Mandated Disclosures EXPOSED

Mandated disclosures, which are meant to be a decision-making aid for consumers, are almost always too lengthy and complex for most people to understand. This article provides advice to help organizations simplify and clarify disclosures their organizations are required to provide.

Mark Grysiuk, CRM, CIP

"'I have read and agree to the Terms' is the biggest lie on the web."

Source: Terms of Service Didn't Read, *http://tosdr.org*

Among the many legal and regulatory requirements organizations must abide by is making mandated disclosure for the products and services they make available to the public. They are the 100-page mortgage documents. They are the privacy policies posted on fitness tracking websites. They are the hygiene grades posted in a restaurant and nutrition labels posted on food products.

Unfortunately, these disclosures – which contain complex terminology only specialists can understand – often present themselves at the most inopportune times. In mid-transaction, consumers must process the information provided, decide if the product or service is safe, and indicate that they agree to the complex terms if they want to proceed. Otherwise, the business transaction won't be completed. The computer software won't perform. The GPS navigation app won't operate.

The irony of these requirements is that their complexity and the way they are provided to consumers render them ineffective in achieving the regulatory goals established and mandated by policy makers.

This article will:

- Review briefly what experts say about mandated disclosures
- Examine problems in attaining the regulatory objectives for disclosures
- Consider what information governance (IG) professionals can do to improve disclosure transparency
- Provide tips for delivering customized disclosure messages

What Experts Say

Omri Ben-Shahar and Carl E. Schneider contend in their 2014 book, *More Than You Wanted to Know: The Failure of Mandated Disclosure:*

> '[m]andated disclosure' may be the most common and least successful regulatory technique in American law. It aspires to help people making unfamiliar and 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.

The reality, Ben-Shahar and Schneider argue in their book, is that most people could care less. "It ill fits the way people live their lives and make their choices…," they write.

Mounting evidence shows that few care about or read these mandated disclosures.

Why Disclosures Don't Work

There are several reasons disclosures are not effective in attaining regulatory objectives, including those described in the following paragraphs.

We Can't Understand Them

A large percentage of the population does not understand the technical information that disclosures use. According to Statistic Brain's 2016 research into U.S. adult literacy rates, 32 million adults (about 14%) in America can't read, and the vast majority of the remaining adults (73%) are less than proficient readers. With literacy rates so low, it's not reasonable to expect most people to understand the pertinent technological concepts and apply them to disclosure decisions on a moment's notice.

A large percentage of the population does not understand the technical information that disclosures use.

A good example of this is the disturbing trend of people who, though they don't likely understand what they are agreeing to, are willing to give up their personal information when they use applications for digital health management (DHM). According to the 2015 Makovsky Health "Pulse of Online Health" survey, two-thirds of Americans "said they would be willing to use a wearable device to manage their health…." and 278 million Americans would be willing to share personal information if it meant improving healthcare and treatment options.

This, despite a finding by ProLiteracy, an organization that promotes adult literacy, that "nearly half of American adults have difficulty understanding and using health information," according to its "Adult Literacy Facts" website.

Yet, they use apps for tracking personal symptoms, sleep patterns, diets and nutrition, and any number of health issues. In 2015, the IMS Institute identified more than 165,000 applications dedicated to DHM; about one in 10 can connect to a sensor, "providing biofeedback and physiological function data from the patient and greatly extending the accuracy and convenience of data collection."

Those who do have advanced literate and numerate skills are more likely to be fully informed, assuming they can schedule several hours of reading at the most inopportune time. Yet, even if they do have time, they may struggle. According to *More Than You Wanted to Know: The Failure of Mandated Disclosure,* U.S. Senator Elizabeth Warren (D-Mass.), who is also a former special advisor for the Consumer Financial Protection Bureau, once said

Checklist Questions

Check your mandated disclosures against this checklist:

Risk Management:

Has the event that triggered the disclosure requirement been fully examined and assessed?

Has old content in disclosure documents been decommissioned?

Business Process:

Does information in the end user license agreement conflict with information in the public-facing privacy policy?

Have data collection practices been written at the eighth-grade reading level?

Does it take more than one step to engage a privacy subject matter expert?

Security:

Has the Bluetooth feature Privacy LE been integrated into mobile apps?

Are all communications encrypted?

of a credit card disclosure, "I teach contract law at Harvard, and I can't understand half of what it says."

Disclosures Are Too Lengthy

Mandatory disclosures are often several pages long. Reported in the *Wall Street Journal* article "Privacy Policies More Readable, But Still Hard to Understand" published on Dec. 30, 2015, "In 2012, researchers calculated it would take 25 days [or 600 hours] to read all the densely-worded privacy policies an average Internet user had agreed to."

A paper published by the New York University School of Law confirms that investing time in reviewing such dense legalese online is an afterthought for many people. The authors of "Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts" discovered that "about one or two in one thousand shoppers access a product's EULA [End User's License Agreement] for at least one second."

In a study published in *I/S: A Journal of Law and Policy*, "The Cost of Reading Privacy Policies," authors Aleecia M. McDonald and Lorrie Faith Cranor discovered it would take about 53.8 billion hours for Americans to review the privacy policies they encounter in a one-year period. This translates into a $781 billion hit to productivity.

Long disclosures can also "crowd out" other information people should know about. Important information about, for example, financial service fees, can easily be inserted in between several pages of text that are not relevant to the reader.

People's attention spans are briefer, too, so any mandated requirement to provide more information is likely to be ignored. According to "Attention Span Statistics" reported on *Statisticbrain.com*, the average human attention span in 2015 had fallen to 8.25 seconds from 12 seconds in 2000. As also reported on *Statisticbrain.com*, the authors of "Not quite the average: An empirical study of Web use" found that only 4% of web page views lasted more than 10 minutes.

If privacy policies and other mandatory disclosures contain several thousand words, the likelihood of reader consumption rates rising is slim to none.

How IG Pros Can Help

Making mandated disclosures more effective is simple:

- Eliminate unrealistic expectations.
- Remove out-of-date requirements.
- Reduce the number of words used to express what is *most* important to the reader.
- Deliver customized messages at the right place, at the right reading level, at the right time, using the right expertise. (See "Tips for Delivering Customized Messages" section below.)

The following steps are good places to start.

Designate an Ombudsman

Effective IG not only means having the right information available at the right time, it also means it should be easy for those who want information to get it. An ombudsman or designated staff responsible for explaining public-facing disclosures should be readily available.

Stand Behind Your Promises

In "Every Step You Fake: A Comparative Analysis of Fitness Tracker Privacy and Security" published by Open Effect, the authors reported that one fitness application developer claimed in its terms and conditions that information would be "secured against all attacks." Further investigation revealed that its privacy policy presented a different, more realistic claim, stating that "we cannot guarantee the security of personal data during its transmission or its storage on our systems."

Stand behind promises of securing personal data by ensuring that *all* communications are encrypted.

When disclosures claim "we will never share your [personal] information with anyone," ensure that this claim is not invalidated by sharing unencrypted personal data with third-party service and product providers. Remember, too, that acquiring or being acquired by another company may entail sharing personal data with a third party.

Use IT Security Tools

The *Every Step You Fake* authors also discovered that fitness tracking app developers cut corners by not com-

plying with Bluetooth's LE Privacy feature. According to Bluetooth's blog post "Bluetooth Technology Protecting Your Privacy," Bluetooth devices "announce their presence to other devices through a process known as advertising." To identify the device, these advertising packets contain a media access control (MAC) address, which comprises the device's manufacturer and its unique serial number. The LE Privacy feature replaces the MAC address with a random value that intermittently changes to protect the user's privacy.

"Most fitness tracking companies do not design their devices to change their MAC addresses," the authors write. "Publicly-discoverable static MAC addresses enable third parties to track devices persistently, whereas the use of private MAC addresses foils such surveillance."

Ensure Integrity

Consumers can suffer real harm when disclosures lack integrity, as shown in the following industry-specific examples.

As reported in the January 7, 2017, *Toronto Star* article "Canada should lead battle against sugar worldwide," "The food industry has been trying to disguise the preponderance of sugar in its products by using a multitude of unfamiliar names to describe them. These include 'carob syrup,' 'anhydrous dextrose,' 'high fructose corn syrup…'"

Canadian physicians are lobbying Health Canada to simplify how food producers report sugar content. If they are successful, sugar will appear first in the list of the product's ingredients under a heading called "Sugars."

Read More About It

Attention Span Statistics." 2017 Statistic Brain Research Institute, publishing as Statistic Brain. 2 July, 2016. Available at *www.statisticbrain.com/attention-span-statistics/.*

Bakos, Yannis, Florencia Marotta-Wurgler, and David R. Trossen. "Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts." *Journal of Legal Studies, Vol. 43, No. 1* (2014). Available at *http://lsr.nellco.org/nyu_lewp/195.*

Ben-Shahar, Omri and Carl E. Schneider. *More Than You Wanted to Know: The Failure of Mandated Disclosure.* Princeton, NJ: Princeton University Press, 2014.

"Canada should lead battle against sugar worldwide." *Toronto Star.* Section, 7 January, 2017. Available at *https://www.pressreader.com/canada/toronto-star/20170107/281801398643363.*

Dwoskin, Elizabeth. "Privacy Policies More Readable, But Still Hard to Understand." *The Wall Street Journal*, 30 Dec., 2015. Available at *https://blogs.wsj.com/digits/2015/12/30/privacy-policies-more-readable-but-still-hard-to-understand/.*

Hilts, Andrew, Christopher Parsons, and Jeffrey Knockel. *Every Step You Fake: A Comparative Analysis of Fitness Tracker Privacy and Security.* Open Effect Report, 2016. Available at *https://openeffect.ca/reports/Every_Step_You_Fake.pdf.*

Ho, Daniel E. "Fudging the Nudge: Information Disclosure and Restaurant Grading." *The Yale Law Journal.* Vol. 122, No. 3 (2012). Available at *www.yalelawjournal.org/article/fudging-the-nudge-information-disclosure-and-restaurant-grading.*

"Illiteracy Statistics – Statistic Brain." 2017 Statistic Brain Research Institute, publishing as Statistic Brain. 22 August, 2016. Available at *www.statisticbrain.com/number-of-american-adults-who-cant-read/.*

IMS Institute. "Patient Adoption of mHealth: Use, Evidence and Remaining Barriers to Mainstream Acceptance." 2015. Available at *https://www.imshealth.com/en/about-us/news/ims-health-study:-patient-options-expand-as-mobile-healthcare-apps-address-wellness-and-chronic-disease-treatment-needs.*

Makovsky Health. "Pulse of Online Health Survey." 2015. Available at *www.makovsky.com/news/fifth-annual-pulse-of-online-health-survey-2/.*

McDonald, Aleecia M. and Lorrie Faith Cranor. "The Cost of Reading Privacy Policies." *I/S: A Journal of Law and Policy for the Information Society, Vol. 4. #3,* 2008. Available at *https://stanford.edu/~jmayer/law696/week4/The%20Cost%20of%20Reading%20Privacy%20Policies.pdf.*

ProLiteracy. "U.S. Adult Literacy Facts." Available at *https://www.proliteracy.org/Resources/Adult-Literacy-Facts.*

Weinreich, Harald, Hartmut Obendorf, Eelco Herder, and Matthias Mayer. "Not quite the average: An empirical study of Web use." ACM Transactions on the Web, Vol 2, #1 2008. Available at *http://dl.acm.org/citation.cfm?doid=1326561.1326566.*

Woolery, Martin. "Bluetooth Technology Protecting Your Privacy," Bluetooth blog post 2 April 2015. Available at *https://blog.bluetooth.com/bluetooth-technology-protecting-your-privacy.*

In the restaurant business, hygiene grades aren't *exactly* high on the data quality scale. Yet customers trust and make decisions about patronizing a restaurant based on the scores, assuming all is well.

In "Fudging the Nudge: Information Disclosure and Restaurant Grading," published by *The Yale Law Journal*, author Daniel E. Ho shares that inspectors may apply scores in "drastically divergent ways." A study that took place in Tennessee documented mean scores for qualified inspectors ranging from 69 to 92 on a scale of 100. It revealed that the same inspection can result in 48 violations in San Diego to 68 in New York. This is because New York inspectors record separate violations – and accompanying scores – for evidence of rats, mice, live roaches, and filth flies. In San Diego, evidence of rodents, insects, birds, or animals is a single violation. Inspectors also have discretion in how thoroughly to search for violations like mouse droppings, Ho writes.

Another problem is that some restaurants have enough influence to quickly reapply for a new inspection. "New York restaurants scoring badly can reapply (and clean up) for a reinspection and meanwhile not have to post the bad grades," Ho writes. The public doesn't know if a bad score existed, because "on reinspection, a wonderfully high number of restaurants do just well enough to earn an A." Interestingly, 99.9% of restaurants in San Diego get As.

When one combines different scoring methodologies with the level of discretion inspectors employ and the mood they might be in at the time of inspection, a meaningful grade would be an intellectual achievement if it ever were attained.

Tips for Delivering Customized Messages

Utilize technologies to deliver customized messages in accordance to jurisdictional requirements. Single-source authoring – using the same source content many times across various media – may reduce the risk of cross-contaminating content that is applicable in some jurisdictions and not in others.

Simplify what's most important. Use methods that encourage ideas to "stick." Employ a good story or a good crossword puzzle to help people remember boring concepts. There is a reason famous authors write at the fifth-grade reading level.

Replace legal phrases such as "Your use of the Services and Content must follow the rules set forth in this section…" with a more targeted statement. Customers are more likely to consider a statement such as "If you download this content without permission, you or your parents may receive a letter from our legal department." A typical teenager might then ask his parents, "What's a Cease and Desist letter?"

Remove redundant, out-of-date, trivial information. This is crucial to improving disclosure. It helps readers understand data collection so they can better protect themselves. Liability risks that might have occurred 10 or 20 years ago may no longer be risks. As every IG professional knows, more information is not always better.

Standardize measurement methodologies wherever possible. Allowing individual jurisdictions to develop drastically different criteria for scoring, for example, just isn't logical.

Employ a good story or a good crossword puzzle to help people remember boring concepts.

Fostering an IG Culture

Unfortunately, there is no guarantee that reducing the number of words or using simpler words in a privacy policy, a mortgage document, or EULA will increase readership. As Ben-Shahar and Schneider point out in their book mentioned above, *More Than You Wanted to Know,* it usually takes more time to write a disclosure that uses simple terminology to explain technical concepts.

IG pros should always strive to keep disclosures simple. They also should continue to foster a culture that embraces information disposition, transparency, integrity, and simplicity, remembering that disposing of out-of-date information reduces clutter; ensuring public-facing information is truthful increases trust; and improving data quality at the source strengthens record integrity. E

About the Author: Mark Grysiuk, CRM, CIP, has more than 15 years of information management experience. For the past nine years, he has helped organizations develop defensible disposition programs in a variety of industries, including financial services, broadcasting, technology, telecommunications, and government. His specialties include information governance, records management, business analysis, and technical writing. He won ARMA's 2015 Britt Literary Award for the beat feature article appearing in *Information Management* magazine that year. He is serving his second two-year term on ARMA International's Content Editorial Board. Grysiuk can be contacted at *mgrysiuk@gmail.com*.