Can Cost-Benefit Analysis Help Consumer Protection Laws? Or at Least Benefit Analysis?

Jeff Sovern*

Cost-benefit analysis is often troubling to consumer advocates. But this Article argues that in some circumstances it may help consumers. The Article gives several examples of supposed consumer protections that have protected consumers poorly, if at all. It also argues that before adopting consumer protections, lawmakers should first attempt to determine whether the protections will work. The Article suggests that because lawmakers are unlikely to adopt multiple solutions to the same problem, one cost of ineffective consumer protections is a kind of opportunity cost, in that ineffective consumer protections might appear to make adoption of effective ones unnecessary. Ironically, such an opportunity cost is unlikely to be taken account of in cost-benefit analysis. Among the protections that especially risk failing to benefit consumers are laws that require consumers to perform certain tasks, such as disclosure laws that presuppose consumers will pay attention to and act on the disclosures; if consumers instead generally ignore the disclosures, the consumer protection will be largely illusory. Accordingly, before adopting measures that depend on consumers to do something, lawmakers should try to verify that consumers would in fact undertake those actions. The Article also makes some suggestions for ascertaining whether consumer protections will work (i.e., benefit consumers) and concludes with a brief critique of the proposed Independent Agency Regulatory Analysis Act.

---

* Professor of Law, St. John's University School of Law. The author thanks Dee Pridgen, Eric Levine, Andrew Lipkowitz, Rebecca McBee, Preston J. Postlethwaite, the organizers (especially Adam Sechooler) of the *UC Irvine Law Review* symposium titled "The Costs and Benefits of Cost-Benefit Analysis" at which I presented a version of this Article, and Professor Katherine Porter for the invitation to do so.

INTRODUCTION

We are all consumers and so would benefit from well-crafted consumer protections. On the other hand, consumer protections that impose costs disproportionate to their benefits or that fail to produce benefits seem undesirable. Accordingly, some advocate using cost-benefit analysis to analyze proposed consumer protections. For example, the proposed Independent Agency Regulatory Analysis Act would require certain independent consumer protection agencies to employ cost-benefit analysis and to have the Office of Information and Regulatory Affairs review those analyses.

For several reasons, consumer advocates often oppose cost-benefit analysis.[1] First, the benefits of consumer protections are frequently difficult to quantify. How, for example, can the benefits of privacy rules that prevent people from knowing your purchasing practices be measured?[2] This difficulty makes it hard to argue that the benefits of privacy protections exceed the costs of those protections. Second, cost-benefit analysis often delays the adoption of rules, and during that interval, consumers lack needed protections.[3] Third, requirements that rules pass muster under cost-benefit analysis can lead to litigation challenging the

---

1. Cost-benefit analysis has been defined as the "systematic identification of all of the costs and benefits associated with a forthcoming regulation, including nonquantitative and indirect costs and benefits, and how those costs and benefits are distributed across different groups in society." CURTIS W. COPELAND, COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS 1 (2011). Commentators have called it "the official creed of the executive branch." *See generally* Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

2. *See* discussion *infra* Part I.D and notes 102–103 and accompanying text.

3. *See, e.g.*, Editorial, *Stuck in Purgatory*, N.Y. TIMES, July 1, 2013, at A22 (noting that seventy-two draft rules had been under review for longer than the ninety days specified by executive order; thirty-eight had been under consideration for more than a year; and three had been languishing since 2010); Letter from Rachel Weintraub et al., Consumer Fed'n of Am. to Sen. Joseph Lieberman & Sen. Susan Collins (Nov. 2, 2012), *available at* http://www.consumerfed.org/news/610; Ben Peck, *Impact of the Independent Regulatory Analysis Act, S. 3468: Further Delaying Needed Safeguards for Our Economy*, DEMOS (Sept. 12, 2012), http://www.demos.org/publication/impact-independent-regulatory-analysis-act-s-3468-further-delaying-needed-safeguards-our.

rules, which can in turn lead to additional delay and even invalidation of the rules.[4] Indeed, consumer advocates may view cost-benefit analysis as a pretext used by those who oppose consumer protection and wish their opposition to sound more neutral.[5]

To the extent that cost-benefit analysis requires matching costs against benefits, I share this skepticism. But to the extent that cost-benefit analysis requires those proposing consumer protections to try to demonstrate that those protections will benefit consumers, even if those benefits cannot be quantified precisely, it may have value. That is because lawmakers have sometimes adopted consumer protections that have not conferred the intended benefits upon consumers.[6]

Even if purported consumer protections do not benefit consumers, some

---

4. *See* Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011); *see also* Silla Brush, *U.S. Regulators 'Paralyzed' by Cost-Benefit Suits, Chilton Says*, BLOOMBERG (Mar. 8, 2012), http://www.bloomberg.com/news/2012-03-08/u-s-regulators-paralyzed-by-cost-benefit-suits-chilton-says.html ("'Some regulators live in constant fear and are virtually paralyzed by the threat' that they will face 'spuriously' filed suits alleging that the costs and benefits of their rules weren't adequately considered, [Commodity Futures Trading Commissioner Bart] Chilton said . . . ."). *See generally* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289 (2013). Critics of the Independent Regulatory Agency Analysis Act, *see* Peck, *supra* note 3 and accompanying text, also charged that the bill would undermine the independence of regulatory agencies by subjecting their decisions to cost-benefit review by the Office of Information and Regulatory Affairs, *see, e.g.*, Letter from Ams. for Fin. Reform to Senator (Sept. 7, 2012), *available at* http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2012/09/AFR-Oppose-S.-3468-9-6-12.pdf; Letter from Rachel Weintraub et al., *supra* note 3; Noah H. Sachs, *Don't Undercut Consumer Financial Protection Agencies' Independence . . .*, RICHMOND TIMES-DISPATCH, Nov. 26, 2012, http://www.timesdispatch.com/opinion/their-opinion/sachs-don-t-undercut-consumer-financial-protection-agencies-independence/article_bee1a54a-3759-11e2-afe3-001a4bcf6878.html.

5. *See* Editorial, *Senate Confronts a Sleazy Stealth Attack on Financial Regulation*, ST. LOUIS POST-DISPATCH, Nov. 13, 2012, *available at* http://www.stltoday.com/news/opinion/columns/the-platform/editorial-senate-confronts-a-sleazy-stealth-attack-on-financial-regulation/article_83231246-fc2a-5419-8387-2148d0c6161c.html (quoting Lisa Donner, executive director of Americans for Financial Reform, as calling the bill subjecting regulatory agency rules to cost-benefit analysis "a sideways attack on Dodd-Frank"); Letter from Ams. for Fin. Reform, *supra* note 4 ("[T]his legislation would give Wall Street lobbyists another powerful set of tools to delay and derail the implementation of financial safeguards that are needed to protect our economy."); Letter from Rachel Weintraub et al., *supra* note 3 (asserting that the cost-benefit analysis proposal would give "deep-pocketed opponents of . . . reforms yet another way to derail them"). Advocates of cost-benefit analysis are aware of this criticism. *See* Hahn & Sunstein, *supra* note 1, at 12 ("According to some skeptics, the antonym of cost-benefit analysis is not the unguided stab in the dark, but regulatory protection itself."). Such a pretext may be behind a letter by Representatives Randy Neugebauer and Shelley Moore Capito to Consumer Financial Protection Bureau (CFPB) Director Richard Cordray, dated March 29, 2012, requesting "assurance[s] that the CFPB will conduct rigorous, transparent cost-benefit analysis whenever it drafts a new rule." Letter from Rep. Randy Neugebauer & Rep. Shelley Moore Capito to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (Mar. 29, 2012), *available at* http://www.consumerfinancelawblog.com/wp-content/uploads/sites/157/2012/04/Cordray-letter.pdf. Both voted against the Dodd-Frank Act, which created the CFPB. *See* OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, FINAL VOTE RESULTS FOR ROLL CALL 413, WALL STREET REFORM AND CONSUMER PROTECTION ACT OF 2009 (June 30, 2010), *available at* http://clerk.house.gov/evs/2010/roll413.xml.

6. See *infra* Part I.

may see such protections as not worth arguing about if their costs are low. But that overlooks something in the nature of an opportunity cost in ineffective consumer protections. If consumer protections are ineffective, then the problems they are intended to solve remain. If policymakers believe the problems are solved by their chosen reform, then they may eschew other more effective ways of addressing the problems. Consequently, ineffective consumer protections not only impose costs, they also reduce the likelihood that the underlying problem will be cured another way. An irony is that this cost is unlikely to be taken into account in performing a cost-benefit analysis of consumer protections, even though it may be more significant than the costs that are considered.[7]

Why would consumer protections fail? One reason is that lawmakers sometimes adopt consumer protection laws without determining whether consumers will actually use them. While some consumer protection laws help consumers even if consumers are unaware of them,[8] others depend on consumer actions for their effectiveness, and if consumers do not take these actions, then the protections do not work. This is often true of disclosures, which typically require consumers to read and act on the information disclosed.[9] Accordingly, to the extent that cost-benefit analysis examines whether consumers will actually use consumer protection rules, cost-benefit analysis may improve consumer protection. Otherwise, consumer protection regulation may be no more than the

7. Richard Craswell refers to something analogous in the disclosure situation when he argues that mandated disclosures risk what he terms an "interference cost" in that they may crowd out "other information that would itself be useful to consumers." Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 348 (2013).

8. Prohibitions on conduct, such as requirements that debt collectors refrain from lying to consumers, 15 U.S.C. § 1692e (2012), or that businesses not employ bait and switch tactics, N.Y. GEN. BUS. LAW § 396-o (McKinney 2012), do not require consumer participation to be effective.

9. *See, e.g.*, *infra* notes 16, 71 and accompanying text. Not all disclosures suffer from this disability. For example, some localities, including Los Angeles, COUNTY OF L.A., CAL., TITLE 8 CONSUMER PROTECTION & BUSINESS REGULATION § 8.04.225 (2014), *available at* https://library.municode.com/index.aspx?clientId=16274; New York, N.Y.C., N.Y., HEALTH CODE art. 81 § 81.51 (2014), *available at* http://www.nyc.gov/html/doh/html/about/health-code.shtml; San Diego, SAN DIEGO, CAL., COUNTY CODE OF ADMINISTRATIVE ORDINANCES § 61.107 (2014), *available at* http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sandiegoco_ca_mc; and the State of South Carolina, S.C. CODE ANN. REGS. 61-25(L) (West, Westlaw through State Reg. Vol. 38, Issue 9, eff. Sept. 26, 2014), now require restaurants to post health department grades at their entrances. Some studies have shown that even consumers who ignore the disclosures have been aided by them because restaurateurs, not wishing poor grades on their doors, have improved restaurant hygiene, resulting in lower hospitalization rates for food-borne illness. *See, e.g.*, L.A. CNTY. DEP'T OF PUB. HEALTH, 10-YEAR REVIEW OF RESTAURANT AND FOOD FACILITY GRADING PROGRAM 4 (2008), *available at* http://file.lacounty.gov/bc/q1_2008/cms1_082885.pdf; Michael M. Grynbaum, *In Reprieve for Restaurant Industry, New York Proposes Changes to Grading System*, N.Y. TIMES, Mar. 22, 2014, at A15 (reporting a fourteen percent decline in salmonella cases since adoption of restaurant grading in New York City). *But see* Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 643–46 (2012) (reporting that New York City's restaurant grades did not improve consumer health, as measured by calls to 311 and Google searches for food poisoning and restaurant sanitation complaints).

"stab in the dark" that cost-benefit analysis advocates claim cost-benefit analysis avoids.[10]

Part I of this Article gives four examples of consumer protection laws that consumers seem not to use sufficiently to accomplish the intended goals. Part II mentions a few ideas for increasing the likelihood that policymakers adopt rules that confer benefits upon consumers, while Part III offers comments on the proposed Independent Agency Regulatory Analysis Act, which would subject decisions by independent administrative agencies, including the Federal Trade Commission, the Consumer Product Safety Commission, and the Consumer Financial Protection Bureau (the Bureau or CFPB)—all of which regulate consumer transactions—to cost-benefit analysis review by the Office of Information and Regulatory Affairs.

I. CONSUMER PROTECTIONS THAT CONSUMERS DID NOT USE SUFFICIENTLY TO PROTECT CONSUMERS

A. Truth in Lending Act Mortgage Disclosures

While many factors contributed to the Great Recession, one of its chief causes was that millions of consumers took out mortgages on which they later defaulted.[11] Many of those mortgages have been foreclosed upon or may yet be.[12] Many of the defaulting consumers later claimed that they did not know what their payment obligations would be.[13] Yet all those borrowers undoubtedly received the

10. *See* Hahn & Sunstein, *supra* note 1, at 8.

11. As of January 2011, nearly four million homes had been foreclosed upon and millions more consumers were delinquent on their mortgage payments. See FIN. CRISIS INQUIRY COMM'N, *Conclusions of the Financial Crisis Inquiry Comm'n*, *in* THE FINANCIAL CRISIS INQUIRY REPORT, at xv (2011). According to the QUARTERLY REVIEW issued by the Federal Reserve Bank of New York, from the first quarter of 2011 through the first quarter of 2013, an additional 2,388,000 foreclosures occurred. *See, e.g.*, Rajashri Chakrabarti et al., *Household Debt and Saving During the 2007 Recession*, 482 FED. RES. BANK N.Y. 1, 6 (2011); Andrew Haughwout et al., *The Supply Side of the Housing Boom and Bust of the 2000s*, 556 FED. RES. BANK N.Y. 1, 10 (2012); *see also* Mark Adelson, *The Deeper Causes of the Financial Crisis: Mortgages Alone Cannot Explain It*, J. PORTFOLIO MGMT., Spring 2013, at 16, 22 ("Together with the four millions loans that went through foreclosure during the crisis, a sum of between 8 million and 12 million mortgages, or between 15 percent and 25 percent of the original 48.7 million [mortgage] loans [outstanding], will default or have already defaulted.").

12. *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 11, at xv–xxviii.

13. *See, e.g.*, ILL. DEP'T OF FIN. & PROF'L REGULATION, FINDINGS FROM THE HB 4050 PREDATORY LENDING DATABASE PILOT PROGRAM 3–4 (2007), *available at* http://nlihc.org/sites/default/files/SIRR-IL-2007.pdf (reporting that consumers with adjustable-rate loans believed they had secured fixed-rate loans); Rick Brundrett, *How Mounting Loans Devastated 87-Year-Old*, STATE (SC), Feb. 24, 2002, *available at* NewsBank, Rec. 0202240092 (last visited July 20, 2014); Bob Herbert, Op-Ed., *A Swarm of Swindlers*, N.Y. TIMES, Nov. 20, 2007, at A23 ("[P]redatory 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."); Bob Herbert, Editorial, *Lost in a Flood of Debt*, N.Y. TIMES, Nov. 24, 2007, at A17 ("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

disclosure statements required under the Truth in Lending Act (TILA).[14] While TILA has been said to have a number of purposes, its principal goal was to provide for "meaningful" disclosure of loan terms to consumers.[15] How can it be that this consumer protection device so failed consumers?

The answer seems to have two parts. The first part can be seen in the results of a 2009 survey of mortgage brokers about how consumers used the TILA mortgage disclosures.[16] What the brokers said raises serious doubts about how much consumers use the TILA disclosures. The survey asked specifically about the final TILA disclosures, which were provided no later than at the closing of the loan during the years leading to the Great Recession.[17] The final TILA disclosures

---

again—decent people enticed, sometimes fraudulently, into loans they never understood and couldn't afford."); Gretchen Morgenson, *Looking for the Lenders' Little Helpers*, N.Y. TIMES, July 12, 2009, at BU1 (reporting that borrowers allege that a lender promised fixed-rate loan when loan was actually adjustable, something borrowers did not discover until two years later; initial monthly payments consumed forty-five percent of borrowers' income and later rose); Carolyn Said, *Living the American Nightmare*, S.F. CHRON., July 29, 2007, at A1; Carolyn Said, *Mortgage Meltdown: Plenty of Blame for Lending Mess*, S.F. CHRON., Feb. 3, 2008, at C1 ("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."); Brian Bucks & Karen Pence, *Do Homeowners Know Their House Values and Mortgage Terms?* 2 (FEDS, Working Paper No. 2006-03, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899152 ("[A] sizeable number of adjustable-rate borrowers report that they do not know the terms of their contracts."); Statement of Karen Brown, Home Def. Program, Atl. Legal Aid Soc'y, Public Hearing Re: Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice 201–02 (July 11, 2006), *available at* http://www.federalreserve.gov/events/publichearings/hoepa/2006/20060711/transcript.pdf (describing how a borrower with credit score considered prime was given adjustable-rate mortgage she thought was fixed and payments increased to $215 while her monthly income was $541); Lisa Prevost, *The Fallout of Subprime Loans*, N.Y. TIMES, July 15, 2007, http://www.nytimes.com/2007/07/15/realestate/15wczo.html?ex=1342152000&en=51502d66d5337e7d&ei=5088 ("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.").

14. Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (2012).

15. *See id.* § 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 some three dozen such disclosure goals, see Thomas A. Durkin & Gregory Elliehausen, *Disclosure as a Consumer Protection*, *in* THE IMPACT OF PUBLIC POLICY ON CONSUMER CREDIT 109, 114 (Thomas A. Durkin & Michael E. Staten eds., 2002).

16. The survey is discussed more fully in Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 779–86 (2010), on which much of this discussion of TILA is based.

17. At the time the survey was conducted, TILA, as implemented by Regulation Z, mandated that the disclosures be provided no later than at consummation (i.e., the point at which the consumer was contractually obliged on the loan). *See* 12 C.F.R. §§ 226.2(a)(13), 226.17(b) (2014); Truth in Lending, 73 Fed. Reg. 44,522, 44,591 (July 30, 2008) (to be codified at 12 C.F.R. pt. 226). Under the

are the only disclosures that are required to contain the actual loan terms.[18] According to the responding brokers—who collectively conducted at least 58,125 closings—borrowers almost never withdrew from a loan after reading the final disclosures at the closing and never used the final disclosures for comparison shopping. Thus, the TILA disclosures failed to accomplish one of their principal goals: facilitation of comparison shopping.[19]

But there is more. Borrowers also spent very little time with the disclosures.[20] Just over half of the brokers reported that less than ten percent of their borrowers spent more than a minute with the disclosures.[21] An additional group stated that between ten and twenty-nine percent of their customers devoted more than a minute to the disclosures.[22] So more than two-thirds of the brokers reported that less than thirty percent of their borrowers spent more than a minute with the disclosures.[23]

To make matters worse, when consumers had questions about the TILA disclosure forms, those questions tended not to deal with whether consumers were obtaining the best possible deal, but rather, matters that those familiar with TILA disclosures would be unlikely to ask about. Many brokers reported that borrowers often asked at the closing why the TILA Annual Percentage Rate (APR) disclosure was higher than the interest rate they had been led to expect.[24] Borrowers also expressed surprise about the size of the "Total of Payments"—that is, the amount consumers could expect to pay over the life of the loan.[25] Consumers who spend time on those issues and spend a minute—or less—on the disclosures are probably not exploring whether they could have obtained better terms elsewhere.

If consumers choose not to use the TILA disclosures, those disclosures can't fulfill the lawmakers' goal of helping consumers comparison shop for loan terms.[26] The result is that TILA provides only the illusion of consumer protection.

Mortgage Disclosure Improvement Act, which became effective July 30, 2009, borrowers are to receive the final disclosures at least three days before the closing. Mortgage Disclosure Improvement Act of 2008, Pub. L. No. 110-289, 122 Stat. 2855.

18. *See* Truth in Lending, 73 Fed. Reg. at 44,594.

19. *See supra* note 15 and accompanying text.

20. *See* BAREFOOT, MARRINAN & ASSOC., INC. & ANJAN V. THAKOR, COMMON GROUND: INCREASING CONSUMER BENEFITS AND REDUCING REGULATORY COSTS IN BANKING 6, 25 (1993) ("Our research indicates that [bank] disclosures are not even read by large numbers of customers, and are understood by very few. . . . [B]ased upon observations from the bankers who furnish [bank] disclosures, most [consumers] do not even attempt to read them, but rather, drop them in the bank's recycling bin on the way out the door.").

21. *See* Sovern, *supra* note 16, at 783.

22. *Id.* at 784.

23. *Id.*

24. *See id.* at 785.

25. *See id.*

26. *See* George R. Milne et al., *A Longitudinal Assessment of Online Privacy Notice Readability*, 25 J. PUB. POL'Y & MARKETING 238, 238 (2006) ("For disclosures to be useful . . . consumers need to be motivated to read the disclosure, and they must have the ability to comprehend its content.").

The second part of the answer to how the TILA disclosure statement failed to help borrowers understand their borrowing costs lies in problems with the disclosures themselves. For many borrowers, the disclosures were unintelligible; for those with adjustable rate mortgages—which made up about eighty percent of the subprime loans that led to the Great Recession—the disclosures were affirmatively misleading.[27] Disclosures for adjustable rate loans suffer from an inherent problem. TILA obliges mortgage originators to disclose the monthly payments and interest rates for such loans,[28] but because those and other mandated disclosures depend on future events, they cannot be known in advance. Unfortunately, the Federal Reserve, which was charged until 2011 with interpreting TILA, made a poor decision about how to deal with this problem. The Federal Reserve did not instruct originators to note in the TILA disclosure forms that the numbers could not be predicted with certainty, or to include ceilings for future monthly payments. Instead, the Federal Reserve directed lenders preparing disclosure statements to state disclosures as if interest rates would remain what they were on the date the loan was issued for the entire life of the loan—often thirty years.[29] Put another way, a system devised to cope with interest rates' fluctuations would convey to consumers precisely the opposite: that interest rates would remain unchanged for the life of the loan. If interest rates rose, as could be expected at some time during a thirty-year period, the consumer could be obliged to pay considerably more than the disclosure statement indicated.

Because consumers do not benefit from a disclosure statement that reports inaccurately what they will owe or the interest rate they will pay, and that also fails to note that the amounts so reported may be incorrect, the rule requiring such a

27. *See* Christopher Mayer et al., *The Rise in Mortgage Defaults*, J. ECON. PERSP., Winter 2009, at 27, 30 ("The overwhelming majority—over 75 percent—of subprime mortgages that originated over the 2003–2007 period were so-called 'short-term hybrids' . . . ."); Statement of Hilary Shelton, On Preserving the American Dream: Predatory Lending Practices and Home Foreclosures: Hearing Before the Senate Committee on Banking, Housing and Urban Affairs (Feb. 7, 2007), *available at* http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9cc88a69-7757-4988-ae9b-ecad5f7bae99 ("[O]ver 80% of home loans made in the subprime market today are adjustable rate mortgage (ARMs) loans and the so-called '2/28' or '3/27' mortgages are the dominant product."); Mara Lee, *Subprime Mortgages: A Primer*, NPR (Mar. 23, 2007), http://www.npr.org/templates/story/story.php?storyId=9085408 ("The vast majority [of subprime loans]—about 80 percent—have adjustable-rate mortgages, or ARMs, says Susan Wachter, a professor at the University of Pennsylvania's Wharton School who specializes in real estate."). 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." Truth in Lending, 73 Fed. Reg. 44,522, 44,540 (July 30, 2008) (to be codified at 12 C.F.R. pt. 226).

28. *See* 12 C.F.R. § 1026.18 (2014).

29. The TILA commentary, *see* 12 C.F.R. pt. 226. supp. I, subpt. A(8) (2012), states:

> *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.

disclosure would surely have flunked a cost-benefit analysis.[30] Accordingly, an attempt to perform cost-benefit analysis, or even assess only the form's benefits, might have led to a different rule.

Even consumers who received fixed-rate mortgages may have been confused by the forms. In 2007, the Federal Trade Commission (FTC) staff displayed the disclosure forms to consumers who had recently obtained mortgages.[31] The FTC staff reported that the disclosures failed to convey key mortgage costs to many consumers and that about one-fifth of the respondents, while looking at the current disclosure forms, "could not correctly identify the APR of the loan, the amount of cash due at closing, or the monthly payment."[32]

But there is reason for hope because the rules have changed since the advent of the Great Recession. First, Congress enacted the Mortgage Disclosure Improvement Act, which took effect July 30, 2009, and made two relevant changes in mortgage disclosure rules.[33] One of these changes advanced the time at which consumers receive the final terms of their mortgages from the closing to at least three days before the closing.[34] The other change directed the Federal Reserve to issue a regulation that would require the disclosures to state the highest monthly payment the borrower might owe during the life of the loan.[35] The resulting regulation directs mortgage originators to disclose the largest monthly payment the consumer might owe during both the first five years of the loan and the entire term of the loan, thus curing the problem with the earlier misleading disclosures about adjustable rate loans—if consumers heed the new disclosures.[36]

Congress acted again in 2010 when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) and created the CFPB.[37] The Dodd-Frank Act directed the Bureau to combine the TILA disclosures with another set of disclosures mandated by the Real Estate Settlement Procedures Act (RESPA),[38] and in 2013, the Bureau promulgated a rule to do so,

---

30. Another irony is that the cost of this particular rule would have been trivial. But because the benefits were negative, even zero cost would have exceeded the benefits of the federal government's interpretation.

31. *See* JAMES M. LACKO & JANIS K. PAPPALARDO, FED. TRADE COMM'N, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE MORTGAGE DISCLOSURE FORMS, at ES-6, ES-11–12 (2007), *available at* http://www.ftc.gov/sites/default/files/documents/reports/improving-consumer-mortgage-disclosures-empirical-assessment-current-and-prototype-disclosure-forms/p025505mortgagedisclosureexecutivesummary.pdf.

32. *Id.* at ES-6–7.

33. Mortgage Disclosure Improvement Act of 2008, Pub. L. No. 110-289, 122 Stat. 2855.

34. *See id.*; 12 C.F.R. § 1026.19(a)(2)(ii) (2014).

35. Mortgage Disclosure Improvement Act § 2502(a)(6).

36. *See* 12 C.F.R. § 1026.18(s)(2).

37. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of the U.S. Code).

38. *See id.*

to take effect in 2015.[39] Before doing so, the Bureau retained a contractor to conduct ten rounds of qualitative testing on various versions of the disclosures to see if consumers could understand them,[40] and the contractor also performed quantitative tests.[41] The Bureau also solicited and received more than 27,000 comments during the testing phase,[42] and received nearly 3000 more comments after proposing the rule.[43]

The stated purposes of the consumer testing were to determine if consumers could understand the disclosures, compare disclosures for two or more loans, and make informed decisions.[44] This increased attention to whether consumers understand the disclosures is laudable. But in all this testing, the Bureau did not verify that consumers would actually use the disclosures. Those who want to learn the terms of their loans from the disclosure forms should have an easier time doing so under the CFPB's forms, but the forms will not benefit consumers if consumers persist in ignoring them. And if no one uses the forms, it is hard to see how they provide much consumer protection—or how they will prevent defaults and foreclosures in the future.

In the absence of a test of whether consumers will use the forms, all we have is conjecture about what, if anything, consumers will do with them. One reason borrowers might use them is that the forms are more visually appealing than their predecessors. Weighing against that strength, however, is the forms' length. The estimate forms, for example, are three pages long and contain dozens of disclosures.[45] The final disclosures, which again are the only forms that contain the actual loan terms (unless the consumer locks in a rate), run five pages.[46] That

---

39. *See* Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79,730 (Dec. 31, 2013) (to be codified at 12 C.F.R. pts. 1024, 1026) [hereinafter Integrated Mortgage Disclosures].

40. *See* KLEIMANN COMMC'N GRP., INC., KNOW BEFORE YOU OWE: EVOLUTION OF THE INTEGRATED TILA-RESPA DISCLOSURES 9–10, 37, (2012), *available at* http://files.consumerfinance.gov/f/201207_cfpb_report_tila-respa-testing.pdf.

41. *See* KLEIMANN COMMC'N GRP., INC., KNOW BEFORE YOU OWE: QUANTITATIVE STUDY OF THE CURRENT AND INTEGRATED TILA-RESPA DISCLOSURES (2013).

42. Integrated Mortgage Disclosures, *supra* note 39.

43. *See Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and Truth In Lending Act (Regulation Z)*, REGULATIONS.GOV, http://www.regulations.gov/#!docketDetail;D=CFPB-2012-0028 (last visited July 20, 2014) (2982 comments received).

44. *See* KLEIMANN COMMC'N GRP., INC., *supra* note 40, at 4–5:

> [T]he CFPB's Mortgage Disclosure Project had three objectives:
>
> [1] Comprehension. The disclosures should enable consumers to understand the basic terms of a loan and its costs, both immediate and over time.
>
> [2] Comparison. The disclosures should enable consumers to compare one Loan Estimate to another and identify the differences. The disclosures should also enable consumers to compare the Loan Estimate to the Closing Disclosure to identify differences between the two and understand or ask about the reasons for those differences.
>
> [3] Choice. Both comprehension and comparison should enable consumers to make informed decisions. For the Loan Estimate, consumers should be able to decide on the best loan for their personal situation. For the Closing Disclosure, they should be able to decide whether to close on the loan after reviewing the final terms and costs.

45. *See* Integrated Mortgage Disclosures, *supra* note 39.

46. *See id.*

is a lot of information for consumers to take in, even as to one loan, but consumers who use the forms to comparison shop must compare an equal number of disclosures for each loan they consider. If consumers continue to give the forms only a minute or less of their attention, it is not clear how much of that information they will absorb. Ironically, TILA's original version was seen as containing so many disclosures that consumers suffered from information overload and disregarded the disclosures.[47] And yet, TILA at that time required only thirty-six disclosures, far fewer than the CFPB's forms.[48] Congress responded to that perceived excess by enacting the Truth in Lending Simplification and Reform Act to reduce the number of disclosures.[49] The Bureau's rule risks repeating and even exacerbating Congress's original error (though to be fair, it is hard to see how the TILA and RESPA disclosures can be combined without risking information overload). Without testing, we simply cannot tell whether consumers would use the disclosure forms, and so we cannot tell whether they will benefit consumers.

Nor do we know if the change in the disclosure schedule has affected how consumers use the forms. Though borrowers now must receive the final disclosures at least three days before closing,[50] it remains unclear whether consumers comparison shop at that point or are willing to withdraw from loans carrying unsatisfactory terms. Perhaps some borrowers upon receiving the disclosures in the days before closing will discover that the terms are not to their liking and will back out of the loan. Homeowners refinancing an existing mortgage who have little to lose by delaying the refinancing might so act. But it is harder to imagine a consumer facing the loss of his or her dream house and possibly also a hefty deposit walking away from a loan only days before the closing, especially since many consumers are undoubtedly psychologically committed at that late stage.[51] Yet lenders are not required to provide the final loan terms any earlier than three days before closing.

The new rules seem to be an improvement, but if consumers persist in not taking advantage of the disclosures, the result could again be illusory consumer

47. *See* S. REP. No. 96-3, at 2–3 (1979), *available at* 1979 WL 10376 ("There is considerable evidence, for example, that disclosure forms given consumers are too lengthy and difficult to understand . . . . [T]he Consumer Affairs Subcommittee heard testimony from a leading psychologist who has studied the problem of 'information overload.' The Subcommittee learned that judging from consumer tests in other areas, the typical disclosure statement utilized today by creditors is not an effective communication device. Most disclosure statements are lengthy . . . . The Committee has adopted . . . suggestions to simplify the typical Truth in Lending disclosure statement. The number of disclosures given the consumer would be reduced . . . .").

48. *See* 12 C.F.R. § 226.8 (2014); Truth in Lending, 34 Fed. Reg. 2002 (Feb. 11, 1969) (to be codified at 12 C.F.R. pt. 226).

49. Truth in Lending Simplification and Reform Act, Pub. L. 96-221, tit. VI, 94 Stat. 168 (1980) (codified as amended in scattered sections of 12 & 15 U.S.C.).

50. *See* Mortgage Disclosure Improvement Act of 2008, Pub. L. No. 110-289, 122 Stat. 2855.

51. *See* Baher Azmy, *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").

protection, and the cost could be the failure to adopt more effective consumer protection measures. Surely it would be preferable to discover if consumers will use the new forms through consumer testing rather than through another Great Recession.[52] If such testing reveals that consumers give the forms too little attention for them to be effective, the Bureau should adopt something else or recommend to Congress that it enact better consumer protections.[53]

B. Magnuson-Moss Warranty Act of 1975

Among Congress's goals when it enacted the Magnuson-Moss Warranty Act of 1975[54] was "to make warranties on consumer products more readily understood."[55] Just as TILA sought to improve the functioning of the consumer loan market, Magnuson-Moss attempted to improve the functioning of the consumer warranty market.[56] One way Congress sought to accomplish that goal was by requiring providers of consumer goods carrying written warranties to label their warranties either "full" or "limited."[57] Thus, consumers who wanted greater warranty protection could seek full warranties, while those unwilling to pay for the greater protection could settle for limited warranties.

But in fact, consumers seem largely unaware of the difference between full and limited warranties. For example, in one study, recent purchasers of new cars were asked whether their cars' warranties were full or limited.[58] Some forty-three percent replied that their cars had full warranties; in fact, none did.[59] And another survey of consumers "revealed widespread ignorance about the legal difference between full and limited warranties. . . . [R]espondents in the study were effectively unaware of the differences prescribed for full and limited warranties and their rights under the law."[60] To make matters worse, according to another

52. *See* BAREFOOT, MARRINAN & ASSOC. & THAKOR, *supra* note 20, at 51 ("In the banking disclosure rules, the whole point is to give customers information they can put to use. Accordingly, the core issue should be to determine what information is actually most useful to people. This is a question to which consumer research can make a great contribution . . . .").

53. I made some suggestions for alternative consumer protections in Sovern, *supra* note 16, at 783.

54. *See* Magnuson-Moss Warranty Act of 1975, 15 U.S.C. §§ 2301–12 (2012).

55. *See* H.R. REP. NO. 93-1107, at 20 (1974). The Committee Report also quoted a 1968 Report by the Task Force on Appliance Warranties and Service that "[t]here is substantial evidence that at the time of the sale the purchaser of a major appliance does not understand the nature and extent of the protection provided by the manufacturer's warranty or of the obligations under the warranty of the manufacturer or of the retailer." *Id.* at 27–28.

56. *See* 15 U.S.C. § 2302(a) (2012) (stating, "In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products . . . .").

57. *See id.*

58. *See* F. Kelly Shuptrine, *Warranty Coverage: How Important in Purchasing an Automobile?*, *in* MARKETING: FOUNDATIONS FOR A CHANGING WORLD 300, 301 (Brian T. Engelland & Denise T. Smart eds., 1995).

59. *See id.* at 304.

60. Robert E. Wilkes & James B. Wilcox, *Limited Versus Full Warranties: The Retail Perspective*, 57 J. RETAILING 65, 75–76 (1981). The study did find that "consumers react negatively to a product with

study, "the average consumer who purchases a product is not able to understand or comprehend the meaning of expressed warranties."[61]

If consumers don't know the difference between full and limited warranties, then they cannot value the different types of warranties correctly, and so they cannot make an informed decision about whether they are willing to pay more for the extra protection a full warranty provides. While the authors of the Magnuson-Moss Act undoubtedly had good intentions, they failed to give sufficient attention to whether consumers would use their warranty classification system. The result is that for nearly forty years consumer products have borne labels that consumers cannot accurately interpret and appear not to use. It is hard to find a benefit in that. And manufacturers seem to be aware that consumers ignore the rule, because the available evidence suggests few offer full warranties—which makes sense because if consumers don't know what full warranties are, they may not be willing to pay extra for them, and manufacturers may be reluctant to incur the extra costs of providing them.[62] In other words, the statute has failed in its goal of informing consumers and stimulating warranty competition. Once again, a consumer protection that depends upon consumers for its effectiveness has seemingly stumbled. In the meantime, Congress has not enacted an alternate system that might have enabled the warranty marketplace to function better.

---

a limited warranty even if they do not understand what the word 'limited' really means." *Id.* at 76. Whether that is still true is unclear.

61. F. Kelly Shuptrine & Ellen M. Moore, *Even After the Magnuson-Moss Act of 1975, Warranties Are Not Easy to Understand*, 14 J. CONSUMER AFF. 394, 403 (1980); *see also* Ellen M. Moore & F. Kelly Shuptrine, *Warranties: Continued Readability Problems After the 1975 Magnuson-Moss Warranty Act*, 27 J. CONSUMER AFF. 23, 29 (1993) ("All waranties [sic] examined in this study clearly would not be easy to read or understand by the 50 percent of the American adult population unable to read at an eighth-grade level."); Michael J. Wisdom, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117, 1144 (1979) ("[W]arranties are no easier to read than before passage of the Act.").

62. Little empirical evidence bears on how common full warranties are. A twenty-year-old study found less than one-third of the 105 warranties examined to be full. *See* Moore & Shuptrine, *supra* note 61, at 30. A few sources have noted that full warranties are less prevalent than limited warranties, *see What is a Full Warranty?*, WISEGEEK, http://www.wisegeek.com/what-is-a-full-warranty.htm (last visited Apr. 11, 2014) ("In general, limited warranties are more frequently offered by manufacturers than full warranties."); *What Is the Difference Between a Full Warranty and a Limited Warranty?*, FINDLAW, http://consumer.findlaw.com/consumer-transactions/difference-between-a-full-warranty-and-a-limited-warranty.html#sthash.KXodvN8S.dpuf (last visited Apr. 11, 2014) ("Limited warranties are substantially more common [than full warranties]."), but it is not clear what these observations are based on. Consequently, I asked a research assistant, Eric Levine, to visit a store selling warranted consumer products to see how many had full warranties and how many limited. Of the twenty items he checked, seventeen carried limited warranties. The remaining three warranties were not labeled either full or limited; apparently their manufacturers were violating the Magnuson-Moss Act. None bore a full warranty. This is obviously only a tiny study conducted at one store, but when the tally for "not in compliance with the law" exceeds the number of items with full warranties, one may fairly wonder what the requirement that warranties be labeled either full or limited is accomplishing. The paucity of full warranties contrasts with the goals of at least one sponsor of the Magnuson–Moss Act. *See* 119 CONG. REC. 972, 973 (1973) (statement of Sen. Moss) ("This bill would encourage more manufacturers to issue 'full' warranties . . . .").

C. Cooling-Off Periods

Many federal and state laws provide that consumers must be given three days to rescind certain transactions.[63] For example, federal law requires that cooling-off periods be provided in certain student loans,[64] mortgages and home-equity loans,[65] and door-to-door sales,[66] while state laws oblige businesses to give consumers a right to rescind in telemarketing sales, gym memberships, and dance lesson contracts.[67] Proponents of cooling-off periods argue that they enable consumers to reconsider a purchase after being subjected to a "hard sell,"[68] buying something on impulse,[69] or after finding a better deal.[70] Yet not only has no study ever shown

---

63. *See, e.g.*, ARK. CODE ANN. § 4-89-108 (West, Westlaw through 2d Extraordinary Sess.) (door-to-door sales); CAL. CIV. CODE § 1812.85 (West 2009) (health studio services); D.C. CODE § 28-3811 (West, Westlaw through Sept. 22, 2014) (door-to-door sales); KAN. STAT. ANN. § 50-640 (West, Westlaw through 2014 Reg. Sess.) (door-to-door sales); LA. REV. STAT. ANN. § 37:2444.2 (West, Westlaw through 2013 Reg. Sess.) (hearing aids); MASS. GEN. LAWS ANN. ch. 93, § 48 (West 2006) (door-to-door sales); MO. ANN. STAT. § 407.710 (West, Westlaw through 2014 2d Reg. Sess.) (door-to-door sales); MONT. CODE ANN. § 30-14-504 (West, Westlaw through 2013 Sess.) (door-to-door sales); N.Y. GEN. BUS. LAW § 394-b (McKinney 2012) (dance-instruction contracts); N.Y. PERS. PROP. LAW § 425 (McKinney 2013) (door-to-door sales); N.Y. PERS. PROP. LAW §§ 440–448 (2013) (telemarketing); N.C. GEN. STAT. ANN. § 25A-39 (West, Westlaw through 2014 Reg. Sess.) (door-to-door sales); OHIO REV. CODE ANN. § 1345.43 (West, Westlaw through Files 1–140 & Statewide Issue 1 of the 130th General Assemb.) (prepaid entertainment contracts); OKLA. STAT. ANN. tit. 14A, § 2-502 (West, Westlaw through 2014 2d Reg. Sess.) (door-to-door sales); S.C. CODE ANN. § 37-2-502 (West, Westlaw through 2013 Reg. Sess.) (door-to-door sales); W. VA. CODE ANN., § 33-25A-14 (West, Westlaw through 2014 2d Extraordinary Sess.) (health-maintenance-organization contracts).

64. *See* Truth in Lending, 74 Fed. Reg. 41,194 (Aug. 14, 2009) (to be codified at 12 C.F.R. pt. 226).

65. *See* 15 U.S.C. § 1635 (2012); 12 C.F.R. § 226.23 (2014).

66. *See, e.g.*, 16 C.F.R. § 429.1 (2014).

67. See *supra* note 63 and accompanying text.

68. *See, e.g.*, S. REP. NO. 90-1417, at 1 (1968) ("The Consumer Sales Protection Act is designed to provide a consumer with some meaningful and readily available relief once he has succumbed to a high pressure sales pitch of a door-to-door salesman, but has subsequently had time to mull over the transaction and realize that he has made an unwanted purchase, paid an unconscionable price, or unnecessarily burdened his family with a major long-term expenditure."); *In Re* Public Hearing on Proposed Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales Before the Federal Trade Commission, 38 (F.T.C. 1971) (testimony of Sen. Frank E. Moss, Chairman, Consumer Subcomm.) ("[Cooling-off periods] also reduce[] the reliance the salesman may place on high-pressure tactics. For when the decision to buy must make as much sense to the consumer after mature reflection as it did during an energetic sales pitch, there will be no purpose served by a high-pressure tactic designed to make the consumer sign before he can think about it.").

69. *See, e.g.*, *Door-to-Door Sales Act: Hearing on S. 1599 Before the Consumer Subcomm. of the S. Comm. on Commerce*, 90th Cong. 44 (1968) (statement of David Caplovitz, Professor, Columbia University) ("Door-to-door selling reduces [the] deliberative process to a minimum at the same time that it maximizes what has been called 'impulse buying.' It is quite one thing to buy an inexpensive trinket on impulse, and quite another to assume a debt of several hundred dollars or more in this way."); William G. Meserve, *The Proposed Federal Door-to-Door Sales Act: An Examination of Its Effectiveness as a Consumer Remedy and the Constitutional Validity of Its Enforcement Provisions*, 37 GEO. WASH. L. REV. 1171, 1186 (1969) ("When a purchase has been made on impulse, 'buyer's remorse' will undoubtedly set in after the salesman has left and may result in a cancellation." (footnote omitted)).

70. *See, e.g.*, Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22,934, 22,939 (Oct. 26, 1972) ("Excessive prices for products sold in the home are

that consumers use cooling-off periods in significant numbers, but in addition, several studies have raised serious questions about whether consumers use such rescission rights.

In 2010, I had research assistants call businesses subject to cooling-off periods to determine the extent to which consumers invoked their right to rescind.[71] More than one-third (thirty-five percent) of the respondents who answered questions reported that buyers never cancel within three days.[72] Another twenty-nine percent claimed that fewer than one percent of the buyers cancelled within three days, while eight percent indicated that at least one percent, but no more than two percent, of the buyers rescinded within three days.[73] In other words, nearly three-quarters of the respondents stated that two percent or fewer of their customers cancelled within three days. It is hard to see how cooling-off periods protect consumers from hard sells or impulse purchases when consumers seemingly use them so rarely.

Other studies have been no more encouraging about the effectiveness of cooling-off periods. An early study of a one-day cooling-off period in Connecticut found that the right to rescind "benefits consumers very little."[74] And two studies commissioned by the Federal Trade Commission in 1981 to evaluate the Commission's Door-to-Door Cooling-Off Period Rule (the FTC Rule) support similar conclusions. Of the more than 1400 consumers queried in one survey, not one had invoked the FTC Rule to rescind a purchase, although the fact that few were dissatisfied with their purchases undoubtedly contributed to that outcome.[75] Similarly, a survey of businesses subject to the FTC Rule found that only two percent believed that the FTC Rule had increased the number of cancellations their company experienced.[76]

While it remains unclear whether cooling-off periods are in fact aimed at a real problem, if such a problem exists, it seems unlikely that cooling-off periods can solve it if consumers do not invoke them. And that, in turn, suggests that lawmakers who believe that a problem exists should long ago have considered an alternative to a remedy that provides such a meager benefit.

---

commonplace . . . . Since the sale is being made in the home, the consumer is unable to ascertain the price of similar or substitute products as he could do if he visited several retail establishments.").

71. *See* Jeff Sovern, *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, 75 U. PITT. L. REV. (forthcoming 2014) (manuscript at 17–23), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103807 (reporting survey results from businesses regarding implementation and utility of cooling-off periods).

72. *Id.* at 18.

73. *Id.*

74. Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 628 (1969).

75. *See* GLENN E. DAVIS, PUB. SECTOR RESEARCH GRP., FINAL REPORT OF AN IMPACT EVALUATION OF THE COOLING-OFF PERIOD FOR DOOR-TO-DOOR SALES TRADE RULE, at I-5 (1981).

76. *See* WALKER RESEARCH, INC., THREE-DAY COOLING-OFF PERIOD TRADE RULE EVALUATION STUDY 16 (1981).

D. Financial Privacy Notices

In 1999, Congress enacted the Gramm-Leach-Bliley Act (GLB), which obliges financial institutions to notify their customers—depositors, credit card customers, and the like—of their information-sharing policies annually and describe customers' rights to opt out of the transfer of some of that information.[77] The result has been called "a blizzard of notices."[78] Yet early reports indicated that few consumers had opted out, although available evidence about opt-outs is sparse. Thus, an America's Community Banker Survey found that sixty percent of financial institutions stated that less than one percent of consumers opted out;[79] the American Banker, a trade publication, reported that five percent of consumers had opted out;[80] and the Financial Services Coordinating Council claimed that the percent of consumers opting out was "low, and in nearly all cases under 10 percent."[81]

Conceivably, opt-out rates are higher now. In 2009, regulators produced model forms, which seemingly are easier to read than the forms the financial institutions created and so might generate more opt-outs.[82] The opt-out figures provided above preceded the model form, although even at that time, financial institutions could find aid in sample clauses included in the implementing regulations.[83] While not all financial institutions have abandoned their own forms in favor of the model form, the model form functions as a safe harbor in that institutions using it are deemed in compliance with GLB and so have an incentive to employ it.[84]

One reason the model form might generate higher opt-out rates is that, like the CFPB's mortgage forms, its design was the subject of extensive consumer

---

77. 15 U.S.C. § 6801 (2012).

78. *See* Jeffrey M. Lacker, *The Economics of Financial Privacy: To Opt Out or Opt In?*, ECON. Q., Summer 2002, at 1, 2; Timothy J. Muris, Former Fed. Trade Comm'n Chairman, Remarks at the Privacy 2001 Conference: Protecting Consumers' Privacy: 2002 and Beyond (Oct. 4, 2001), *available at* http://www.ftc.gov/public-statements/2001/10/protecting-consumers-privacy-2002-and-beyond ("The recent experience with Gramm-Leach-Bliley privacy notices should give everyone pause about whether we know enough to implement effectively broad-based legislation based on notices. Acres of trees died to produce a blizzard of barely comprehensible privacy notices.").

79. Privacy Compliance Survey, America's Cmty. Bankers, WASH. PERSP. SUPPLEMENT (Dec. 3, 2001) (on file with author).

80. W.A. Lee, *Opt-Out Notices Give No One A Thrill*, AM. BANKER, July 10, 2001, at 1.

81. *Financial Privacy and Consumer Protection: Hearing Before the U.S. Sen. Comm. on Banking, Housing and Urban Affairs*, 107th Cong. 4 (2002) (statement of John C. Dugan, Partner, Covington & Burling LLP, Financial Services Coordinating Council). Mr. Dugan later served as the Comptroller of the Currency, which was at that time responsible for enforcing GLB. *See* MARK FURLETTI & STEPHEN SMITH, FINANCIAL PRIVACY: PERSPECTIVES FROM THE PAYMENT CARDS INDUSTRY 10 (2003) (finding that "less than 5 percent of [a card] issuer's customers typically opt out of affiliate-sharing efforts").

82. *See* 16 C.F.R. pt. 313, app. A (2014).

83. The model clauses appeared in earlier versions of 16 C.F.R. pt. 313, app. A.

84. *See* 15 U.S.C. § 6803(e)(4) (2012). Financial institutions that use their own forms will still be in compliance with GLB if their form meets the GLB requirements.

testing, this time by two different firms.[85] But just as with the mortgage forms, the testing was intended to determine whether consumers who wished to could understand the form, rather than whether consumers would actually use the form.[86] Consequently, the extent to which consumers use the form remains unclear.

Perhaps a better way to measure the effectiveness of the notices focuses on awareness of the forms rather than the opt-out rate. The use of the opt-out rate as a measure of efficacy assumes that consumers will want to opt out, when in fact it may be that opt-out rates are low because consumers read the forms and decide against protecting their privacy. Some evidence does indeed suggest that consumers have greater awareness of the privacy forms than the low opt-out rates imply. A University of Michigan survey of 500 adults, conducted a few years after GLB became effective, but before the model forms were available, found that seventy-three percent recalled receiving privacy policies from their financial institutions; when asked what they did with the forms, fifty-nine percent said they opened the forms and glanced at them, while thirty percent reported they gave the forms more than just a glance.[87] Less than ten percent of the respondents stated they threw the forms away.[88] It is unclear how accurate the survey responses are; perhaps the act of asking consumers if they remembered the forms caused them to think they remembered them.[89]

---

85. *See* KLEIMANN COMMC'N GRP., EVOLUTION OF A PROTOTYPE FINANCIAL PRIVACY NOTICE 2–4 (2006) [hereinafter KLEIMANN COMMC'N GRP., EVOLUTION OF A PROTOTYPE]; KLEIMANN COMMC'N GRP., FINANCIAL PRIVACY NOTICE: A REPORT ON VALIDATION TESTING RESULTS 1–2 (2009) [hereinafter, KLEIMANN, FINANCIAL PRIVACY NOTICE]; MACRO INT'L, INC., MALL INTERCEPT STUDY OF CONSUMER UNDERSTANDING OF FINANCIAL PRIVACY NOTICES: METHODOLOGICAL REPORT 1–4 (2008); *see also* Loretta Garrison et al., *Designing Evidence-Based Disclosures: A Case Study of Financial Privacy Notice*s, 46 J. CONSUMER AFF. 204, 209–11 (2012) (using consumer testing to develop evidence-based disclosures). Web-based notices were also subject to testing, *see* KLEIMANN COMMC'N GRP., WEB-BASED FINANCIAL PRIVACY NOTICE FINAL SUMMARY FINDINGS REPORT 5–6 (2009), but again the focus was on such things as whether consumers could understand the web forms rather than whether they would use them. *Id.*

86. *See* MACRO INT'L INC., *supra* note 85, at 6–16 (including an Appendix A of questions posed to consumers, none of which pertains to whether consumers will use the forms). Similarly, KLEIMANN, EVOLUTION OF A PROTOTYPE, *supra* note 85, at 2, states as its goals:

> [1] Comprehension. The prototype must enable customers to understand the basic concepts behind the privacy notices and understand what to do with the notices. It must be clear and conspicuous as a whole and readily accessible in its parts.
>
> [2] Comparison. The prototype must allow consumers to compare information sharing practices across financial institutions and to identify the differences in sharing practices.
>
> [3] Compliance. The content and design of the alternative privacy notices must include the elements required by the GLBA and the affiliate marketing provision of the Fair and Accurate Credit Transactions Act.

87. *See* UNIV. OF MICH., SURVEY RESEARCH CTR., SURVEYS OF CONSUMERS (2004) (on file with author); Press Release, Am. Bankers Ass'n., ABA Survey Shows Nearly Two Out of Three Consumers Read Their Privacy Notices (June 7, 2001) (on file with author).

88. *See* Press Release, Am. Bankers Ass'n., *supra* note 87.

89. Another issue raised by privacy survey data is that when it comes to privacy, consumers "do not do what they say, and they do not know what they claim to know . . . . [The consumers'] behavior did not match their survey statements." Carlos Jensen et al., *Privacy Practices of Internet Users: Self-Reports Versus Observed Behavior*, 63 INT'L J. HUM.-COMPUTER STUD. 203, 224 (2005).

While the Michigan survey suggests consumer awareness of the forms, other findings raise doubts about whether consumers actually used the forms. Survey data suggests that more consumers are interested in protecting their privacy than have in fact opted out.[90] Indeed, two-thirds of the respondents to the Michigan survey reported that they would be very likely to transfer their account to another financial institution if they believed their primary financial institution did not protect their personal financial information adequately—far more than appear to have opted out of the transfer of their financial information, a less onerous act than transferring accounts.[91] While the surveys may overstate consumers' interest in protecting their privacy, it is also plausible that the burden of noticing the forms, reading and understanding them, and then acting on the information, is

90. The University of Michigan survey asked: "How important is it to you that your (family's) primary financial institution protects the personal information about your (family's) account or accounts?" UNIV. OF MICH., *supra* note 87, at 4. Of those responding, eighty-seven percent said it was very important, and nine percent said it was somewhat important. *Id.* at 4. Less than two percent said it was either not very important or not at all important. *Id.*; *see also* Statement of Richard Holober, Exec. Dir., Consumer Fed'n of Cal., Financial Privacy Initiative Press Conference (Mar. 11, 2003), *available at* http://www.consumercal.org/article.php?id=245 (noting sixty-seven percent of California voters surveyed rated financial privacy a "major or important concern"); Rob Schneider, *Financial Privacy*, CONSUMERS UNION 1 (Jan. 2003), http://consumersunion.org/wp-content/uploads/2013/04/FinPrivacy.pdf ("In poll after poll, Americans say that protecting their personal privacy is of great concern to them."). Respondents to the University of Michigan Survey also seemed to believe that their financial institutions did protect their information. UNIV. OF MICH., *supra* note 87, at 5. Thus, fifty-nine percent thought their primary financial institution protected financial information about them or their family very well, and another thirty-one percent believed their financial institution protected their financial information somewhat well. *See id.* Perhaps consumers do not opt out because they believe their financial institution is not selling their information. That raises questions about how many financial institutions do in fact share customer information, something that is difficult to determine. An America's Community Bankers survey stated that about half the financial institutions with assets exceeding $1 billion provided customer information to nonaffiliated third parties while the "great majority" of smaller institutions did not do so. Privacy Compliance Survey, *supra* note 79. But as that information was collected in 2001, it is unclear whether it remains true today. A more recent study found that about a quarter of financial institutions sampled reported sharing with affiliates and only seven percent reported sharing with nonaffiliates, but the sample was largely confined to financial institutions using the model form or that were among the largest 100 banks, and so may not be representative of financial institutions generally. *See* LORRIE FAITH CRANOR ET AL., ARE THEY ACTUALLY ANY DIFFERENT? COMPARING THOUSANDS OF FINANCIAL INSTITUTIONS' PRIVACY PRACTICES 5–6 (2013), *available at* http://weis2013.econinfosec.org/papers/CranorWEIS2013.pdf (last visited Apr. 10, 2014). Because institutions selling consumer information may wish to continue doing so, they have an incentive to eschew the model form and use their own less clear form to reduce consumer opt-outs. On the other hand, lenders that do not sell customer information have no reason to use a form that is harder to understand, and so may be more likely to use the model form. Thus, a study that draws disproportionately on financial institutions that use the model form may understate the number of banks selling consumer information. It thus seems plausible that many consumers believe incorrectly that their banks are not transferring information about their transactions to others, though it is impossible to be certain.

91. *See* UNIV. OF MICH., *supra* note 87. Another eighteen percent reported that it was somewhat likely that they would transfer their account to another institution. *Id.* Less than twelve percent replied that it was somewhat or very unlikely that they would transfer their account. *Id.* Similarly, in choosing a financial institution, forty-eight percent stated that the privacy policy was very important and thirty-five percent reported that it was somewhat important. *Id.*

more than most consumers are willing to take on to protect their privacy.[92] If more consumers are interested in protecting their privacy than are acting to protect it, that would suggest that GLB has failed to enable a significant number of consumers to protect their privacy, notwithstanding consumers' desire to have it protected. Or, to put it another way, it appears that GLB did not create a system that many consumers who want to protect their privacy use. If it is the case that consumers want to protect their privacy, and society wishes to accommodate that desire, some other means must be found.[93]

Alternatively, if few people wish to protect their privacy, that raises questions about just how valuable GLB is to consumers. A protection that only a tiny fraction of people use may not be worth having in that form.

II. HOW TO INCREASE THE LIKELIHOOD THAT CONSUMER PROTECTIONS WILL BE EFFECTIVE?

The foregoing has argued that consumer protections that depend on consumers doing things consumers do not in fact do provide few benefits. That suggests that before lawmakers adopt consumer protection rules that depend on consumers to act, they should verify that consumers will play their part. This part addresses some strategies for accomplishing that.

One way lawmakers can try to determine if consumers will use consumer protection rules is to use pilot projects. For example, one alternative to the disclosure regime established by TILA is to mandate counseling. Lawmakers could set up pilot projects to determine if credit counseling produces better outcomes than TILA. Chicago ran just such an experiment with positive results, although additional study is needed for confirmation.[94]

---

92. According to the Michigan survey, when asked how confident they are that they understand the forms, seventy-two percent reported that they were either very or somewhat confident. *Id.* When asked about the usefulness of the privacy notices, two-thirds called them either very or somewhat useful, suggesting that they are able to navigate the forms. *Id.*

93. Another example of a consumer protection that depends on consumers to act is the rule in the Fair Credit Reporting Act that entitles each consumer to obtain a free credit report once a year from each of the three major credit bureaus, Experian, TransUnion, and Equifax. *See* 15 U.S.C. 1681j(a) (2012). Less than twenty percent of consumers take advantage of this right. *See* CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA 27 (2012), *available at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf. While that appears to be a higher response rate than is true of some of the protections described in this Article, it still means that more than eighty percent of consumers are not helped by that particular consumer protection. Nevertheless, the free annual credit report benefits the nearly twenty percent of Americans who take advantage of it.

94. For example, one study found the counseling "helped borrowers better understand the costs and terms of their loans, leading to better-informed decision-making," ILL. DEP'T OF FIN. & PROF'L REGULATION, *supra* note 13, at 1 (2007), while another study reported "substantially lower ex post default rates and somewhat better loan choices among some of the counseled borrowers that remained in the market." Sumit Agarwal et al., *Do Financial Counseling Mandates Improve Mortgage Choice and Performance? Evidence from a Legislative Experiment* 3, 4 (Fed. Reserve Bank of Chicago, Working Paper No. 07, 2009), *available at* http://www.chicagofed.org/digital_assets/publications/working

Another option is to borrow from Justice Brandeis's familiar view of the states as laboratories of democracy.[95] For example, some states require cooling-off periods for telemarketing sales while others do not.[96] Those wishing to see whether cooling-off periods serve any useful purpose for telephone sales could compare the issues arising from telemarketing in two states with different approaches to see if the cooling-off period produces any benefits.

But sometimes it simply is not possible to determine the effect of consumer protections before they are adopted. In such cases, it may be possible to evaluate them after they take effect, and come to conclusions about their efficacy after the fact.

In evaluating rules, it is also important to understand that sometimes the rule may be ineffective in one form but effective in another. For example, it appears that the early GLB disclosures were not effective to protect consumer privacy,[97] but it is possible that the model form may work better. We won't know until it is studied. Similarly, TILA was not able to prevent the Great Recession, but it is possible that better-designed disclosures might yet prove effective. On the other hand, if even the best possible disclosures are not enough, lawmakers must either accept that they are employing an ineffective consumer protection, or try another approach, such as consumer counseling.

It may also be necessary to accept that some rules cannot be evaluated. The inability to determine whether a rule is effective should not by itself be enough to abandon the rule, but it is obviously not ideal. In such cases, it may be desirable to pair the consumer protection with another consumer protection that can be shown to be effective.

III. A COMMENT ON THE INDEPENDENT AGENCY REGULATORY ANALYSIS ACT

I have argued that proponents of consumer protections that depend on consumers to act to be effective should have to show that consumers will actually do what is necessary for the protections to work. Put another way, advocates should demonstrate that the protections will actually confer benefits. This is not to say, however, that they should be obliged to demonstrate in a rigorous way that the benefits of the intervention exceed the costs, or that regulators' conclusions that a particular consumer protection can be justified by a cost-benefit analysis

_papers/2009/wp2009_07.pdf (noting, however, that the positive results may have been attributed to factors other than counseling, such as "the threat of oversight and the imposition of transaction and compliance costs of counseling").

95. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 281 (1932) (Brandeis, J., dissenting).

96. For an example of a cooling-off statute for telemarketing sales, see N.Y. PERS. PROP. LAW § 440 (McKinney 2013). For a list of such statutes and summaries of them, see DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW app. 15A (2012–2013).

97. *See, e.g.*, Privacy Compliance Survey, *supra* note 79 (noting sixty percent of financial institutions report that less than one percent of customers opted out); Lee, *supra* note 80, at 2 (reporting that five percent of consumers had opted out).

should be second-guessed by the Office of Information and Regulatory Affairs, all as contemplated by the Independent Agency Regulatory Analysis Act.[98] This section is intended to make clear that it is possible to support a requirement that, before consumer protections are created, advocates must demonstrate that consumers will take advantage of the protections, without at the same time calling for the troubling rules of the Independent Agency Regulatory Analysis Act.

Consumer protection agencies already use cost-benefit analysis to some degree. For example, the Dodd-Frank Act obliges the CFPB to "consider" costs and benefits when promulgating a rule.[99] The Consumer Product Safety Commission is subject to a similar directive.[100] The Federal Trade Commission's Bureau of Economics is an institutionalized way to perform cost-benefit analysis,[101] while the FTC's definition of unfairness, codified by Congress as to the FTC and also carried forward into the Dodd-Frank Act to govern determinations of unfairness by the CFPB, is strongly flavored with economics: for the FTC to find conduct unfair, "the act or practice [must] cause[] or [be] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[102]

This seems like an appropriate way to handle the matching of costs to benefits. Consumer protection agencies are commanded to take cost-benefit analysis into account, but are not bound slavishly to it. They should attempt to

---

98. The bill was originally introduced as S. 3468, 112th Cong. (2012), and has been re-introduced as S. 1173, 113th Cong., 1st Sess. (2013); see also Hahn & Sunstein, *supra* note 1, at 23. The *New York Times* editorial board criticized the bill, finding that "[s]ubjecting independent agencies to executive regulatory review would not improve the rule-making process, but . . . would ensure that ostensibly regulated industries are as unregulated and deregulated as possible. Even the bill's Senate proponents admit as much, though not intentionally." Editorial, *Reining In the Regulators*, N.Y. TIMES, July 6, 2013, at A16.

99. *See* 12 U.S.C. § 5512(b)(2) (2012) ("In prescribing a rule under the Federal consumer financial laws—(A) the Bureau shall consider—(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule . . . .").

100. *See* 15 U.S.C. § 2058(f) (2012):

> (2) The Commission shall not promulgate a consumer product safety rule unless it has prepared, on the basis of the findings of the Commission under paragraph (1) and on other information before the Commission, a final regulatory analysis of the rule containing the following information:
>
> (A) A description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs.

101. *See* Jonathan Baker, *"Continuous" Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 859, 874 (1997) ("[T]he FTC has created an organizational structure that helps it accomplish what cost-benefit analysis is intended to provide. By creating a large role for the Bureau of Economics—both in ongoing investigations and systematic evaluations of past regulatory efforts—the FTC attempts to achieve better results with fewer burdens on private parties.").

102. 15 U.S.C. § 45(n); *see also* 12 U.S.C. § 5531(c) (codifying the Bureau's counterpart); J. Howard Beales, III, *Regulatory Analysis and the Independent Agencies*, RFF.ORG 4 (Apr. 7, 2011), http://www.rff.org/documents/events/workshops%20and%20conferences/110407_regulation_beales.pdf (describing test for unfairness as "[b]asically a cost benefit test").

demonstrate that protections will have benefits, but should not necessarily be forced to quantify those benefits, because often the benefits cannot be quantified. For example, consider financial privacy. Some people don't care about protecting the confidentiality of their financial transactions, and for them, it may be fair to value financial privacy at zero. Does that mean financial privacy should be valued at zero for everyone? Some consumers value their financial privacy enough to wade through their GLB forms and take the steps necessary to protect it. That indicates that they do value financial privacy, but does not answer the question of how much they value it, beyond the time needed to protect it. Still others may value their privacy, but have not responded to the GLB forms. Is that because they value their privacy less than the time they would expend in responding to the GLB forms, or does it mean only that they have not realized that the forms offer a way to protect their privacy and so have ignored them, thinking of them as junk mail? How can policymakers possibly quantify the value of financial privacy reliably under these circumstances?

Then there are cooling-off periods. How much value should policymakers accord the right to rescind a contract? For consumers who choose not to rescind, is the right to rescind valueless, or do they derive some comfort from the knowledge (assuming they read the notice and possess that knowledge) that they can rescind if they want to?[103]

Or suppose the CFPB is able to devise effective mortgage disclosure forms. Not only would they enable consumers to learn their payment obligations, they would help consumers make wiser choices. If consumer protection rules make markets work better, how is that to be valued?[104] Similarly, if consumer protection rules reduce the number of foreclosures, how is that to be valued? Loan foreclosures damage borrowers, lenders, communities, and entire economies. Should we take into account the value of avoiding the next Great Recession?

It is possible to imagine numbers that would purport to answer these questions, just as it was possible for the federal government to instruct mortgage originators to assume that interest rates would never change so that they could fill out the TILA disclosure forms. But the numbers policymakers could arrive at could be just as wrong as the numbers in the TILA forms, and if policymakers relied on them, they could be just as misled as consumers who relied on their TILA forms and later defaulted and were foreclosed upon. That seems pointless. We would be better off to require policymakers to demonstrate that consumers

103. *Cf.* Craswell, *supra* note 7, at 350 ("[H]ow we value any improvement (or any decline) in the accuracy of consumers' beliefs is a question that cannot be answered by mathematical calculations. Instead, it requires a fundamental value judgment about the importance of a better- or worse-informed citizenry compared to the value of other uses to which the money might otherwise have been put.").

104. *Cf.* Baker, *supra* note 101, at 864 ("[K]eeping markets open and honest reduces the private transaction costs of participating in market exchanges and relationships, and thereby leads to greater economic growth."). The Magnuson-Moss Act was also intended to make markets work better. *See* Magnuson-Moss Warranty Act of 1975, 15 U.S.C. §§ 2301–12 (2012).

will benefit from consumer protection rules, do their best to quantify costs and benefits, and leave it at that.