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## Who Decides Whether Clarity is Clear?: An Analysis of TILA's Clarity of Disclosure Requirement in Actions by Consumers Against Creditor Card Companies

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# Who Decides Whether Clarity is Clear?: An Analysis of TILA's Clarity of Disclosure Requirement in Actions by Consumers Against Creditor Card Companies

Brandon Mohr\*

## Introduction

Courts are currently split on the following issue: When a consumer sues a credit card company for violating the Truth In Lending Act (TILA or the "Act") by claiming that the terms specified in the credit card agreement are unclear, is the clarity of disclosure of the terms of the agreement a question of law to be decided by the court or a question of fact better left for the jury? In the early part of the twenty-first century the United States Court of Appeals for the Third Circuit found that fact-finders were best equipped to determine whether the credit card companies had satisfied the statute's requirements to disclose the terms of the agreement clearly.<sup>1</sup> In recent years, however, circuit courts from the United States Court of Appeals for the Seventh and Ninth Circuits have found that the clarity of disclosure of credit agreement terms is more appropriately decided as a matter of law by the court.<sup>2</sup>

TILA requires credit agreement terms to be disclosed to consumers

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1. See *Roberts v. Fleet Bank (R.I.), N.A.*, 342 F.3d 260 (3d Cir. 2003); *Rossmann v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384 (3d Cir. 2002).

2. See *Rubio v. Capital One Bank*, 613 F.3d 1195 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1817 (2011); *Barrer v. Chase Bank USA, N.A.*, 566 F.3d 883 (9th Cir. 2009); *Hamm v. Ameriquist Mortg. Co.*, 506 F.3d 525 (7th Cir. 2007).

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“clearly and conspicuously.”<sup>3</sup> The statute, however, fails to define either term. Moreover, it does not provide any type of framework or guidance for analyzing whether credit agreement terms are disclosed clearly and conspicuously and, more importantly, who should make the determination. To help construct an appropriate standard, courts have borrowed from various sources to establish how each word should be evaluated.<sup>4</sup> While little disagreement exists regarding conspicuousness being decided as a question of law by the court, clarity involves greater discord.<sup>5</sup>

Both the clarity and the conspicuousness requirements exist in the statute to impart a sense of how the credit agreement terms are to be disclosed, but they do not necessarily need to be treated identically. Even a cursory review of the definitions of each word indicates that each means something slightly different.<sup>6</sup> So if each word individually is supposed to represent a different requirement that credit card companies must meet to satisfy TILA’s obligatory disclosure, then clarity does not necessarily need to be decided as a question of law by the court just because conspicuousness is analyzed in such a manner.

While conspicuousness requires courts to decide whether the disclosed information is visually noticeable within the credit agreement terms and solicitation materials, clarity focuses on whether the consumer intellectually understands the information itself.<sup>7</sup> Allowing courts to decide what consumers will and will not understand places too much discretion with the courts on an issue that would be more properly decided by the finders of fact. Therefore, when analyzing the clarity of disclosure by credit card companies of credit agreement terms, the determination of whether the requisite level of clarity has been achieved should be a question of fact decided by the fact-finder.

Section 1 will begin by discussing credit card usage and the levels of debt of American consumers. Section 2 will outline the history of TILA, which was promulgated by Congress in 1968, as well as the enforcement power bestowed by Congress on the Federal Reserve Board to implement TILA.<sup>8</sup> This exploration will also include descriptions of

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3. 15 U.S.C. § 1632 (2009).

4. *See infra* text accompanying notes 144-54.

5. *Rubio*, 613 F.3d at 1209 n.5; *see also supra* notes 1-2.

6. *See infra* Part IV.C.

7. *See infra* notes 151-52 and accompanying text.

8. John A. Marold, *Third Circuit’s Decision in Roberts v. Fleet Bank: Thinking Outside of the “Schumer Box” or “Consumerism Gone Berserk?”*, 8 N.C. BANKING INST.

Regulation Z and the Schumer Box requirements that state exactly what information needs to be clearly and conspicuously displayed in credit card application materials as well as how the information is to be displayed for consumers to review. Section 3 will discuss the recent Ninth Circuit case, *Rubio v. Capital One*,<sup>9</sup> where the court decided the clarity of disclosure as a question of law. The dissent from *Rubio* will also be analyzed because the position taken is in accord with the Third Circuit opinion of *Roberts v. Fleet Bank*,<sup>10</sup> where the clarity of disclosure was left as a question of fact for the jury. Section 4 will outline the *Roberts* case, and the court's decision to analyze clarity of disclosure as a question of fact, in more detail. The fifth and final Section will recommend leaving clarity of disclosure as a question of fact to be decided by a fact-finder.

### I. Credit Card Debt

Today there are more than a billion credit cards in use.<sup>11</sup> The sheer size of the industry is not lost on credit card companies as they continuously search for new ways to make money from cardholders. During the past decade, credit card companies have shifted away from charging cardholders annual fees and are now opting for late fees that trigger penalty interest rates.<sup>12</sup> Currently, the Annual Percentage Rate (APR), which is the interest rate charged to credit card holders, is at a national average of 14.71 percent<sup>13</sup> However, those with bad credit, who are required to pay penalty APRs, are being charged an average of 24.95 percent on their outstanding credit card balances.<sup>14</sup> These high APRs are arguably the most significant factor contributing to American's average

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399, 403 (2004).

9. *Rubio*, 613 F.3d 1195.

10. *Roberts v. Fleet Bank (R.I.), N.A.*, 342 F.3d 260 (3d Cir. 2003).

11. Jeffrey Kimball Paulsen, *Credit Card Disclosure and the Elderly: Will the Proposed Amendments to Regulation Z Help the Elderly Understand Credit Card Documents?*, 17 ELDER L.J. 125, 127 (2009).

12. Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 163 (2006). "Consumer groups have suggested that this combination of late fees and penalty rates is convincing evidence of 'anti-consumer policies employed by credit card companies to force cardholders to slide deeper into debt.'" *Id.*

13. *Weekly Credit Card Rate Report*, CREDITCARDS.COM (Jan. 5, 2011), <http://www.creditcards.com/press-releases/CreditCards-Weekly-Credit-Card-Rate-Report-January-05-2011.php>.

14. *Id.*

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credit card debt of \$15,799 per household.<sup>15</sup>

The record debt levels we see today begin with one of the credit card companies' target markets—students. By soliciting students, lenders are able to hook consumers at a young age into paying for items on credit until they become so dependent on credit cards that they amass debt amounts that are virtually unpayable.<sup>16</sup> Minorities<sup>17</sup> and the elderly<sup>18</sup> attract the attention of credit card companies as well, and these groups often carry significant balances which can ultimately result in higher than average APRs.

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15. Ben Woolsey & Matt Schulz, *Credit Card Statistics, Industry Facts, Debt Statistics*, CREDITCARDS.COM, <http://www.creditcards.com/credit-card-news/credit-card-industry-facts-personal-debt-statistics-1276.php> (last updated July 14, 2011).

16. See *Study Finds Rising Number of College Students Using Credit Cards for Tuition*, SALLIE MAE (Apr. 13, 2009), [https://www1.salliemae.com/about/news\\_info/newsreleases/041309.htm](https://www1.salliemae.com/about/news_info/newsreleases/041309.htm).

Eighty-four percent of undergraduates had at least one credit card, up from 76 percent in 2004. . . . The average (mean) balance grew to \$3,173, higher than any of the previous studies. . . .

. . . .

The study found that:

Sixty percent [of students] experienced surprise at how high their balances had reached, and 40 percent said they have charged items knowing they did not have the money to pay the bill.

*Id.*

17. See Woolsey & Schulz, *supra* note 15. "In 2004, of those with credit cards, 84 percent of African-American households carried credit card debt compared with 54 percent of white households." *Id.* In a 2009 study conducted by the FINRA Investor Education Foundation, 44 percent of Hispanics surveyed reported having at least two credit cards. *Id.*

18. See Paulson, *supra* note 11. "[F]inancial literacy among elders is lower than for any other age group." *Id.* at 132.

[The elderly] are trusting and trustworthy, believe in meeting any obligation incurred, and are more likely to be homeowners, confined to home, or on a fixed income. Because of these vulnerabilities, the elderly are often targeted by predatory lenders seeking to tap into their home equity, payday loan companies, and consumer scam artists—and also credit card companies.

*Id.* at 130.

## II. Truth In Lending Act

In 1968, Congress passed TILA in an effort to protect consumers from unethical lenders.<sup>19</sup> These lenders had been employing various tricks and bait-and-switch tactics to trap consumers in contracts containing unfair terms.<sup>20</sup> Specifically, these contracts would subject consumers to unreasonably high interest rates.<sup>21</sup> Consumers would enter into credit agreements expecting specific interest rates, only to be charged much higher rates by lenders.<sup>22</sup>

Unfortunately, such predatory and misleading tactics by some lenders did not cease with the original passage of TILA.<sup>23</sup> In fact, since being passed into law, TILA has been amended multiple times in an effort to perfect the consumer protections first desired in 1968.<sup>24</sup>

While many Americans today find themselves in a downward financial spiral because of mounting levels of credit card debt, Congress is using TILA and its subsequent amendments to help consumers make more informed decisions when deciding which credit cards to apply for and use on a regular basis.<sup>25</sup> Section 1601 of the Act states its purpose as being “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms

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19. Marold, *supra* note 8. TILA came into being in 1968 with a purpose to “assure a meaningful disclosure of credit terms . . . and to protect the consumer against inaccurate and unfair credit billing and credit card practices.” 15 U.S.C. § 1601(a) (1976).

20. Marold, *supra* note 8.

21. *Id.*

22. *Id.*

23. *Id.* at 406.

In 1988, due to changes in consumer credit products and creditor marketing practices, the TILA was amended by the Fair Credit and Charge Card Disclosure Act (“FCCDDA”). The purpose of the amendment was to provide for more specific and uniform disclosure by credit and charge card issuers with regard to information relating to interest rates and other fees.

*Id.*

24. *Id.* at 405-08. Based on constant changes in the financial markets as well as new business tactics employed by credit card companies, Congress amended TILA various times in the 1970s and 1980s. *Id.* The amendments served to curb the use of unacceptable marketing practices and the issuance of various credit products by lenders by more effectively informing consumers about credit products. *Id.*

25. *Id.* at 403.

available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.”<sup>26</sup> TILA’s role is not to tell credit card companies how to run their operations but only to ensure that consumers are not duped into applying for and using credit products with terms that they do not understand from the onset.<sup>27</sup> Issuers must disclose required terms clearly and accurately, meaning literal falsities as well as misleading statements are prohibited.<sup>28</sup>

#### A. TILA Enforcement

Congress recognized when initially passing TILA that the management of consumer credit was a day-to-day activity.<sup>29</sup> Therefore, Congress delegated broad authority to the Federal Reserve Board (FRB) to implement the Act.<sup>30</sup> Section 1604 of TILA authorized the FRB to “prescribe regulations to carry out the purposes of” the Act.<sup>31</sup> Additionally, the Supreme Court affirmed Congress’s delegation of power to the FRB, which was done to ensure that any gaps in TILA’s regulatory power were filled.<sup>32</sup> In total, the sources of law surrounding this complex statute include “TILA, the FRB’s Regulation Z (which implements the Act), the Official Staff Commentary on Regulation Z, and case law interpreting TILA and its regulations.”<sup>33</sup>

The FRB promulgated Regulation Z for the purpose of enforcing TILA.<sup>34</sup> “Regulation Z promotes the informed use of consumer credit by requiring disclosures about its terms and cost. The regulation controls certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes.”<sup>35</sup> Also, TILA and Regulation Z

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26. 15 U.S.C. § 1601(a) (2000).

27. Marold, *supra* note 8, at 403.

28. Rossman v. Fleet Bank (R.I.) N.A., 280 F.3d 384, 390-91 (3d Cir. 2002).

29. Marold, *supra* note 8, at 404.

30. *Id.*

31. 15 U.S.C. § 1604(a) (2010).

32. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) (“Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive . . .”).

33. Marold, *supra* note 8, at 404.

34. Rossman v. Fleet Bank (R.I.) N.A., 280 F.3d 384, 389 (3d Cir. 2002).

35. Marold, *supra* note 8, at 404. “TILA and Regulation Z are both aimed at educating consumers about the terms and conditions attached to credit card accounts. They accomplish this goal by requiring creditors to disclose specific, important pieces of

both make a distinction between open-end and close-end consumer credit.<sup>36</sup> An open-end credit plan expects repeat transactions and features the application of finance charges to unpaid balances as well as “conditioning the amount of available credit on any outstanding balance.”<sup>37</sup> The essential financial terms of all open-end credit plans must be disclosed by lenders prior to the consumer’s first transaction.<sup>38</sup>

### B. *Disclosure*

Each day, millions of Americans receive offers for credit cards, home equity loans, and auto loans. The language is now commonplace to most Americans. You have been pre-approved for a new credit card! “Just transfer a balance now and you’ll pay no interest on purchases—0% APR—until June 1, 2009 with NO balance transfer fee. Plus, you’ll appreciate a credit limit of up to \$30,000! No annual fee!”<sup>39</sup>

The above language, while familiar to most Americans, might still

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information to consumers at various stages of the creditor-consumer relationship.” Paulsen, *supra* note 11, at 138.

36. Marold, *supra* note 8, at 408.

37. Paulson, *supra* note 11, at 135. TILA defines an open-end credit plan as “a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance.” 15 U.S.C. § 1602(i) (2009). Credit cards, retail charge accounts, revolving accounts, and check overdrafts are all examples of open-end credit plans. Paulson, *supra* note 11, at 135. Regulation Z places much stricter requirements on open-end credit plans than on closed-end plans. *Id.* at 135-36.

38. Marold, *supra* note 8, at 408.

39. James M. Garrett, Comment, “Congrats! You’ve Been Pre-Approved!”: *Determining the Correct Approach to a Firm Offer of Credit*, 45 HOUS. L. REV. 1311, 1312 (2008). “Even with the increased popularity of these alternate channels, however, direct mail continues to have a significant impact as an advertising medium. In 2007, United States households were expected to receive approximately 5.3 billion mailings pertaining to offers for new credit cards alone.” *Id.* Because the business of consumers and credit has become so intertwined in our society, Elizabeth Warren, President Obama’s appointee responsible for implementing Wall Street reform, said clarity in the distribution of information from credit card companies to consumers is paramount. Jim Puzanghera, Op-Ed., *Reform Begins Here Elizabeth Warren Has Key Role in Protecting Consumers*, STAR LEDGER (Newark, N.J.), Oct. 28, 2010, at 12. Mere disclosure is no longer enough. *Id.*



be misleading depending on the consumer's familiarity with the financial industry, as well as their ability to read and understand the fine print of an agreement. In an effort to aid consumers, Congress passed the 1988 amendments to TILA in the form of the "Fair Credit and Charge Card Disclosure Act," directly imposing disclosure requirements to be adhered to by credit card companies when producing credit card applications and solicitations.<sup>40</sup> Direct-mail credit card solicitations were among the credit disclosures initially regulated by TILA.<sup>41</sup> With each new amendment, TILA's primary goal of promoting disclosure rather than substantively regulating "the terms creditors can offer or include in their financial products," has been maintained.<sup>42</sup>

A creditor must satisfy two conditions in order to comply with the disclosure requirements set for by TILA and Regulation Z.<sup>43</sup> First, the creditor must disclose all of the information required by the statute.<sup>44</sup> Second, the information disclosed must be a true and accurate representation of the legal obligations of the parties.<sup>45</sup> "The purpose of the disclosure is to present the significant terms of the agreement to the consumer in a consistent manner that is readily seen and easily understood, thereby 'enabling consumers to shop around for the best cards.'"<sup>46</sup>

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40. See *Rossman v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384, 390 (3d Cir. 2002). The 1988 amendments required "applications and solicitations to disclose the annual percentage rates, certain fees (including annual fees), the grace period for payments, and the balance calculation method." *Id.* (citation omitted). Before the amendment, TILA required only that "issuers make these disclosures before the opening of the account—a requirement ordinarily fulfilled by providing the disclosures along with the card." *Id.*

41. See *Rubio v. Capital One Bank*, 613 F.3d 1195, 1199 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1817 (2011). "TILA requires that all such solicitations disclose, among other information, '[e]ach annual percentage rate applicable to extensions of credit under' the credit card agreement." *Id.* (citing 15 U.S.C. § 1637(c)(1)(A)(i)(I) (2006)).

42. *Barrer v. Chase Bank USA, N.A.*, 566 F.3d 883, 887 (9th Cir. 2009).

43. See *id.*

44. See *id.*; see also Regulation Z, 12 C.F.R. § 226.6 (2010) (outlining what creditors must disclose as a consumer moves through the process of opening an account with the creditor).

45. See *Barrer*, 566 F.3d at 887. "Disclosures shall reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c) (outlining how the creditor is to disclose the information to the consumer).

46. *Rossman v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384, 390 (3d Cir. 2002) (quoting S. REP. NO. 100-259, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3936, 3938). "[D]isclosures should reflect the contractual agreement itself" since "[t]he legal obligation normally is presumed to be contained in the contract that evidences the agreement." *Id.* (quoting 12 C.F.R. § 226(5)(c)(1)(iii)).

TILA and Regulation Z require information to be disclosed to consumers in a tabular format.<sup>47</sup> This format is commonly known as a “Schumer Box” in honor of the principal sponsor of the House bill—Congressman (now Senator) Charles Schumer.<sup>48</sup> Section 1632(c) of TILA describes the tabular format requirements, including general appearance, the ordering of information, and the wording to be utilized, but does not provide any specific visual formatting examples.<sup>49</sup>

Additionally, TILA requires that all terms in the agreement be “clearly and conspicuously” disclosed by the creditor to the consumer.<sup>50</sup> “This standard requires the disclosures to be ‘in a reasonably understandable form and readily noticeable to the consumer.’”<sup>51</sup> This does not mean, however, that more disclosure is better.<sup>52</sup> It is about striking a balance between complete disclosure on one end and information overload on the other end.<sup>53</sup> “Clarity is about emphasizing the key pieces of information that someone needs to know: price, risk, easy comparison of other products.”<sup>54</sup> Pure disclosure has come to be considered somewhat of a dirty word according to Elizabeth Warren,

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47. See Marold, *supra* note 8, at 407-08 (citing 12 C.F.R. § 226.5a(b)(1)-(7)); see also 12 C.F.R. § 226.5a(a)(2)(i) (“The disclosures in paragraphs (b)(1) through (5) (except for (b)(1)(iv)(B)) and (b)(7) through (15) of this section . . . generally shall be in the form of a table with headings, content, and format substantially similar to any of the applicable tables found in G-10 in appendix G to this part.”). See generally 12 C.F.R. § 226.5 (a)(3) (outlining how disclosures in credit card applications and solicitations must be displayed in a tabular or prominent location).

48. See Marold, *supra* note 8, at 406; see also Joseph W. Gelb & Peter N. Cubita, *Credit Card Application and Solicitation Disclosure Legislation: An Alternative to the Rate Ceiling Approach*, 43 BUS. LAW. 1557, 1561 (1988).

49. See 15 U.S.C. § 1632(c) (2009). The table must “(i) contain[] clear and concise headings for each item of [required] information; and (ii) provide[] a clear and concise form for stating each item of information required to be disclosed under each such heading.” *Id.* § 1632(c)(2)(A)(i)-(ii).

50. *Id.* § 1632(a).

51. *Rossman v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384, 390 (3d Cir. 2002) (quoting 12 C.F.R. § 226.5a(a)(2) cmt. 1 (Supp. I 2011)).

52. See *Hamm v. Ameriquet Mortg. Co.*, 506 F.3d 525, 529 (7th Cir. 2007) (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)).

53. *Id.* The *Hamm* court based its understanding of meaningful disclosure on the Supreme Court’s definition in *Ford Motor Credit Co. v. Milhollin*. *Id.* “[T]he concept of ‘meaningful disclosure’ that animates TILA . . . cannot be applied in the abstract. Meaningful disclosure does not mean more disclosure. Rather, it describes a balance between competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload].” *Id.* (alterations in original) (quoting *Ford Motor Credit Co.*, 444 U.S. at 568) (internal quotation marks omitted).

54. *Puzzanghera*, *supra* note 39.

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President Obama's newly appointed head of the Consumer Financial Protection Bureau.<sup>55</sup> She said "[d]isclosure has become like shrubbery, a dense thicket of words that are a good place to hide tricks and traps."<sup>56</sup>

Clarity of disclosure is important because the average American adult reads at an eighth-grade level, while most credit card disclosures historically were written at a tenth-grade level or higher.<sup>57</sup> Credit card companies used more complex language to describe contract terms to confuse consumers. This confusion led to consumers entering into agreements without truly understanding the terms. Had consumers been aware of the conditions imposed by the credit card companies, there is a strong likelihood that they would have sought out credit cards with more favorable terms.

The compliment in TILA to clarity is conspicuousness. Understanding the meaning of conspicuousness in relation to disclosure is somewhat unclear as TILA does not define the word. However, the Uniform Commercial Code provides some guidance by defining the term conspicuous to mean "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it."<sup>58</sup> Therefore, clear and conspicuous disclosure means that the

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55. *Id.*

56. *Id.*

57. Jaelyn Rodriguez, *The Credit Card Act of 2009: An Effective but Incomplete Solution Evidencing the Need for a Federal Regulator*, 14 N.C. BANKING INST. 309, 318-19 (2010).

Although the average American adult reads at an eighth-grade level, most credit card disclosures were written at a tenth-grade level or higher. The credit card disclosure documents were excessively complicated, included more detail than necessary, and used complex terms when only simple ones were necessary. For example, one cardmember agreement used the phrase "rolling consecutive twelve billing cycle period" rather than using "over the course of the next twelve billing statements" or "next twelve months." Excessive detail both lengthened and complicated the disclosure document. Experts determined that this excess information made consumers less likely to read or understand the information presented.

*Id.*

58. U.C.C. § 1-201(b)(10) (2010). The UCC provides two examples of conspicuousness:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

consumer will not have to make any assumptions regarding the terms in the credit agreement.<sup>59</sup>

### III. Question of Law

#### A. *Majority Opinion*—Rubio v. Capital One

The United States Court of Appeals for the Ninth Circuit recently considered a case that required the court to decide whether the clarity of disclosure of the terms of a credit agreement is a question of law to be decided by the court or a question of fact to be decided by the jury.<sup>60</sup> The plaintiff, Raquel Rubio, received a direct-mail credit card solicitation from the defendant, Capital One Bank.<sup>61</sup> The solicitation's Schumer Box described a "fixed" APR of 6.99 percent on purchases and balance transfers.<sup>62</sup> "Next to the Schumer Box's prominent heading, 'ANNUAL PERCENTAGE RATE (APR) for purchases,' was an asterisk linked to a paragraph printed just below the Schumer Box."<sup>63</sup> The paragraph stated, in ten-point font, three specific conditions that would trigger an

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(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

*Id.* § 1-201(b)(10)(A)-(B).

59. See *Hamm v. Ameriquet Mortg. Co.*, 506 F.3d 525, 529 (7th Cir. 2007). While the *Hamm* court believed that clarity of disclosure was a question of law, the importance of this passage for our purpose is the general description of the clear and conspicuous nature of disclosure. "If a lender does not disclose [even one required] piece of information in the specified way, leaving the borrower to make assumptions, then TILA has been violated." *Id.* To illustrate this point, in *Hamm*, the plaintiff received a thirty-year mortgage from the defendant bank. *Id.* at 527. The disclosure statement did not contain any reference to the number of payments required, which would have been 360, nor did it say the payments were supposed to be made monthly. *Id.* Because the defendant failed to include these facts in the disclosure statement, they were found to have violated TILA even though such details would seem to the reasonable consumer to be commonsense. *Id.* at 531-32.

60. *Rubio v. Capital One Bank*, 613 F.3d 1195 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1817 (2011).

61. *Id.* at 1198.

62. *Id.*

63. *Id.* (emphasis in original).

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increase in the APR associated with the card.<sup>64</sup> The solicitation, on the same page as the Schumer Box, also contained a heading in eight-point font that read “Terms of Offer,” which informed the customer that they would receive the Capital One Customer Agreement in the mail and would be bound by its contents.<sup>65</sup> The Customer Agreement also informed the consumer that Capital One reserved the right to “amend or change any part of [the] Agreement, including periodic rates and other charges, or add or remove requirements . . . at any time.”<sup>66</sup>

Approximately three and a-half years after Rubio applied for, received, and began using her Capital One credit card, the interest rate on purchases and balance transfers increased to 15.9 percent, even though Rubio had not triggered any of the three conditions detailed in the solicitation agreement.<sup>67</sup> Capital One notified her of the rate increase by mail and said she could avoid the higher rate by paying off the account balance and closing the card.<sup>68</sup> Rubio subsequently filed suit against Capital One alleging, among other claims, violations of TILA.<sup>69</sup>

After the district court dismissed Rubio’s claim on a 12(b)(6) motion to dismiss brought by the Defendant, Rubio appealed to the United States Court of Appeals for the Ninth Circuit for reconsideration.<sup>70</sup> The court of appeals focused on the information contained in the Schumer Box and the language used to describe the terms of the credit agreement, and ultimately reversed the district court’s granting of Capital One’s motion to dismiss.<sup>71</sup> The court held that as a matter of law Capital One did not prove that the terms of the agreement were clearly and conspicuously disclosed.<sup>72</sup>

In arriving at its decision that the Schumer Box terms were not clearly and conspicuously presented, the court of appeals found empirical evidence submitted by the parties helpful in determining how a

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64. *Id.* The three conditions listed as triggers were (1) failing to make a payment when due; (2) the account balance being overlimit; or (3) the payment being returned for any reason. *Id.* The first time a triggering event occurred, the APR would increase to 12.9 percent. *Id.* Then, if any combination of triggering events occurred twice during a six-month period, the APR would be increased to 25.9 percent. *Id.*

65. *Id.*

66. *Id.* (alteration in original) (internal quotation marks omitted).

67. *Id.*

68. *Id.*

69. *Id.* at 1198-99.

70. *Id.* at 1197-98.

71. *Id.* at 1200.

72. *Id.*

reasonable consumer would understand the terms of the agreement.<sup>73</sup> One such piece of evidence was a 2006 study, financed by the Federal Reserve Board of Governors (“FRBG Study”), designed to improve credit card disclosure effectiveness.<sup>74</sup> In the FRBG Study’s early rounds, when asked what they understood the term “fixed” to mean, “participants frequently assume[d] that a rate that [was] labeled ‘fixed’ [could not] be changed for any reason.”<sup>75</sup> Partially relying on the FRBG Study’s results, the Federal Reserve Board promulgated Regulation Z.<sup>76</sup> Regulation Z states in relevant part that, when used in the Schumer Box’s APR disclosure,

the term *fixed*, or a similar term, may not be used to describe [the annual percentage] rate unless the creditor also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while

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73. *Id.* The Federal Reserve Board of Governors, the agency charged with implementing TILA, has provided evidence on how reasonable consumers understand the term “fixed.” *Id.*

74. *Id.*; see MACRO INT’L INC., DESIGN AND TESTING OF EFFECTIVE TRUTH IN LENDING DISCLOSURES (2007), available at <http://www.federalreserve.gov/dcca/regulationz/20070523/Execsummary.pdf>. The FRBG Study was aimed at representing a complete range of demographics so as to provide trustworthy and accurate results. *Rubio*, 613 F.3d at 1201.

75. *Rubio*, 613 F.3d at 1201 (quoting MACRO INT’L INC., *supra* note 74, at 33) (internal quotation marks omitted). “When asked to define what a ‘fixed’ rate was, most participants said that it was a rate that would not change.” *Id.* (quoting MACRO INT’L INC., *supra* note 74, at 10) (internal quotation marks omitted). “When asked what it meant if a rate was labeled ‘fixed,’ most participants responded that these rates would not change for any reason.” *Id.* (quoting MACRO INT’L INC., *supra* note 74, at 30) (internal quotation marks omitted). The term “fixed” has been misunderstood by consumers in relation to the way the term is understood in the industry. See Stanton Koppel, Nicole Ibbotson & Helen Y. Lee, *Credit CARD Act of 2009: Implementation Guidelines*, 63 CONSUMER FIN. L. Q. REP. 205, 205-06 (2009).

The term “fixed,” when used in the context of an APR or interest rate, may only be used to refer to an APR or interest rate that will not change or vary for any reason over the period that is specified clearly and conspicuously in the terms of the account.

*Id.* at 208.

The amendment defining the term “fixed” was codified in 15 U.S.C. § 1637(m) (2009).

76. See *Rubio*, 613 F.3d at 1201.

the plan is open.<sup>77</sup>

“Under this regulation, a creditor may do what Capital One did—describe an APR as ‘fixed,’ without specifying a period during which the APR will remain the same—only if the rate is unchangeable for the life of the card.”<sup>78</sup>

Confusion arises from use of the term “fixed” because credit card companies like Capital One, and creditors in general, understand the term “fixed” to refer to an APR that is not tied to an index.<sup>79</sup> As the FRBG Study indicated, consumers do not share creditors’ understanding of the term when it refers to credit card APRs.<sup>80</sup> Capital One argued that a reasonable consumer could understand “fixed” to signify that the APR is not tied to an index.<sup>81</sup> The appeals court acknowledged that, while Capital One’s position might be true, “it is precisely because reasonable consumers can interpret an ambiguous disclosure in more than one way that such a disclosure cannot be clear and conspicuous.”<sup>82</sup>

In addition, Capital One used the term “fixed” to describe the APR in the Schumer Box while listing only three conditions that would trigger an increase in the APR.<sup>83</sup> Then, elsewhere in the solicitation sent to Rubio, Capital One reserved the right to change the APR at any time.<sup>84</sup> This all-encompassing clause allowing Capital One to change the APR completely at its discretion nullified, for all intents and purposes, the three triggering conditions stated in the Schumer Box. Based on these conflicting messages in the solicitation, the court of appeals reasoned that “it [wa]s not ‘clear and conspicuous’ to describe an APR as ‘fixed’ when the creditor has reserved the right to change the APR for any reason.”<sup>85</sup> Capital One continued by arguing that the clause enabling them to alter the APR for any reason cured any uncertainty or haziness

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77. *Id.* (alterations and emphasis in original) (quoting Truth in Lending, 74 Fed. Reg. 5244, 5401 (Jan. 29, 2009) (to be codified at 12 C.F.R. § 226.5(a)(2)(iii))).

78. *Id.*

79. *Id.* “The ‘index’ the Board refers to in its new regulation is a publicly available measure of the cost of funds (for example, the federal funds rate).” *Id.* at 1201 n.1.

80. *See supra* text accompanying note 75. The Board found creditors often use the term to describe an APR that is not tied to an index. Truth in Lending, 74 Fed. Reg. 5244, 5372-73 (Jan. 29, 2009).

81. *Rubio*, 613 F.3d at 1202.

82. *Id.*

83. *Id.*

84. *Id.* at 1198.

85. *Id.* at 1202.

surrounding the three triggering events in the Schumer Box.<sup>86</sup> This argument did not persuade the court of appeals, which stated that “[a]llowing disclosures made outside of the Box to cure a Schumer Box’s unclear or inconspicuous APR disclosure would seem to allow creditors to evade the tabular requirements.”<sup>87</sup>

After examining the evidence presented by the parties and the arguments put forth in support of their respective positions, the court of appeals returned to an analysis of TILA and the purpose for which the statute was enacted.<sup>88</sup> When considering an alleged TILA violation, ambiguities in the disclosure terms are to be “liberally construed in favor of the consumer and strictly enforced against the creditor.”<sup>89</sup> If, after a careful analysis by the court, ambiguity still exists regarding how a reasonable consumer would interpret disclosure terms in the credit agreement, such ambiguity “should be resolved in favor of the consumer.”<sup>90</sup> The majority ultimately reversed the district court’s dismissal of the TILA claim, finding that Rubio had stated a claim under TILA.<sup>91</sup> The court reasoned that Rubio’s TILA claim was supported “not because Capital One failed to disclose its unqualified right to change the terms of the Cardholder Agreement, but rather because Capital One failed to show as a matter of law that it made its APR disclosure ‘in a reasonably understandable form and readily noticeable to the consumer.’”<sup>92</sup>

#### IV. Question of Fact

##### A. *Dissenting Opinion*—Rubio v. Capital One

While Judge Graber agreed with the majority in its decision to

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86. *Id.* at 1203.

87. *Id.* at 1203 n.2.

88. *Id.* at 1202.

89. *Id.* (citation omitted). “In applying TILA and its implementing regulations, we ‘require absolute compliance by creditors,’ *Hawk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir. 2009), and ‘[e]ven technical or minor violations of the TILA impose liability on the creditor,’ *Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir. 1989).” *Id.* at 1199.

90. *Id.* at 1202 (quoting *Rossman v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384, 394 (3d Cir. 2002)) (internal quotation marks omitted).

91. *Id.* at 1203.

92. *Id.* (quoting Regulation Z, 12 C.F.R. § 226.5a(a)(2) cmt. 1 (Supp. I 2011)).



reverse the district court's dismissal of Rubio's TILA claim, she disagreed with the majority's reasoning.<sup>93</sup> The majority held as a matter of law that the clarity of disclosure in the cardholder agreement was inadequate.<sup>94</sup> Approaching the analysis this way enabled the court to determine whether Capital One satisfied the TILA disclosure requirements without having to submit the issue to a jury. Judge Graber believed that the clarity of disclosure should be left for consideration by the fact-finder.<sup>95</sup> Her examination and analysis of the solicitation sent to Rubio, as well as Capital One's compliance with the disclosure requirements of TILA and Regulation Z, demonstrate that a reasonable consumer could have found the disclosure made by Capital One to have been clear and conspicuous.

The goal of a disclosure analysis in this context is to determine whether a reasonable cardholder would notice and understand the terms.<sup>96</sup> The relevant inquiry then is "not whether additional disclosure would be useful to consumers but, rather, whether the disclosures that were made complied with the requirements of TILA and Regulation Z."<sup>97</sup> Accordingly, the information presented may satisfy the clear and conspicuous standard established in TILA.

The solicitation Capital One sent to Rubio contained a Schumer Box that described the APR as "fixed" and listed three events that could trigger an increase in the customer's APR.<sup>98</sup> On the same page as the Schumer Box and the list of triggering events, a section entitled "Terms of Offer" stated, "I will receive the Capital One Customer Agreement and am bound by its terms and future revisions thereof. My Agreement terms (for example, rates and fees) are subject to change."<sup>99</sup>

In contrast to the solicitation documents considered in *Rubio v. Capital One*, Judge Graber referred to a set of facts considered by the Ninth Circuit in *Barrer v. Chase Bank USA, N.A.*, as an example of

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93. *Id.* at 1206 (Graber, J., concurring in part and dissenting in part). "I too would hold that [Rubio] has stated a TILA claim—although I would decline to hold that the disclosure is clear as a matter of law . . ." *Id.* at 1206 n.1.

94. *Id.* at 1206.

95. *Id.*

96. *Id.* at 1207.

97. *Id.* (citing *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1121 (9th Cir. 2009)).

98. *See supra* Part III.A.

99. *Rubio*, 613 F.3d at 1207 (internal quotation marks omitted).

disclosure not being clear and conspicuous.<sup>100</sup> “[T]he change-in-terms provision appear[ed]. . . five dense pages after the disclosure of the APR and was neither referenced in nor clearly related to the ‘Finance Terms’ section.”<sup>101</sup> In *Rubio*, the APR and reservation of rights both appeared on the same page and were displayed in a legible font.<sup>102</sup> It is apparent that the cardholder agreement terms in *Barrer* are representative of inconspicuous disclosure. It becomes necessary to ask, then, how far a creditor must go in the opposite direction to ensure that the cardholder agreement terms can be considered clearly and conspicuously disclosed.<sup>103</sup>

During her examination of Capital One’s usage of the word “fixed” to describe the APR, Judge Graber stated that Capital One’s disclosures were accurate.<sup>104</sup> In coming to her conclusion, she acknowledged the majority’s reliance on the FRBG Study.<sup>105</sup> Her main point of contention regarding the majority’s use of the FRBG Study was the sample size on which the survey’s results were based.<sup>106</sup> A failure to sample an appropriate cross-section of the population can produce results that are not indicative of what is average, or reasonable, among the entire population.<sup>107</sup> A sample must be large enough so that the researchers can

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100. *Id.* at 1207 n.2 (citing *Barrer v. Chase Bank USA, N.A.*, 566 F.3d 883, 892 (9th Cir. 2009)).

101. *Id.* (alteration in original) (quoting *Barrer*, 566 F.3d at 892) (internal quotation marks omitted).

102. *Id.*

103. *Id.* at 1207 (The Ninth Circuit has “construed TILA and Regulation Z to prohibit disclosures that are either inconspicuous or opaque to a reasonable consumer.”). The cause for the current circuit split is the divergence of opinions on what is clear and conspicuous disclosure to the reasonable consumer.

104. *Id.* at 1208.

105. *Id.* at 1210; *see supra* Part III.A.

106. *Rubio*, 613 F.3d at 1210. The FRBG Study stated that researchers only interviewed nine consumers in Baltimore, nine in Kansas City, and seven in Denver. *Id.* (citing *MACRO INT’L INC.*, *supra* note 74). In total, the small sample size of twenty-five “consumers was not intended to be—and was not—representative of the card-holding public, even though the majority is correct that it was intended to represent the *range* of those consumers.” *Id.* (emphasis in original).

107. *Id.* Judge Graber writes that “[a] representative sample is one in which the frequency of distribution of some trait corresponds to that trait’s frequency or distribution in the population being sampled.” *Id.* at 1210 n.7; *see also Representative Sample Definition*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/representative-sample.html> (last visited Oct. 5, 2011) (defining “representative sample” as: “A small quantity of something such as customers, data, people, products, or materials, whose characteristics represent (as accurately as possible) the entire batch, lot, population, or universe.”).

be sure to have captured the variance of opinions that can exist on a topic. The larger the potential pool of surveyees, the more individuals that must participate in the survey to accurately capture the differences in opinion among the entire group. Judge Graber's discontent with the majority's reliance on the FRBG Study therefore has some justification. The potential pool of surveyees would be all individuals eligible to have a credit card in the United States. While there is no set of guidelines that dictates how large a sample size must be, Judge Graber's critique of the sample size used for the FRBG Study seems warranted.<sup>108</sup> The FRBG Study's results in determining the average consumer's understanding of the term "fixed" were apparently based on the opinions of twenty-five people,<sup>109</sup> which at first glance appears to be quite small. This is not to suggest that the FRBG Study's results are incorrect. It merely is cause for skepticism of the FRBG Study's findings, given the potential difficulty in capturing the variety of opinions that most likely exist among the potential credit card holders in the United States, based on such a small sampling of individuals.

In further analysis, Judge Graber dissected Capital One's use of the term "fixed" to describe the APR in the solicitation sent to Rubio.<sup>110</sup> To support her position that use of the term "fixed" satisfied TILA's clear and conspicuous requirement, she referenced the commentary to Regulation Z that distinguished the term "fixed-rate account" from "variable-rate account."<sup>111</sup> The commentary described a "variable-rate account" as one where "rate changes are part of the plan and are tied to an index or formula."<sup>112</sup> It can then be understood that a "fixed-rate account" is one that is *not* tied to an index or formula.<sup>113</sup> So when Capital One described its APR as "fixed," its disclosure was accurate and clearly stated according to the information contained in Regulation Z's commentary.<sup>114</sup>

Judge Graber's dissenting analysis concluded that if the cardholder agreement and solicitation terms were accurate and a reasonable consumer could have understood the terms, then Capital One should not

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108. *Rubio*, 613 F.3d at 1210.

109. *Id.*

110. *Id.* at 1207.

111. *Id.* at 1207-08 (citing Regulation Z, 12 C.F.R. § 226.5a(b)(1) cmt. 5 (Supp. I (2011))).

112. 12 C.F.R. § 226.5a(b)(1) cmt. 1 (Supp. I 2011).

113. *Rubio*, 613 F.3d at 1208 (emphasis added).

114. *Id.*

be held in violation of TILA's clear and conspicuous disclosure requirement as a matter of law.<sup>115</sup> So while the majority said that, if reasonable consumers could differ regarding whether terms are clear and conspicuous, then the solicitation does not satisfy the TILA disclosure requirements,<sup>116</sup> Judge Graber took a different approach.<sup>117</sup> She felt that if the terms could be found by a reasonable consumer to be clear and conspicuous, then a court should not be able to say as a matter of law that the terms did not meet TILA's "clear and conspicuous" standard.<sup>118</sup> Support for her position exists in Third Circuit case law where clarity of disclosure has been held, through a series of opinions, to be a question of fact to be decided by the fact-finder.<sup>119</sup>

#### B. Roberts v. Fleet Bank

The plaintiff, Denise Roberts, found herself in a situation with Fleet Bank similar to that of Raquel Rubio and her scenario with Capital One. Roberts received a credit card solicitation in the mail from Fleet Bank.<sup>120</sup> The solicitation advertised a "fixed" APR of 7.99 percent on the introductory flyer and in the solicitation letter, which twice stated that the

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115. *Id.* at 1211.

116. *Id.* at 1203 (majority opinion).

117. *Id.* at 1206 n.1 (Graber, J., concurring in part and dissenting in part).

118. *Id.* at 1211. The credit agreement terms used in *Rubio v. Capital One Bank* never stated that the APR was "for life" or for the consumer's "lifetime," nor [did] it promise that the rate [would] stay the same 'as long as' the account remain[ed] in good standing." *Id.* at 1208 n.4. This is in contrast to a case considered fifteen years before *Rubio v. Capital One Bank* where the "[d]efendant advertised a card with a 'Lifetime APR' and told consumers that they would 'receive a low fixed APR . . . for life!'" *Id.* (citing *DeMando v. Morris*, 206 F.3d 1300, 1301-02 (9th Cir. 2000)). The solicitation in *DeMando v. Morris* also declared: "You will keep this low fixed rate as long as your account remains in good standing . . . [Y]ou will never have to shop for another credit card again!" *Id.* (citing *DeMando*, 206 F.3d at 1302 (alteration in original) (internal citation omitted)). These two examples illustrate the variations credit card companies use in solicitation offers to customers and also demonstrate how direct the solicitations can be when the credit card companies choose to "spell out" the terms of the offer.

119. *Id.* at 1209 n.6; see *Roberts v. Fleet Bank (R.I.) N.A.*, 342 F.3d 260, 262 (3d Cir. 2003) (holding that whether defendant violated TILA's clear and conspicuous disclosure requirement is a question of fact); *Rossmann v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384, 394-95 (3d Cir. 2002) (implicitly treating the disclosure as a question of law, such that the court did not specifically discuss the issue and left the question of whether the disclosure was truly inaccurate or whether (1) no issue of fact existed or (2) clarity of disclosure is always decided as a matter of law).

120. *Roberts*, 342 F.3d at 262-63.

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APR of 7.99 percent was “fixed” and that it was not an introductory rate.<sup>121</sup> On the back of the solicitation, Fleet listed the “Terms of Pre-Qualified Offer,” which stated in relevant part:

I request a Fleet Titanium MasterCard account upon acceptance of my request by Fleet Bank (RI), National Association in Rhode Island. I agree to the terms of the Cardholder Agreement mailed with my Card, including those which provide that the Cardholder Agreement and may [*sic*] account will be governed by Rhode Island and Federal law and *that my Agreement terms (including rates) are subject to change.*<sup>122</sup>

In addition, the “Consumer Information” section contained the requisite Schumer Box, which again stated that the APR was “fixed” at 7.99 percent.<sup>123</sup> The Schumer Box also listed two specific conditions under which Fleet could change the APR: “(1) if the prospective cardholder failed to meet any repayment requirements; or (2) upon closure of the account.”<sup>124</sup> The “Initial Disclosure Statement” also listed the exact same two conditions granting Fleet the authority to change the APR.<sup>125</sup>

Based on the information in the solicitation, Roberts completed the application and returned it to Fleet.<sup>126</sup> She received her Fleet Titanium MasterCard in June 1999 along with the Cardholder Agreement, which stated in section 24, titled “Change in Terms,” that:

We have the right to change any of the terms of this Agreement at any time. You will be given notice of a change as required by applicable law. Any change in terms governs your Account as of the effective date, and will, as permitted by law and at our option, apply both to transactions made on or after such date and to any

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121. *Id.* at 263.

122. *Id.* (emphasis added).

123. *Id.*

124. *Id.*

125. *Id.* at 263-64.

126. *Id.* at 264.

outstanding Account balance.<sup>127</sup>

Thirteen months after Roberts received her Fleet MasterCard, Fleet increased her APR to 10.5 percent.<sup>128</sup> She subsequently filed a class action lawsuit against Fleet claiming, inter alia, that Fleet violated TILA's disclosure requirements.<sup>129</sup> After the district court granted Fleet summary judgment on the TILA claim, Roberts appealed to the court of appeals, which reversed the district court's grant of summary judgment and remanded the case for further fact finding.<sup>130</sup>

The appeals court began its analysis by reiterating the purpose for which Congress enacted TILA.<sup>131</sup> Because the issue in *Roberts* focused on the disclosure of the APR, the court centered its analysis on "TILA and Board-promulgated regulations require[ing] a credit card issuer to disclose the applicable [APR] clearly and conspicuously in a table, commonly referred to as the Schumer Box."<sup>132</sup> The information in the Schumer Box is necessary to ensure the legal obligations of both the credit card company and consumer are accurately and clearly disclosed such that each party understands what the credit contract legally requires of them.<sup>133</sup> Therefore, the information disclosed cannot be patently false, and it also cannot be misleading.<sup>134</sup>

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127. *Id.*

128. *Id.* While the court does not specifically state that Roberts failed to satisfy either of the two triggering events listed by Fleet in the Schumer Box and Initial Disclosure Statement allowing Fleet to increase her APR, it can be understood that she did not (1) fail to meet her repayment requirements or (2) close her account. *See id.*

129. *Id.*

130. *Id.* at 264, 271.

131. *Id.* at 265. Congress enacted TILA "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, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." *Id.* (quoting 15 U.S.C. § 1601(a) (1976)) (internal quotation marks omitted).

132. *Id.* at 266.

133. *Rossman v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384, 390 (3d Cir. 2002) (citing Regulation Z, 12 C.F.R. § 226.5(c) (2011)); *see also Roberts*, 342 F.3d at 267 (stating that the relevant inquiry in this case is "whether Fleet's disclosures in the Schumer Box provided 'an accurate representation of the legal obligation of the parties . . . when the relevant solicitation was mailed.'" (quoting *Rossman*, 280 F.2d at 391).

134. *Rossman*, 280 F.3d at 391 (citations omitted). In addition, "[t]he disclosures should reflect the credit terms to which the parties are legally bound at the time of giving the disclosures." *Id.* (quoting 12 C.F.R. § 226.5(c) cmt. 1 (Supp. I 2011)) (internal quotation marks omitted). "And, more particularly, 'disclosures in direct mail applications and solicitations must be accurate as of the time of mailing.'" *Id.* (quoting 12

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The evidence reviewed by the court in an effort to determine whether Fleet's disclosure was clear included the information in the Schumer Box as well as terms conveyed outside of the Schumer Box.<sup>135</sup> It is not enough that information in the Schumer Box be clearly and conspicuously stated.<sup>136</sup> The solicitation materials as a whole must not contain terms that contradict each other, because such contradiction is very likely to create confusion for the consumer.<sup>137</sup> The court's decision to review all solicitation materials therefore enabled it to champion TILA's purpose of promoting disclosure by ensuring that consumers thoroughly understand the cardholder agreements into which they enter.<sup>138</sup>

In an attempt to prevent review of all solicitation materials associated with the offer sent to Roberts, Fleet claimed "that the 'clear and conspicuous' standard only applie[d] to required disclosures in the Initial Disclosure Statement and the Schumer Box."<sup>139</sup> The court shot back, stating that it doubted Congress intended courts to overlook statements made by credit card issuers in their solicitation materials when the goal of disclosure is that the terms be clearly and conspicuously presented.<sup>140</sup> Fleet also focused on the change in terms clause by highlighting "that the Board's regulations prevent[ed] it from including a 'change in terms' provision in the Schumer Box."<sup>141</sup> Again, the court rejected Fleet's argument and reminded the parties that the issue was whether the APR was clearly and conspicuously disclosed in the Schumer Box, not whether Fleet was allowed to include the change in

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C.F.R. § 226.5a(c) cmt. 1 (Supp. I 2011)).

135. *Roberts*, 342 F.3d at 268.

136. *Id.*

137. *Id.*

When questioned at oral argument about whether the phrase "rates are subject to change" would more clearly and conspicuously disclose the contractual terms than the phrase "won't go up in just a few short months," which appeared in the solicitation letter, counsel for Fleet responded that the solicitation letter is not the TILA disclosure.

*Id.* at 267 n.2.

138. *See id.* at 268.

139. *Id.* at 267.

140. *Id.*

141. *Id.*

terms information within the Schumer Box.<sup>142</sup>

After considering all of the materials transmitted from Fleet to Roberts, the court found that a question of fact existed as to whether the materials contained any misleading statements or failed to disclose the required information under TILA clearly and conspicuously.<sup>143</sup>

### C. *Conspicuousness versus Clarity*

A definition of neither conspicuous nor clarity exists in either TILA or the Board-promulgated regulations of TILA. The terms are solely used to describe the manner in which certain information, including the APR, must be disclosed to the consumer by the credit card issuer.<sup>144</sup> It would then seem that by using both terms, Congress was not looking to create a level of redundancy, but was instead intending to capture the individual meanings of both “clear” and “conspicuous” in the statute’s regulatory verbiage.<sup>145</sup>

Before ultimately deciding whether clear and conspicuous disclosure in the context of TILA should be a question of law or fact, it is necessary to understand what each word requires of the credit card issuer. In her dissenting opinion in *Rubio v. Capital One Bank*, Judge Graber acknowledged that the Ninth Circuit had held previously that the conspicuousness of TILA disclosure was a question of law.<sup>146</sup> She continued by pointing out that the court had not previously addressed how clarity was to be decided.<sup>147</sup>

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142. *Id.* at 268 (“Nonetheless, Fleet argues that it is prohibited from including ‘change in terms’ information in the Schumer Box. However, as we previously stated, this argument avoids the central issue in this case, which is whether the APR was adequately disclosed.”); *see also* *Rossman v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384, 394 (3d Cir. 2002) (rejecting a similar argument made by Fleet that the obligation does not concern change-in-terms provisions but the duty to disclose annual fees.).

143. *Roberts*, 342 F.3d at 269.

144. *See* 15 U.S.C. § 1632(a) (2009).

145. *See* *Nunnally v. Equifax Info. Servs., LLC*, 451 F.3d 768, 773 (11th Cir. 2006) (“It is a cardinal principle of statutory construction that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001)); *In re Jacobson*, 378 B.R. 805, 809-10 (Bankr. E.D. Tex. 2007), *aff’d*, 609 F.3d 647 (5th Cir. 2010) (“A statute should be construed so that none of its terms are redundant and should be read to avoid internal inconsistency.”).

146. *Rubio v. Capital One Bank*, 613 F.3d 1195, 1209 n.5 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1817 (2011) (Graber, J., concurring in part and dissenting in part).

147. *Id.* (“The reasons why we treat conspicuousness as a question of law do not



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Conspicuousness, while not defined by TILA, has been defined by other statutes including the Uniform Commercial Code (UCC):<sup>148</sup> “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.”<sup>149</sup> The UCC goes on to advise that “[w]hether a term is ‘conspicuous’ or not is a decision for the court.”<sup>150</sup> Judge Graber confirmed that the Ninth Circuit borrowed the description of conspicuousness from the UCC in deciding how to consider “conspicuousness of disclosure” in relation to TILA violations.<sup>151</sup>

But just because conspicuousness is treated as a question of law does not mean that clarity must be analyzed in the same vein.<sup>152</sup> Clarity is defined as “clearness or lucidity as to perception or understanding; freedom from indistinctness or ambiguity.”<sup>153</sup> Black’s Law Dictionary does not define “clarity” but it does define “clear” as “1. Free from encumbrances or claims; 2. Free from doubt, sure; 3. *Unambiguous*.”<sup>154</sup> Comparing these definitions to that of conspicuousness above, it is clear that each term has a unique definition. While referring to generally the same idea, each word contributes something different to the overall meaning and understanding of the particular provision of TILA which uses the terms in conjunction with one another. When taken as a whole, “clear and conspicuous” sets forth a standard of disclosure that is required when information is relayed to consumers concerning the terms of the credit agreement. But when the “clear and conspicuous” clause is broken down, it is necessary to determine whether the disclosure required by each word (clear AND conspicuous) is satisfied; only then will the disclosure be sufficient.

### 1. Reasonable Person

In order to determine if a disclosure is complete, a standard needs to

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compel us to treat clarity similarly.”).

148. U.C.C. § 1-201(b)(10) (2009).

149. *Id.*

150. *Id.*

151. *Rubio*, 613 F.3d at 1209 n.5.

152. *Id.*

153. *Clarity* *Definition*, <http://dictionary.reference.com/browse/clarity> (last visited Sept. 28, 2011). “Likewise when a popular or common word is used in a statute, but is not defined, the word should be given its common meaning.” 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:28 (7th ed. 2011).

154. BLACK’S LAW DICTIONARY 287 (9th ed. 2009) (emphasis added).

be established through which the disclosure can be analyzed. The UCC directly states that a term is conspicuous if a “*reasonable person* against which it is to operate ought to have noticed it.”<sup>155</sup> The “reasonable person” standard is the test established by the legal system through which to analyze the conduct of individuals.<sup>156</sup> A reasonable person is one “who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others’ interests.”<sup>157</sup>

Clarity can also be analyzed using the reasonable person standard. Just as courts looked outside of TILA to define conspicuousness, it is necessary to search outside of the statute to better understand clarity and how to analyze the term in relation to the facts of a case. For example, one area of the law where clarity is examined using the reasonable person standard is in cases where public employees raise the qualified immunity defense.<sup>158</sup> When public employees are sued for allegedly violating a constitutional right of an individual or group of individuals, the public employee can claim qualified immunity that, if successful, will result in protection from damages liability.<sup>159</sup> The public employee, by

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155. U.C.C. § 1-201(b)(10) (2009) (emphasis added).

156. BLACK’S LAW DICTIONARY 1380-81 (9th ed. 2009).

157. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 283 (1965) (“Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”).

The chief advantage of this standard of the reasonable man is that it enables the triers of fact who are to decide whether the actor's conduct is such as to subject him to liability for negligence, to look to a community standard rather than an individual one, and at the same time to express their judgment of what that standard is in terms of the conduct of a human being.

*Id.* § 283 cmt. c.

The qualities of a reasonable man are “those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.” *Id.* § 283 cmt. b.

158. See *Raiche v. Pietroski*, 623 F.3d 30, 35-36 (1st Cir. 2010).

159. See *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding “the qualified-immunity defense ‘shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”)); see also David Jacks Achtenberg, *Symposium on Enforcing Constitutional Rights in the Twenty-First Century—Section 1983 Thirty Years After Owen*, 78 UMKC L. REV. 869, 869 (2010) (“The offending official, so long as he

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raising qualified immunity, claims that the law as it currently stands is not clear, and therefore the public employee should not be liable for any damage caused by his or her actions.<sup>160</sup> The relevant analysis focuses on whether the law at the time of the alleged violation was clearly established such that a *reasonable person* in the public employee's shoes would understand that his or her actions violated the plaintiff's constitutional right.<sup>161</sup>

The use of the reasonable person standard to determine clarity when defendants raise qualified immunity as a defense represents at least one example where clarity is analyzed by applying the reasonable person standard. Just as the court in *Rubio* borrowed the reasonable person standard for conspicuousness from the UCC, the use by courts of the reasonable person standard when determining clarity in cases where defendants raise qualified immunity supports the use of the reasonable person standard in determining clarity as it relates to TILA disclosure.

If the reasonable person standard can be used to evaluate both conspicuousness and clarity, it becomes necessary to determine if one term can be decided as a question of law and the other as a question of fact or if both terms need to be analyzed as questions of law. The UCC clearly states that conspicuousness should be decided as a question of law by the court.<sup>162</sup> This makes sense because conspicuousness focuses on whether the reasonable person would have *noticed* the information being disclosed. TILA's purpose is to ensure that consumers have access to information necessary to make informed decisions regarding the terms and conditions of a credit agreement.<sup>163</sup> To achieve this purpose, credit card companies are required to display certain vital pieces of information pertaining to the credit agreement in such a way that the relevant terms of the agreement are not hidden among pages of incomprehensible legalese.<sup>164</sup> "Conspicuousness" ensures that the relevant pieces of information are displayed in a way that a reasonable consumer would notice them. Solicitation materials thus contain a Schumer Box where companies place relevant credit information in a table that is prominently

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conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole.").

160. *Raiche*, 623 F.3d at 35.

161. *Id.* at 36.

162. U.C.C. § 1-201(b)10) (2009).

163. Marold, *supra* note 8, at 403.

164. *Id.*

placed using a readable font size.<sup>165</sup> The Ninth Circuit in *Rubio* evaluated the conspicuousness of such information contained in the Schumer Box as a question of law.<sup>166</sup> This makes sense because the Schumer Box requirements make it a fairly cut and dry question as to whether the reasonable consumer would notice the Schumer Box within the solicitation materials. The difficulty comes when trying to determine whether the information contained within the Schumer Box and throughout all of the solicitation materials as a whole is clear to the reasonable consumer.

There is a marked difference between noticing something and understanding what you are noticing. This is the difference between conspicuousness and clarity. The dissenting opinion in *Rubio* recognizes this distinction by stating: “The assessment of a reasonable consumer’s understanding of a disclosure would be more accurate—and hence more predictable—if made by an informed fact-finder than if made by a court in the abstract.”<sup>167</sup> While a court might very well be equipped to determine whether relevant information is noticeable within the solicitation information, it is not as capable of determining whether the reasonable person would understand the terms of the agreement as they are disclosed in the solicitation materials. Thus, a fact-finder is more capable than a court of reviewing the information disclosed and determining whether it is comprehensible in satisfaction of the clarity requirement.

## V. Conclusion

Disclosure under TILA has become increasingly important as more and more credit card companies are vying for new customers. The incentive to mislead consumers in an effort to have them sign a credit agreement, which they might not fully understand, can be substantial. Accordingly, TILA’s purpose of ensuring that consumers obtain all of the vital details relating to the proposed credit contract before entering into any agreements remains relevant.

In determining whether the disclosure of the relevant credit agreement terms is adequate, TILA established the “clear and

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165. *Id.* at 406-07.

166. *Rubio v. Capital One Bank*, 613 F.3d 1195, 1200 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1817 (2011).

167. *Id.* at 1209 n.5 (Graber, J., concurring in part and dissenting in part).

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conspicuous” standard by which the disclosure is to be judged.<sup>168</sup> Courts have been fairly uniform in the adjudication of conspicuousness as a matter of law. The split among the circuits, however, centers on clarity and whether clarity should be decided as a question of law, like conspicuousness, or a question of fact.

Conspicuousness, as it is defined in the UCC, focuses on how noticeable the information is in the solicitation materials. TILA, through the usage of the Schumer Box, provides an acceptable way for credit card companies to disclose information and ensure the required disclosure items are prominently displayed to the consumer.<sup>169</sup> Whether something is noticeable is fairly objective in the confines of a credit card solicitation document, thus placing it adequately in the hands of the court to decide as a question of law. Clarity, on the other hand, does not deal with whether the disclosed terms are noticeable, but whether the credit agreement terms are understandable given the way they are presented and described. This is a much more subjective determination, given the variations a credit card company might use in describing the terms within the solicitation materials. Thus, the fact-finder is better equipped to determine whether the reasonable consumer would find the disclosed terms understandable.

While TILA requires certain bits of information to be contained in the Schumer Box, it is not an exhaustive list,<sup>170</sup> and leaves out additional pieces of information that consumers might want when making their decision to enter the agreement. This enables companies to place information elsewhere in the materials given to the consumers. In general there is not one defined way in which to disclose all of the credit card agreement information. Consequently, it seems likely that there will always be a question of whether the reasonable consumer would think that the manner in which the terms were disclosed was clear. Given this fact, the fact-finder, as opposed to the court, is better able to determine if the manner in which the terms are communicated is clear.

As an aside, through various amendments to TILA, some certainty has been provided to credit card companies. One specific amendment provides a standardized definition of the term “fixed” so that, when it is

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168. 15 U.S.C. § 1632(a) (2009).

169. Marold, *supra* note 8, at 406-07.

170. 15 U.S.C. § 1637(c) (2006); *see also* Regulation Z, 12 C.F.R. § 226.6 (2010) (outlining what creditors must disclose as a consumer moves through the process of opening an account with the creditor).

used by credit card companies in credit card agreements and solicitation materials, it should no longer cause confusion to consumers.<sup>171</sup> The amendment adopted the consumers' commonly understood definition of the term as concluded by the FRBG Study.<sup>172</sup> As a result, the uncertainty surrounding certain issues has been removed which will help credit card companies more effectively comply with the clarity of disclosure requirements.

In conclusion, courts should adopt the Third Circuit's approach in *Roberts v. Fleet Bank* and the position posited by Judge Graber in her dissenting opinion in *Rubio v. Capital One Bank* when facing similar cases requiring an analysis of clarity of disclosure relating to alleged TILA violations. The clarity of the disclosure of the required information in the solicitation materials and credit card agreement should be decided by the fact-finder as a question of fact using the reasonable person standard.

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171. 15 U.S.C. § 1637(m) (2009); Truth in Lending, 74 Fed. Reg. 5244, 5272 (Jan. 29, 2009) (to be codified at 12 C.F.R. § 226.5(a)(2)(iii)).

172. See *supra* text accompanying notes 79-80.