COMMENT

PRE-EXISTING CREDIT CONDITIONS: A MARKETPLACE SOLUTION TO CREDIT MALADIES*

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I. INTRODUCTION

It is a basic economic principle that the success of a competitive market depends on consumers' ability to make

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informed decisions.[1] Currently, an information asymmetry exists between lenders and borrowers in the market for consumer credit.[2] It is suggested that this asymmetry is the result of an increase in the various types and complexity of credit products available in the market.[3] While this can be good for consumers because they have more choices, increased variety and complexity are only beneficial to the extent that consumers are capable of making informed decisions about which products are best suited for their specific financial situation.[4] Additionally, financial literacy levels throughout the United States suggest that many consumers are not equipped to make informed decisions between these products in an increasingly complex market.[5]

Two of the primary methods currently in use to remedy the information asymmetry are financial literacy education programs and mandated disclosures.[6] However, even with the implementation of education programs and disclosures, there is still a significant information gap between lenders and consumers that prevents consumers from making informed decisions among credit products.[7] As a result, this comment then proposes the creation of a consolidated market for consumer credit products that will (1) allow consumers to make more informed decisions among various credit products and (2) reduce lenders' ability to circumvent mandated disclosures in consumer credit transactions.

1. Howard Gensler, *The Competitive Market Model of Contracts*, 99 COM. L.J. 384, 385 (1994); Carl Shapiro, *Consumer Information, Product Quality, and Seller Reputation*, 13 BELL J. ECON. 20, 20 (1982).

2. Tullio Jappelli & Marco Pagano, *Information Sharing, Lending and Defaults: Cross Country Evidence*, 26 J. BANKING & FIN. 2017, 2017 (Oct. 2002) ("A large body of literature shows that asymmetric information between borrowers and lenders can prevent the efficient allocation of credit.").

3. *See* Richard H. Thaler & Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 135 (2008).

4. *Id.*

5. In 2016, 63% of participants missed two or more questions on a five-question quiz covering fundamental economic and financial concepts. Additionally, the study shows a slight decrease in financial literacy levels since 2009. *See* Fin. Industry Reg. Auth., FINANCIAL CAPABILITY IN THE UNITED STATES 2016 28 (2016), http://www.usfinancialcapability.org/downloads/NFCS_2015_Report_Natl_Findings.pdf [hereinafter Financial Capability 2016].

6. Exec. Order. No. 13,530, 75 Fed. Reg. 5481 (Feb. 3, 2010); *see also* Lauren E. Willis, *Performance-Based Consumer Law*, 82 UNIV. CHIC. L. REV. 1309, 1311 (2015).

7. *See* Thaler, *supra* note 3, at 135–137 (the potential to make people better off can only be realized if people are capable of doing a good job of picking from among the various options).

II. FINANCIAL LITERACY IN AMERICA

There is no one set definition of what it means to be financially literate.[8] However, there is a general consensus that financial literacy includes knowledge of personal financial topics and the ability to make informed judgments about the current and future management of money.[9] There are a variety of initiatives that attempt to increase consumers' financial literacy levels through education.[10] However, these programs have yet to result in a meaningful increase in individuals' financial literacy levels.[11]

A. Financial Literacy Education Programs

Improving the consumers' ability to make better financial decisions has been a concern in this country for decades.[12] Today, there are a variety of ways in which consumers can receive financial literacy education.[13] Some education programs are public programs, either funded by government entities or participation is mandated by a government agency.[14] Private entities, such as non-profits or financial institutions, also offer financial literacy education programs.[15] Additionally, as is the

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8. JUMP$TART COALITION FOR PERSONAL FINANCIAL LITERACY FREQUENTLY ASKED QUESTIONS, http://www.jumpstart.org/faq.html?searched=definition&advsearch=oneword&highlight=ajaxSearch_highlight+ajaxSearch_highlight1 (stating that "[t]here is no single, official definition.").

9. *See* Exec. Order. No. 13,530, *supra* note 6 at 1 ("Financial capability is the capacity, based on knowledge, skills, and access, to manage financial resources effectively."); *see also* Financial Capability 2016, *supra* note 5, at 3; JUMP$TART COALITION FOR PERSONAL FINANCIAL LITERACY NATIONAL STANDARDS IN K-12 PERSONAL FINANCE EDUCATION, http://www.jumpstart.org/national-standards.html.

10. *See e.g.,* Consumer Financial Protection Bureau, EDUCATIONAL RESOURCES, http://www.consumerfinance.gov/ (offering financial education resources for adults, youth, libraries, and more) [hereinafter CFPB Educational Resources].

11. *See e.g.,* Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 208 (2008) ("A number of reported studies find that personal-financial-management programs have no effect on literacy or behavior and a few find small paradoxical results.").

12. The first National Conference on Consumer Education was held in 1939. *Id.* at n. 4 (stating the purpose of the conference was to further the creation of a "nation of economic literates.") (citing Leland J. Gordon, *Next Steps in Consumer Education*, 6 S. ECON. J. 403, 403 (1940)); Justine S. Hastings, Bridgitte C. Madrian & William L. Skimmyhorn, *Financial Literacy, Financial Education and Economic Outcomes* 5 ANN. REV. ECON. 347 (2013).

13. *Infra* notes 14–16.

14. *See* CFPB Educational Resources, *supra* note 10; United States Courts, CREDIT COUNSELING AND DEBTOR EDUCATION COURSES, http://www.uscourts.gov/services-forms/bankruptcy/credit-counseling-and-debtor-education-courses (requiring debtors in bankruptcy to complete credit counseling and debtor education courses before the debts can be discharged).

15. *See e.g.,* OPERATION HOPE: THE GLOBAL LEADER FOR FINANCIAL DIGNITY, https://www.operationhope.org/; CAPITAL ONE FINANCIAL LITERACY PROGRAMS,

case with many financially literate Americans, financial education is taught at home by individuals' parents or guardians.[16]

These programs range from one day seminars to semester long courses taught in online classrooms or star-studded events.[17] In addition to offering financial literacy education through a variety of platforms, the organizations and agencies responsible for administering different education programs intend to intervene at different moments in an individual's decision-making process.[18] For example, state mandated financial education programs that are required as a part of schools' curriculum aim to provide students with financial knowledge and skills before the students will need to make those types of decisions.[19] In contrast, other financial literacy education programs offer retroactive education and counseling that is available after the consumer has already made the decision.[20]

B. Effectiveness of Financial Literacy Education Programs

Although there is an abundance of financial literacy education programs available to consumers, studies of individuals' financial literacy have failed to show significant improvements in financial literacy levels.[21] Ideally, financial literacy programs would effect both consumers' knowledge and behavior regarding financial decisions.[22] While results from a

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https://www.capitalone.com/financial-education/financial-literacy-programs/.

16. "Respondents whose parents or guardians taught them how to manage finances do slightly better on the financial literacy quiz." Financial Capability 2016, *supra* note 5, at 33.

17. The National Financial Educators Council ("NFEC") provides a list of programs offered and recommended by NFEC on their website for individuals who may be interested in financial literacy education. HERE ARE A FEW EVENTS OFFERED AND RECOMMENDED BY THE NFEC, https://www.financialeducatorscouncil.org/financial-literacy-programs/.

18. *Infra* notes 22–23.

19. This is similar to health and sex education programs that aim to teach students how to make healthy decisions and avoid contracting sexually transmitted diseases before the students are confronted with decisions of that nature. *See* Willis, *supra* note 11, at 216 (Willis uses this example to explain how other education initiatives are effective for topics that are relatively consistent over time, as opposed to education programs focused on teaching individuals about an ever-changing financial marketplace.).

20. For example, individuals filing for bankruptcy must complete pre-bankruptcy credit counseling and pre-discharge debtor education courses from an approved credit counseling agency and debtor education provider. Presumably, this would prevent future bankruptcy filings, however, these programs are offered after individuals have already made financial decisions that led them to file for bankruptcy. United States Courts, *supra* note 14.

21. *Supra*, Section II.A.

22. J. Michael Collins, *The Impacts of Mandatory Financial Education: Evidence from a Randomized Field Study*, 95 J. OF ECON. BEHAV. & ORG. 146, 146 (2013).

2016 study by the Financial Industry Regulatory Authority suggest that consumers' abilities to make financial decisions may be improving in some areas, the same study shows that individuals' performance on a financial knowledge and decision-making quiz does not reflect an increase in individuals' understanding of financial concepts.[23]

Furthermore, it is argued that even if financial literacy education programs were effective, the programs would not be able to keep pace with the changes and advancements in the market for financial products.[24] According to a 2013 report from the Consumer Financial Protection Bureau, approximately $2 per person is spent on financial literacy education programs while industry participants spend $54 per person to market financial products and services.[25] Nonetheless, "government authorities frequently pull financial-literacy education out of their policymaking, regulatory, and enforcement toolboxes."[26] Furthermore, employing the use of this tool prevents regulators from enacting policies with the potential to be more effective.[27] Therefore, less focus and fewer resources should be funneled toward financial literacy education programs and redirected towards a more productive solution to the information gap between lenders and consumers.[28]

III. DISCLOSURE REGULATIONS IN AMERICA

The popularity of disclosure regulations can be attributed to the increased number of unfamiliar and complex decisions that consumers are responsible for making.[29] In these types of situations, where consumers often rely on specialists, disclosures aim to help people make better decisions by requiring these

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23. While the study indicates that participants increased their savings or worked to set aside money for retirement, the percentage of respondents who answered four or more quiz questions correctly decreased from the 42% who correctly answered four or more questions in 2009. Financial Capability 2016, *supra* note 5, at 13–31.

24. Effective financial literacy courses would need to work "for most consumers most of the time." In order to do so, financial literacy educators would need to update education programs to correspond with changes in the market. Willis, *supra* note 11, at 211.

25. THE CFPB FINDS FINANCIAL EDUCATION PROGRAMS ARE SIGNIFICANTLY OUTSPENT BY FINANCIAL MARKETING (Nov. 18, 2013), http://www.consumerfinance.gov/about-us/newsroom/the-cfpb-finds-financial-education-programs-are-significantly-outspent-by-financial-marketing/.

26. Willis, *supra* note 11, at 264.

27. *Id.*

28. *Supra,* Section II. (current financial literacy education programs are too expensive without evidence of improving consumers' decisions to justify their use as a means of educating consumers to make better financial decisions).

29. *Id.*

specialists to provide the consumers with a variety of information prior to the transaction.[30] Mandated disclosures are prevalent in several areas of the law, including consumer-protection law, health law, securities regulation, criminal law, and more.[31] Regulators prefer mandated disclosure regulations for several reasons: (1) they align with the free-market principle and the autonomy principle, two fundamental American ideologies;[32] (2) they do not impose the often harsh requirements involved in more direct types of regulation;[33] (3) they are easy to enact;[34] (4) the failures of mandated disclosures often go unnoticed and can be easily explained.[35]

However attractive disclosure regulations appear, mandated disclosures fail to achieve their desired goal—to help consumers make informed decisions.[36] This is because (1) lenders are able to adapt to disclosure regulations in ways that render the regulations practically ineffective; (2) consumers are often overwhelmed by the sheer number of disclosures; (3) it is difficult, if not impossible, to effectively explain the complexities of a transaction in the form of simple, easy to read disclosures; and (4) mandated disclosures are too broad to account for the infinite number of biases that may affect a consumer's decision-making process.[37]

A. *Ineffectiveness of Disclosure Regulations*[38]

However, despite numerous mandated disclosures in

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30. *See* William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1972 WIS. L. REV. 400, 400.

31. Consumer-protection laws require disclosures for transactions involving mortgages, savings accounts, checking accounts, retirement accounts, credit cards, pawnshops, and rent-to-own plans. Additionally, health law requires health professionals to provide patients with information in the form of informed consent, drug labeling, research regulation, health insurance, living wills, and medical privacy. Required disclosures are also included on "food labels, travel tickets, leases, copyright warnings, time-share agreements, house sales, store return policies, school enrollment and graduation data, collage crime reports, flight-safety announcements, parking-garage stubs, product and environmental hazards, and car and home repairs." Omri Ben-Shahar & Carl E. Schneider, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3–4 (2014).

32. *Id.* at 5.

33. Examples of direct regulation include, "imposing safety and quality standards or restricting sales of products or services." *Id.*

34. *Id.*

35. If disclosure regulations harm anyone, it is likely to harm the parties with expertise and may be morally obligated to provide that information to less sophisticated parties. *Id.* at 6.

36. *See e.g.* Ben-Shahar, *supra* note 31, at 7; Willis, *supra* note 6, at 1321.

37. *Infra,* Section III.A.

38. I credit much of this discussion to the discussion in Lauren E. Willis, *Performance-Based Consumer Law*, *supra* note 6.

consumer credit transactions, the regulations are ineffective at achieving that goal for several reasons.[39] First, lenders adapt to mandated disclosures in ways that render the disclosures ineffective.[40] Second, consumers are overwhelmed by the sheer number of disclosures.[41] Third, it is difficult to effectively convey complicated information about the transaction in the form of an easy to read disclosure.[42] Finally, the over-broad nature of mandated disclosures fails to address the infinite number of biases that may influence a consumer's decision-making process.[43] In sum, mandated disclosures fail because they cannot effectively inform consumers about the complex and unfamiliar decisions in which disclosures are required[44]

IV. CONSOLIDATED MARKETPLACE

Instead of continuing financial literacy education programs and disclosure regulations, regulators should shift their focus away from these methods and focus time and resources on new methods for addressing the information asymmetry.[45] The creation of a consumer credit market that this paper suggests would be an extremely progressive step.[46]

A. The Need for a Consumer Credit Market

As stated above, current approaches aimed at closing the information gap between lenders and consumers in the market for consumer credit are not working. Despite the failure of the preferred approaches, the information asymmetry in the market for consumer credit is still worth addressing, because lenders are not incentivized to voluntarily close the information gap since they benefit from uninformed consumers to such an extent that lenders seek out consumers to which disclosures may be

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39. Willis, *supra* note 6, at 1321 (stating "mandated disclosure routinely has little or no positive impact on consumer marketplace decisions . . . ."); *see* Financial Capability 2016, *supra* note 5, at 22 (finding that only 35% of respondents comparison shopped when obtaining their most recent credit card).

40. *Id.* ("Disclosure regulation can control the format in which selected information is presented, but it cannot control the frame in which the consumer receives—and ultimately may not perceive—this information.").

41. Ben-Shahar and Schneider state that, "[t]he accumulation problem arises because consumers daily confront so many disclosures . . . that they cannot attend to (much less master) more than a few." Ben-Shahar, *supra* note 31, at 8.

42. *See e.g., Id.*; Angela Hung et al., EFFECTIVE DISCLOSURES IN FINANCIAL DECISIONMAKING (RAND Labor and Population, 2015).

43. Alan Schwartz, *Regulating for Rationality*, 67 STAN. L. REV. 1373, 1386 (2015).

44. Ben-Shahar, *supra* note 31, at 7.

45. *Supra* Section I (discussing the information asymmetry in the market for consumer credit products).

46. *Infra,* Section IV (discussing the consumer credit marketplace).

particularly ineffective and find ways to sabotage the effectiveness of the disclosures themselves.[47] Furthermore, consumers pay the costs of the information asymmetry. First, uninformed consumers often pay higher prices than more informed consumers.[48] Second, studies show that indebtedness has a negative impact on individuals' health.[49] Studies show that individuals with higher debt levels were found to have a 1.3 percent higher diastolic blood pressure reading, which can lead to a heightened risk for stroke and hypertension.[50] In addition, there is a link between mental health and debt, as "people living with debt are three times more likely than others to suffer from mental illnesses."[51] Even indebted young adults are experiencing a debt-related decrease in physical and mental health.[52]

B. Overview of the Market

The suggested marketplace draws from several areas such as the healthcare insurance marketplace and online lending platforms.[53] The suggested marketplace would be modeled after the healthcare insurance market in that the lenders (analogous to health insurance providers) offer credit products (analogous to health insurance plans) to consumers.[54] The goals of the marketplace are to facilitate consumer comparison shopping and prevent lenders from circumventing the disclosure requirements already in effect at the time of the market's creation.[55] As in the market for health insurance, consumers could opt to search for credit products on their own, outside of the marketplace, in what this paper refers to as the secondary market.[56]

1. Lenders in the Marketplace. Currently, there are

47. "Firms have incentives to offer products that are opaque and unusable . . . . [F]irms shroud prices and other undesirable product features and design products to exploit willpower and rationality limits." Willis, *supra* note 6, at 1318.

48. *Id.* at 1322 (describing ways in which firms would identify consumers who may be better prospects for high-priced mortgages than more aware consumers.).

49. *See e.g.* Matthias Keese & Hendrik Schmitz, *Broke, Ill, and Obese: Is There An Effect of Household Debt on Health?*, 60 R. INCOME & WEALTH 525, 538–39 (2014).

50. Matthew Meintka, *The Effects of Debt Reach Further Than Just Stress; Include Heart Disease, Stroke, and Mental Illness,* MEDICAL DAILY (Jul. 13, 2014, 2:27 PM), http://www.medicaldaily.com/effects-debt-reach-further-just-stress-include-heart-disease-stroke-and-mental-illness-292720.

51. Specifically, individuals experienced a fourteen percent worsening in their depression with every ten percent increase in debt. *Id.*

52. *Id.*

53. *Infra* Section IV.B. (discussing other platforms used as inspiration).

54. *Infra* Section IV.B.

55. *Supra* Part I-III (discussing issues with the current marketplace and the solutions that have failed).

56. *Infra* Section IV.B.

platforms that allow a variety of lenders to offer a variety of credit products to consumers. These platforms include websites such as Bankrate.com[57] and Lending Tree.[58] While online marketplaces allow consumers to compare offers from several lenders, these platforms operate as an advertisement opportunity for the lenders who participate.[59] Because of this, consumers using these services are limited to offers from the lenders that choose to work with Bankrate or Lending Tree.[60] The marketplace proposed by this article builds off of these current online marketplaces.[61] Similar to Bankrate and Lending Tree, financial institutions interested in offering products in the marketplace will need to become members. Presumably, membership would include a required fee. The fee could resemble that of a subscription fee for maintaining a presence in the marketplace and could be used to cover costs associated with managing the marketplace.

To encourage lenders to participate in the marketplace voluntarily, regulators could exempt loans offered in and obtained through the marketplace from the rescind provisions of the TILA.[62] Currently, a consumer has three days to rescind a transaction in which the secured party takes a security interest in the property used as the consumer's principle dwelling.[63]

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57. Bankrate allows consumers to comparison shop for mortgages, refinancing options, auto loans, home equity loans, student loans, certificate of deposit rates, savings and checking accounts, credit cards, and personal loans. Consumers select the desired product and enter in information relevant to obtaining that particular product (i.e. credit score, desired monthly payment, or length of payback period). Credit products appear based on the information entered by the consumer, and the consumer has the ability to sort the results by annual percentage rate or monthly payment, and can also compare financing charges. Bankrate.com.

58. Lending Tree describes its platform as "a leading online loan marketplace with on of the largest networks of lenders in the nation." By creating a Lending Tree Account, consumers can shop for loans, track their credit score, and receive information about potential savings. According to its website, Lending Tree also provides consumers with financial information resources such as, "financial calculators, interactive loan coaching tool, monthly newsletters, and lender ratings and reviews." ABOUT LENDING TREE, https://www.lendingtree.com/press-room/about.

59. In fine print at the bottom of its webpage, Bankrate includes a disclaimer stating, "Bankrate.com is an independent, advertising-supported publisher and comparison service. Bankrate may be compensated in exchange for featured placement of certain sponsored products and services, or your clicking on certain links posted on this website." Bankrate.com. Similarly, Lending Tree is a matching service that provides consumers with conditional loan offers based on the consumer's application. HOW LENDING TREE WORKS, https://www.lendingtree.com/about/partner-with-us/register#hb-how-does-lendingtree-work.

60. *See supra* notes 58–59. (describing how Bankrate and Lending Tree are platforms for participating lenders to advertise their products).

61. *Infra* notes 62–72 and accompanying text.

62. *See* 15 U.S.C. § 1635(a).

63. *Id.*

Products offered in the market could be exempt from this provision, and the provision could be expanded to allow a three-day window for rescission of a larger variety of products offered in the secondary market.[64]

While, ideally, lenders would be encouraged to participate in the market voluntarily, that assumption is likely overoptimistic.[65] In response to a proposal for a voluntary, online payday loan marketplace, critics argue that lenders will not voluntarily participate in the marketplace because lenders already do not comply with mandated disclosures, and further, lenders disagree with the fairness of those disclosures.[66] Assuming that these behaviors and sentiments are similar among lenders of all types of credit products, it may be necessary for regulators to require lender participation in the marketplace.[67]

Additional requirements of marketplace participation could include approval of the lender's disclosures for the credit products offered and approval of the lender's credit packages.[68] By requiring the lenders' to submit disclosures for approval, the overseeing agency would have the opportunity to (1) better ensure that mandated disclosures currently in place are being properly executed and (2) potentially reduce lenders' liability. If the overseeing agency approves of the disclosures contained in the lenders' agreement, courts could presume the disclosures to be sufficient, and shift the burden to consumers to prove otherwise. This added benefit of participation could incentivize lenders to become marketplace members.

Similar to the packages offered in the healthcare insurance market, lenders would be required to develop credit product packages.[69] While the coverage packages offered in the health insurance market are labeled based on their actuarial value,[70]

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64. *See id.*

65. *See* Jim Hawkins, *Can Voluntary Price Disclosures Fix the Payday Lending Market?*, 6 HARV. BUS. L. REV. ONLINE 64, 65–66 (2016).

66. *Id.*

67. *Id.* at 67 (stating that requiring participation in the marketplace is necessary in light of lenders' "aversion to coughing up price information voluntarily.").

68. *Infra* Section IV.B.

69. *See* HealthCare.gov, https://www.healthcare.gov/see-plans/. In order to get a better understanding of how the health insurance market currently operates in November 2016, I entered my own information into the online portal and proceeded through the process of obtaining a health insurance plan up to the point of actually choosing a plan.

70. "Individual ACA-compliant plans are rated with 'metal' designations, which helps consumers compare apples to apples. There is plenty of variation from one carrier to another, both in terms of plan design and price, but policies are labeled based on their actuarial value, or the percentage of costs that the plan covers before the out-of-pocket maximum is reached." Individual Health Insurance Under Obamacare,

lenders could develop packages offering a variety of terms, such as interest rates, monthly payment requirements, and payback periods, ranked based on the credit score range of the consumer.[71] This would allow lenders to maintain control of their diversification and allocation of risk to a level that the lender determines is in accordance with their business's preferences. Additionally, this would prevent the overseeing agency from being required to allocate risk among the lenders or implementing an individual mandate requiring consumers to use the marketplace.[72]

Lenders choosing to offer packages in the secondary market would still be subject to current disclosure regulations. In regards to allowing lenders to operate both in the marketplace and in the secondary market, regulators should consider lenders' ability to use to the agency approved disclosures to potentially manipulate consumers who opt out of the market. There is the opportunity for lenders to advertise that, in addition to the credit product offered, the disclosures have been approved by the agency overseeing the marketplace, leading consumers to believe that the lender is more fair, or discourage comparison shopping. However, the standard oversight board-produced disclosures may offer a solution to this concern. By creating a standard set of disclosures, lenders would still be responsible for drafting disclosures for credit products offered outside of the marketplace and therefore, could not represent to buyers that the disclosures had been approved by the overseeing agency.

2. Consumers in the Marketplace. As previously mentioned, consumers would have the opportunity to obtain credit from sources outside the market. Similar to Lending Tree, consumers opting to participate in the marketplace could submit a single application.[73] The application would vary depending on the desired credit product and would contain the necessary information for assessing risk. This would benefit consumers because (1) this process would reduce the opportunity cost of traditional comparison shopping, and (2) this process would enable a single credit check to be done and provided to potential lenders so that consumers' credit scores are not lowered as a result of comparison shopping. Once the application has been

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https://www.healthinsurance.org/obamacare/individual-health-insurance/.

71. This idea is based on the four metal category plans adopted by the healthcare insurance market. For a brief description of the plans used the health insurance market see https://www.healthcare.gov/choose-a-plan/.

72. *See* Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L. J. 1117, 1126 (2012).

73. *See* About Lending Tree*, supra* note 58.

processed, consumers can choose from the plans offered by the lenders to similarly situated consumers.

A benefit for consumers' participation is that their position in the market has the potential to be upwardly mobile. Each time the consumer complies with the terms of their selected package (*i.e.* makes timely payments or pays off in full) the consumer could become eligible for more desirable packages with lower interest rates or less stringent payback requirements. Not only would this provide consumers access to credit products with more beneficial terms, but it could also provide a framework for consumers to build or improve their credit score. On the other hand, consumers who fail to comply with the terms of their selected package could be negatively effected. However, the accurate assessment of risk is crucial to the functionality of the marketplace. Therefore, negatively effected consumers should be offered less favorable credit packages with the opportunity to rebuild their credit, or could obtain credit through means outside of the marketplace. Unlike the health insurance market, this article does not argue for an "individual credit mandate" that would require consumers to obtain and lenders to lend through the marketplace, but rather suggests that regulators consider methods to make the marketplace as inclusive as possible.

3. Government Involvement in the Marketplace. Ideally, government involvement would be minimal. However, the market requires a third-party to process the applications, run the consumers' credit checks, and make the result available to the lenders. This could be accomplished by designating a section within the Consumer Financial Protection Bureau.[74] As the idea of the marketplace is to reduce the flow of resources to ineffective methods of addressing the information gap, such as financial literacy initiatives and disclosure regulations, resources currently committed to those methods could be funneled towards the creation of the market.

Furthermore, the creation of the market would enable the government to monitor the effectiveness of disclosure regulations. In having the opportunity to review lenders' disclosures before the disclosures reach consumers, the government can prevent misleading disclosures from entering the marketplace. Additionally, the overseeing agency can hold

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74. The Dodd-Frank Act granted rulemaking authority under TILA to the Consumer Financial Protection Bureau. Arguably, this rulemaking authority could be used to create and monitor the market. However, regulators should first conduct an analysis to confirm the constitutionality of this suggestion. *See* CONSUMER FINANCE PROTECTION BUREAU, LAWS AND REGULATIONS: TRUTH IN LENDING ACT 3 (APR. 2015) http://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf.

disobedient lenders accountable by fining them or suspending them from participating in the market. Additionally, government participation may allow regulators use information from actual marketplace consumers to more narrowly tailor disclosures to better suit marketplace participants.

4. General Marketplace Information. This section addresses aspects of the marketplace that do not neatly fit into one of the above categories.[75] In addition to the previously mentioned concerns, regulators should consider exactly how a marketplace of this nature should be developed. It may be beneficial to implement the market a few credit products at a time. This would allow lenders to gradually change they way they offer their credit products and adjust to how to calculate risk in the new marketplace. Additionally, this would allow consumers to become gradually more familiar with the marketplace as well.

Since I do not suggest imposing an individual mandate requiring consumers to obtain credit products through the market, a market with less government supervision would still exist. In the secondary marketplace, lenders could offer higher-risk credit products, or expedite the process of obtaining credit for consumers in emergency situations. Although this would still allow for irrational consumers to obtain credit products that may not be in their best interest, it would also provide rational consumers with the option to obtain credit in the secondary market.[76]

V. CONCLUSION

The lenders in the consumer credit market are operating on an uneven playing field marked by a gap in information between lenders and consumers.[77] Low levels of financial literacy among Americans prevents consumers from adequately assessing the credit products offered in the current market.[78] Additionally, initiatives aimed at improving financial literacy levels have been unsuccessful.[79] Furthermore, the information asymmetry can also be attributed to ineffective disclosure regulations.[80] Disclosures fail because lenders figure out innovative ways to

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75. *Supra* Section IV.B.

76. Colin Camerer et al., *Regulations for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1212 (2003).

77. *Supra* Section I.

78. *Supra* Section II.

79. *Supra* Section II.B.

80. *Supra* Section III.

work around disclosures, and consumers are bombarded by disclosures to the point of experiencing an information overload.[81] Additionally, it is difficult to condense complex information into a disclosure that consumer can easily understand.[82] Finally, the current regulations are based on insufficient information that fails to accurately reflect the reasons that consumers in the marketplace make the specific decisions they do.[83]

Thus, the proposed solution is to create a marketplace where there is increased information among consumers and fewer chances for lenders to circumvent mandated disclosures to form a more efficient and overall more functional consumer credit market.[84] By incorporating aspects from other markets currently existing, the proposed marketplace can benefit all of its participants.[85] Finally, the creation of the marketplace would be a more efficient allocation of the resources allotted to financial literacy initiatives and disclosure regulations, which have shown few signs of improving the efficiency of the consumer credit marketplace.[86]

Barbara Light

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81. *Id.*
82. *Id.*
83. *Id.*
84. *Supra* Section IV.
85. *Id.*
86. *Id.*