 § 615(b), 94 Stat. 168.

58. See 15 U.S.C. § 1640(b) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 615(a), 94 Stat. 168.

59. *Id.* at § 1640(c). This defense does not include errors in legal judgment regarding the Act. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 18, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 893.

60. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 17, reprinted in [1980] U.S. CODE CONG.

tures such as total sale price or late payment charges while not requiring a penalty for failure to disclose.⁶¹ Such disclosures, however, were not considered sufficiently central to the credit transaction as to require a statutory penalty.⁶²

2. *Rescission.* If a transaction involves a security interest taken on a consumer's residence other than a first mortgage, the consumer may rescind the transaction within three days of receiving notice of his right to do so.⁶³ The new Act amends this provision to include other than traditional residences, such as a mobile home or trailer.⁶⁴ TILSRA also extends from ten days to twenty days the time period in which the lender must refund the consumer's money should the right to rescind be exercised.⁶⁵ The Act gives courts discretion to modify the provisions of this section in appropriate situations.⁶⁶

D. *Strengthening of Administrative Enforcement*

Administrative agencies such as the Federal Reserve Board and Federal Trade Commission are now authorized to order restitution when an inaccurate disclosure of the annual percentage rate or finance charge has been discovered.⁶⁷ The creditor will be required to make appropriate adjust-

& AD. NEWS 878, 892-93. The reader should also note that a consumer in default is not prohibited from bringing suit against the creditor for TIL violations. See 15 U.S.C. § 1640 (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 615(a), 94 Stat. 168.

61. See *Truth in Lending Simplification and Reform Act: Hearing on S. 108 Before the Senate Committee On Banking, Housing, and Urban Affairs*, 1st Sess. 14 (statement of Ellen Broadman, Consumers Union) (absence of penalty for failure to disclose certain items may eliminate those disclosures entirely).

62. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 17-18, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 892-93.

63. See 15 U.S.C. § 1635(a) (1976) (amended 1980).

64. See 15 U.S.C. § 1635(a) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 612(a)(1), 94 Stat. 168; S. REP. NO. 96-73, 96th Cong., 2d Sess. 14, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 890.

65. 15 U.S.C. § 1635(b), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 612(a)(3), 94 Stat. 168.

66. 15 U.S.C. § 1635(b), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 612(a)(4), 94 Stat. 168. An example of such situation would be where bankruptcy proceedings forbid return of property by the consumer. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 15, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 890.

67. See 15 U.S.C. § 1607 (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 608(a), 94 Stat. 168. The provision became effective March 31, 1980. See 15 U.S.C. § 1607 (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 608(b), 94 Stat. 168.

ments to the consumer's account reflecting the lower charge.⁶⁸ If such adjustment would have a significantly adverse effect on the creditor's solvency, the agency may require partial payment over a reasonable period of time.⁶⁹

II. TILSRA AND HOME MORTGAGES

To some extent, both TILSRA and Regulation Z recognize real estate as a separate class of credit and attempt to adjust disclosure requirements to the nature of the transaction and needs of the industry.

A. *Time of Disclosure and Tolerances for Variation*

The timeliness requirement for disclosure in mortgage transactions has been altered to conform with the RESPA timeliness requirement.⁷⁰ All federally related mortgage creditors must deliver good faith estimates of credit costs or place them in the mail within three days of application, whichever is earlier.⁷¹ Should the quoted annual percentage rate (APR) subsequently be rendered inaccurate, the new APR must be disclosed at the time of closing or consummation.⁷² An APR will be considered inaccurate at closing if it varies more than one-eighth of one percent from the earlier disclosure.⁷³ Regulation Z adjusts this tolerance to one-quarter of one percent for irregular transactions.⁷⁴

68. 15 U.S.C. § 1607 (1976), *as amended by* Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 608(a), 94 Stat. 168.

69. 15 U.S.C. § 1607 (1976), *as amended by* Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 608(e)(3), 94 Stat. 168.

70. *See* S. REP. NO. 96-368, 96th Cong., 2d Sess. 31, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 834, 864.

71. *See* 15 U.S.C. § 1638(b)(2) (1976), *as amended by* Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(b), 94 Stat. 168; 45 Fed. Reg. 80,648, 80,707 (1980) (to be codified in 12 C.F.R. § 226.19(a)). The Federal Reserve Board suggests adoption of the RESPA definition of "application," which is "written application on an application form or form normally used by the lender." *See* 45 Fed. Reg. 80,648, 80,684 (1980). The Board also proposes to exempt lenders from making disclosures in situations where the lender rejects application for credit within three days of receipt. *Id.* at 80,684.

72. *See* 15 U.S.C. § 1638(b)(2) (1976), *as amended by* Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(b), 94 Stat. 168; 45 Fed. Reg. 80,648, 80,708 (1980) (to be codified in 12 C.F.R. § 226.19(b)). While the Act indicates a new *statement* of disclosures is required at the time of consummation, revised Regulation Z limits this to changed terms only, rather than an entire new set of disclosures. *See* 45 Fed. Reg. 80,648, 80,684 (1980).

73. *See* 15 U.S.C. § 1606(c) (1976), *as amended by* Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 607(a), 94 Stat. 168; 45 Fed. Reg. 80,648, 80,708 (1980) (to be codified in 12 C.F.R. § 226.19(b)).

74. *See* 45 Fed. Reg. 80,648, 80,708 (1980) (to be codified in 12 C.F.R. § 226.19(b)).

The Federal Reserve Board is authorized to determine whether additional tolerances for numerical disclosures other than the APR are necessary to aid compliance.⁷⁶ Under proposed section 226.22(a) of revised Regulation Z, lenders are permitted an additional tolerance for the calculation and disclosure of the finance charge.⁷⁹ The provision will allow variation of the finance charge up to the dollar equivalent of one-eighth of one percent.⁷⁷ Minor irregularities in calculation of payments and schedules are also permitted under revised Regulation Z.⁷⁸

B. Oral Disclosures

Section 623 of TILSRA requires creditors to quote the annual percentage rate in response to oral inquiries.⁷⁹ The Federal Reserve Board is authorized, however, to provide exception when the creditor cannot determine the APR in advance.⁸⁰ Congress provided this exception in response to the expressed concern that the reluctance of mortgage lenders to answer telephone inquiries would frustrate the consumer's shopping process.⁸¹

C. Elimination of First Home Mortgage Disclosure Exemptions

TIL currently exempts creditors of first home mortgages from disclosing the total finance charge or total of payments.⁸² This exemption was based on the fear that prospective home buyers would refrain from

75. See 15 U.S.C. § 1631(c) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 611(d), 94 Stat. 168 (1980). The Senate Report on the Act specifically noted the area of mortgage transactions may be especially in need of additional tolerances. See S. REP. No. 96-73, 96th Cong., 2d Sess. 14, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 889.

76. See 45 Fed. Reg. 80,648, 80,708 (1980) (to be codified in 12 C.F.R. § 222.22(a)).

77. See *id.* at 80,708 (to be codified in 12 C.F.R. § 222.22(a)).

78. See *id.* at 80,708 (to be codified in 12 C.F.R. § 226.22(e)).

79. See 15 U.S.C. § 1665(a) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 623(a), 94 Stat. 168. This provision was enacted in response to the frequent failure of lenders to quote rates in terms of the APR. See S. REP. No. 96-73, 96th Cong., 2d Sess. 21, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 896. When the major part of the finance charge is simple interest, creditors may also quote the simple annual rate. See 15 U.S.C. § 1665(a) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 623(a), 94 Stat. 168.

80. See 15 U.S.C. § 1665(a) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 623(a), 94 Stat. 168. The present revision of Regulation Z does not address the issue of modification or exception in this area.

81. See *Truth in Lending Simplification and Reform Act: Hearing on S. 108 Before the Senate Committee on Banking, Housing, and Urban Affairs*, 1st Sess. 173-74 (letter to Sen. William Proxmire from Franklin Wright, Nat'l Assoc. of Mutual Sav. Banks).

82. See 15 U.S.C. § 1639(a)(4,6) (1976); 12 C.F.R. § 226.8 (b)(3,8) (1980).

purchasing when faced with the actual figures.⁸³ Unpersuaded by these arguments,⁸⁴ Congress eliminated the exemptions, noting that several states already required these disclosures with little ascertainable harm.⁸⁵ The total finance charge and total of payments, however, need not be disclosed in credit advertising.⁸⁶

D. Assumption Provisions

A new disclosure required by TILSRA for residential mortgage transactions is a statement of whether a subsequent purchaser or assignee of the buyer may assume the remaining debt obligation on its original terms.⁸⁷ Revised Regulation Z makes it clear that this provision does not require a statement of absolute assumability since many lenders' assumption policies are based on variable circumstances.⁸⁸ Once the creditor agrees in writing to accept another consumer as the primary obligor on the mortgage, new disclosures based on the existing obligation must be made to the subsequent consumer prior to assumption.⁸⁹ New disclosures are also

83. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 17, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 892; 1 J. FONSECA & P. TEACHOUT, HANDLING CONSUMER CREDIT CASES, 75-110, at 95 (1980) (figures showing total interest on mortgage greater than principal might cause consumer to "faint dead away").

84. See *Truth in Lending Simplification and Reform Act: Hearing on S. 108 Before the Senate Committee on Banking, Housing, and Urban Affairs*, 1st Sess. 86 (statement of David Smith, Jr., American Bankers Assoc.); *id.* at 179 (statement of Nat'l Assoc. of Realtors); *id.* 225 (letter to Sen. Jake Garn from Vondal S. Gravlee, Nat'l Assoc. of Home Builders).

85. See S. REP. NO. 96-73, 96th Cong., 2d Sess. 17, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 892.

86. See *id.* at 20, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 895. Congress expressly forbade the Federal Reserve Board to require these disclosures in credit advertising for closed-end loans. *Id.* at 20, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 878, 895. Builders were concerned about the unfairness of such requirement because those builders not offering credit in their advertisements would only need to show actual cash price. Builders who did offer credit, however, would have to show the total amount of payments over the life of the mortgage, thus showing an "unrealistic difference" between the cost of the two houses. See *Truth in Lending Simplification and Reform Act: Hearing on S. 108 Before the Senate Committee on Banking, Housing, and Urban Affairs*, 1st Sess. 226 (1979) (letter to Sen. Jake Garn from Vondal S. Gravlee, Nat'l Assoc. of Home Builders).

87. See 15 U.S.C. § 1638(a)(13) (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, § 614(a)(13), 94 Stat. 168; 45 Fed. Reg. 80,648, 80,707 (1980) (to be codified in 12 C.F.R. § 226.18(q)).

88. See 45 Fed. Reg. 80,648, 80,684 (1980). Lenders commenting on this provision in the May proposal of Regulation Z were concerned the language would commit them to permit assumption, regardless of unforeseeable circumstances. *Id.* at 80,684. Conditions necessary to permit assumption might be one example of an item explained elsewhere within the contract. See *id.* at 80,707 (to be codified in 12 C.F.R. 226.18(p)).

89. See *id.* at 80,648, 80,708 (to be codified in 12 C.F.R. § 226.20(b)). The Board notes

required when the entire transaction is refinanced by the same consumer.⁹⁰

IV. Conclusion

The simple concept of disclosure has proven to be complex in its application to the field of consumer credit transactions. As a newly developing area of law, TIL legislation continues to be reshaped and adjusted to effect its purpose, as it takes into account the practical perspectives of consumer and creditor. The changes specifically applicable to home mortgage transactions, particularly the timeliness requirement, appropriately recognize the size and importance of this type of consumer purchase by providing the consumer greater opportunity to peruse more cognizant credit terms.

that a lender's approval of creditworthiness of a potential assignee does not in itself constitute an assumption. There must be express written agreement to accept another person as obligor. *See id.* at 80,685.

90. *See id.* at 80,708 (to be codified in 12 C.F.R. § 226.20(a)). This provision requires new disclosures only when the existing obligation is satisfied and is replaced by a new one. The Board notes the transaction must be a "new" one since the Act was not meant to address events subsequent to consummation. *See id.* at 80,708, 80,685.