



More Than You Wanted to Know: Failure of Mandated Disclosure

Posted by June Rhee, Co-editor, HLS Forum on Corporate Governance and Financial Regulation, on Tuesday May 6, 2014

Editor's Note: The following post comes to us from [Omri Ben-Shahar](#), the Leo & Eileen Herzel Professor of Law at the University of Chicago Law School.

"Mandated disclosure may be the most common and least successful regulatory technique in American law." Thus opens our book, [More Than You Wanted to Know: The Failure of Mandated Disclosure](#) (Princeton Press, 2014).

Of mandated disclosure's triumph there is no doubt. This blog's readers see it everywhere. Corporate scandals and financial crises ceaselessly spawn new disclosure laws: the Securities Act of 1933, the Truth-in-Lending laws of the 60s and 70s, Sarbanes-Oxley in 2002, and, recently, Dodd-Frank. Disclosure pervades tort law ("duty to warn"), consumer protection ("truth in lending"), bioethics and health care ("informed consent"), online contracting ("opportunity to read"), food law ("nutrition data"), campaign finance regulation, privacy protection, insurance regulation, and more.

This triumph is understandable. Mandated disclosure aspires to help people making complex decisions while dealing with specialists by requiring the latter (disclosers) to give the former (disclosees) information so that disclosees choose sensibly and disclosers do not abuse their position. It is seductively plausible. (Don't people make poor decisions because they have poor information? Won't they make good decisions with good information?) It alluringly fits all ideologies. (Thaler and Sunstein like it because it is "libertarian paternalistic"; corporations would "rather disclose than be regulated"). So mandates are enacted unopposed. Literally.

But mandated disclosure is like Kennedy after the Bay of Pigs: "The worse I do, the more popular I get." Or like Dr. Johnson's description of second marriages: "the triumph of hope over experience." For disclosure does not work, cannot be fixed, and can do more harm than good. It has failed time after time, in place after place in area after area, in method after method, in decade after decade.

Mandated disclosure's failure is no stranger than its popularity. Disclosures are the fine print everybody derides, the interminable terms everybody clicks agreement to without reading. Disclosures describe complex facts in complex language; most people little like the former and little understand the latter. Decisions requiring sophistication and expertise cannot be bettered by pelting the unsophisticated and inexpert with data.

If disclosure could work, it would be working now. In area after area, able people have ingeniously tried method after method. Full and summary disclosure, advance and real-time disclosure, oral and written disclosure, disclosure in words and in numbers, disclosure in boxes and in charts, disclosure in depth and in scores, disclosure by guidelines and by formulas, disclosure in print and on line. But success remains around the corner.

Today, sophisticated "disclosurites" want simplification, often guided by behavioral economics. But decades of simplification have yielded little progress. And behavioral economics is not the solution, it is the explanation for the failure. It reveals people perceiving and processing information in so many distorting ways that no mandate can account for them all. For example, studies of conflict-of-interest disclosure show that people's "heuristics and biases" are so unpredictable that designing disclosure to overcome one bias can just trigger another.

In some markets, "information intermediaries" digest complex information and disseminate advice. But intermediaries, when present and reliable, are largely substitutes for, not complements to, mandated disclosure. Nor do they need it for their work.

It is often recognized that mandated disclosure fails because of the "overload problem." But mandated disclosure is also defeated by the "accumulation problem." People face not only a clutter of information in each disclosure, they face a clutter across disclosures. When disclosures come single spies, they may be manageable; in battalions they are not. So the accumulation problem arises because disclosées confront so many disclosures daily and so many consequential disclosures yearly that they could not attend to (much less master) more than a few even if they wanted to.

The accumulation problem defeats even sophisticated regulators, faithful to the best methods of cost benefit analysis (CBA), and keen to solve overload problems. Assume that disclosure regulations can be subject to meaningful CBA—although John Coates, in a paper discussed on the Forum [here](#), [argues convincingly that it cannot](#). Regulators have neither the tools nor the insight to design new disclosures that resolve the accumulation problem.

Here is an example why CBA of financial disclosure regulation is futile (we develop it more fully in a forthcoming [Journal of Legal Studies article](#) for a symposium on "Cost Benefit Analysis of

Financial Regulation”). Mortgage loans have complex terms and complex disclosures. Under Dodd-Frank, the Consumer Financial Protection Bureau tried to simplify these overloaded disclosures. The Bureau employed scientific methods in experimenting with new templates and produced an admirably improved forms ([here](#)) that scored well in its labs. But when making real decisions, borrowers at a closing get at least 50 forms (truly), of which the Bureau’s is just one. Other statutes demand other mortgage disclosures, all enacted to alert consumers to other aspects of the transaction (insurance, taxation, privacy, security, constitutional rights, fraud). Instead of one fine form, borrowers get a stack of forms easily exceeding one hundred pages. Even if each was excellently done, nobody could read them all. And no single agency has the authority to whittle away at the stack.

In other words, lawmakers mandating disclosure are grazing a public commons—people’s attention. Each mandate draws a bit of this resource, degrading the others. Lawmakers never consider this when mandating a disclosure, since they are focused on the immediate problem before them. Yet so many law-makers are trying to solve so many problems with disclosure that the already overgrazed commons becomes daily more depleted.

We are often asked what should replace mandated disclosure. If mandated disclosure does not work, little is lost in abandoning it. And if mandated disclosure cannot work, the rational response is not to search for another (doomed) panacea, but to bite the bullet and ask which social problems actually need a regulatory response and what response might actually ameliorate the problem.