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Deference in Decline: ECOA's Regulation B and Agency Discretion Might Not Be Broad Enough to Include Spousal Guarantors

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For more than 40 years, the Equal Credit Opportunity Act ("ECOA")[1] has prohibited lenders from discriminating against applicants for credit on various prohibited bases, including marital status.[2] The policy reasons for such protections, including ensuring that married women have full access to credit, are plain. There is no indication, however, that the statute was intended to cover lenders' interest in the transparency of their commercial debtors' assets. Notwithstanding, since 1985, the Board of Governors of the Federal Reserve System's ("Board") Regulation B[3] has extended its protection to spousal guarantors in credit transactions—and multiple federal circuit courts of appeals have affirmed. A recent Eighth Circuit decision rejected the Board's interpretation for the first time, finding that the plain language of ECOA unambiguously excludes spousal guarantors from the statute's purview. The circuit split created by this decision raises important questions not only about the scope of ECOA with respect to spousal guarantors, but also more generally regarding the degree of judicial deference that the Board and other federal agencies can expect going forward to their increasingly broad interpretations of fair lending laws.

Historical Treatment of Spousal Guarantors Under ECOA and Regulation B. Under ECOA, it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction – (1) on the basis of [. . .] sex or marital status."[4] Congress broadly defined the term "applicant" to encompass:

> any person who applies to a creditor directly for an extension, renewal or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.[5]

[1] 15 U.S.C. § § 1691 *et seq*.

[2] Additional prohibited bases include race, color, religion, national origin, sex, age, receipt of public assistance income and the fact that an applicant exercised any right under the Consumer Credit Protection Act.

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[3] In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred ECOA rulemaking and enforcement authority from the Board to the Consumer Financial Protection Bureau ("CFPB") (12 U.S.C. § 5581(b)). The CFPB inherited the Board's implementing regulations, including Regulation B, and accompanying administrative interpretations.

[4] 15 U.S.C. § 1691a(1).

[5] 15 U.S.C. § 1691a(b).

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In drafting the initial definition of ''applicant'' under Regulation B, the Board expressly excluded guarantors from the term's scope.[6] However, the Board reversed this position in its December 1985 amendments to Regulation B, under which it re-defined ''applicant'' as any person who is or may become contractually liable regarding an extension of credit [. . . including . . .] *guarantors*, sureties, endorsers, and similar parties.''[7] The Board explained that, although Congress's primary concern in enacting ECOA ''may have been to protect the individual seeking credit,'' Congress also had a ''broader purpose to bar discrimination on the basis of marital status in any aspect of a credit transaction.''[8] The Board reasoned that a person required to ''assume a debt obligation'' as a guarantor due to marriage ''has suffered discrimination based on marital status'' within the meaning of ECOA.[9]

Judicial Deference to the Board's Interpretation. Since the 1985 amendment to Regulation B,[10] courts historically have deferred to the Board's interpretation and permitted spousal guarantors to bring claims under ECOA. The majority of state and federal courts considering this issue, including the First, Third and Fourth Circuits,[11] have axiomatically applied the expanded definition without reaching the question of agency deference under the two-step *Chevron* framework.[12] Indeed, until 2014, the Seventh Circuit was the only federal circuit court not to treat the Board's interpretation as presumptively applicable.[13]

In that case, *Moran Foods v. Mid-Atlantic*, the Seventh Circuit considered whether ECOA's statutory language could ''be stretched far enough to allow'' the Board's definition of ''applicant'' in Regulation B to include guarantors.[14] In *Moran*, the plaintiff's husband owned a franchisee company that operated multiple grocery stores.[15] The franchisee was indebted to franchisor Moran Foods, and both the plaintiff and her husband had executed guaranties on the debt.[16] When the franchisee entered bankruptcy, Moran sought to collect the remaining company debt owed from the plaintiff; however, the plaintiff refused to honor her guaranty, claiming that the franchisor had discriminated against her based on her marital status in violation of ECOA.[17]

Writing for the court, Judge Richard Posner concluded that the protections of ECOA were not intended to extend to cover spousal guarantors like the plaintiff in *Moran*:

> it is true that courts defer to administrative interpretations of statutes when a statute is ambiguous, and that this precept applies to the [Board's] interpretation of ambiguous provisions of the Equal Credit Opportunity Act. But there is nothing ambiguous about ''applicant'' and no way to confuse an applicant with a guarantor.[18]

Judge Posner further reasoned that the Board's expansive definition of ''applicant'' would create liabilities for creditors that Congress likely did not intend.[19] Specifically, a guarantor seeking to invalidate his or her guaranty based on an ECOA violation could render a debt entirely uncollectable—which would impose a much more significant liability on a creditor-defendant than typically would exist in an action under ECOA.[20] Ultimately, however, Judge Posner found that even if the Board's definition in Regulation B did apply, the plaintiff had failed to prove any discrimination as required by the statute, and thus could not prevail on her claim under ECOA.

In June 2014, the Sixth Circuit weighed in with a decision in *RL BB Acquisition v. Bridgemill Commons*.[21] The defendant in *RL BB* had executed a personal guaranty in connection with her husband's company's debt. The wife claimed she was told her that her signature was required, and that she felt ''tremendous pressure to sign a guaranty[.]''[22] As in *Moran*, a key issue in the case was whether the wife had standing to sue under

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[6] 12 C.F.R. § 202.0(e) (1977) (defining ''applicant'' as ''any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit *other than a guarantor*, surety, endorser, or similar party'') (emphasis added).

[7] 12 C.F.R. § 202.2(e) (emphasis added).

[8] *Revision of the Board's Equal Credit Regulation: An Overview*, Federal Reserve Bulletin Vol. 71, No. 12, at 918 (Dec. 1985).

[9] *Id.* at 918–19.

[10] Although the CFPB amended Regulation B on Jan. 18, 2013, it did not change the text of the Board's definition of ''applicant.'' The provision is now codified at 12 C.F.R. § 1002.2(e).

[11] *Mayes v. Chrysler Credit Corp.*, 167 F.3d 675, 677 (1st Cir. 1999) (accepting the Board's regulation without engaging in *Chevron* analysis); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 30–331 (3rd Cir. 1995) (accepting the Board's definition of ''applicant''); *Ballard v. Bank of* America, 734 F.3d 308, 310 n. 1 (4th Cir. 2013) (declining to engage in *Chevron* analysis of the Board's definition); *see also Empire Bank v. Dumond*, 13-CV-0388-CVE-PJC, 2013 BL 333678 (N.D. Okla. Dec. 3, 2013) (affirming the Board's interpretation in Regulation B, and providing a comprehensive overview of prior judicial treatment of Regulation B's definition of ''applicant''); *Citgo Petroleum Corp.*, 2010 BL 185789, at *9 (affirming the Board's interpretation in Regulation B); *F.D.I.C. v. Medmark*, Inc., 897 F. Supp. 511, 514 (D. Kan.1995) (concluding a guarantor may assert an alleged ECOA violation defensively); *Bank of the West v. Kline*, 782 N.W.2d 453, 458 (Iowa 2010) (holding that guarantors are ''applicants'' under ECOA); *Eure v. Jefferson Nat'l Bank*, 448 S.E.2d 417, 417–18, 421 (Va. 1994) (determining that requiring a spousal guaranty in violation of Regulation B is a violation of ECOA); *W. Star Fin., Inc. v. White*, 7 P.3d 502, 505–06 (Okla.Civ.App.2000) (allowing the claim of a spousal guarantor that her rights under ECOA were violated to proceed to trial).

[12] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (setting forth a two part test to determine whether judicial deference to an agency interpretation is warranted: (1) whether Congress has directly and unambiguously spoken to the precise question at issue; and, if not, (2) whether the agency's answer is based on a permissible construction of the statute).

[13] *Moran Foods v. Mid-Atlantic Market Dev. Co., LLC*, 476 F.3d 436 (7th Cir. 2007).

[14] *Id.* at 441.

[15] *Id.* at 437.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 441.

[19] *Id.*

[20] *Id.* (''Damages in other cases will be limited to the cost of the higher interest, or the inconvenience of arranging alternative credit or getting one's credit restored, or embarrassment at being thought not creditworthy, or emotional distress at being thought a deadbeat or at feeling oneself a victim of discrimination'').

[21] 754 F.3d 308 (6th Cir. 2014).

[22] *Id.* at 382.

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ECOA as an ''applicant,'' as defined by Regulation B, based on her execution of a spousal guaranty.[23]

The Sixth Circuit reasoned that, because Regulation B was promulgated pursuant to ECOA's express grant of rulemaking authority, its definition of ''applicant'' should be entitled to deference if it ''survives the two-step inquiry in *Chevron*[.]''[24] With respect to the first prong of the *Chevron* test, the court concluded that the statutory definition of ''applicant'' in ECOA was ambiguous based on its use of two broad terms, ''applies'' and ''credit.'' Beginning with the dictionary definition of ''applies,'' the Sixth Circuit found that a guarantor ''formally approaches'' a creditor by offering up her own personal liability as consideration for credit to be extended to the borrower. For this reason, the court stated that ''the text could just as easily encompass all those who offer promises in support of an application—including guarantors who make formal requests for aid in the form of credit for a third party.'' The court also found that the statute's use of the word ''debtor,'' rather than an ''applicant,'' to define ''credit'' further supported differentiation between an applicant and debtor, and that an applicant could therefore be a third-party guarantor. The court found that these textual ambiguities in ECOA suggested that the term ''applicant'' could include a spousal guarantor—sufficient to satisfy *Chevron* step one.

The Sixth Circuit determined that the second prong of the *Chevron* test was also satisfied because the Board's definition of ''applicant'' to include guarantors was a permissible construction of ECOA.[25] The court based this conclusion on its finding that at least one of the ''natural meanings of 'applicant' includes guarantors,''[26] and also cited the well-researched and reasoned nature of the Board's 1985 decision to amend Regulation B to extend ECOA's scope to include guarantors.[27] The court further noted that its conclusion aligned with the view expressed by ''the vast majority of courts that have examined this issue.''[28] The court distinguished the Seventh Circuit's opinion in *Moran*, pointing out that, ''in 2007, this universal deference to Regulation B was upset by a paragraph of dicta in a Seventh Circuit decision [. . .] *Moran* does not offer a competing interpretation of the statute apart from its offhanded dismissal of Regulation B's definition.''[29]

The court did not share the Seventh Circuit's concerns that by permitting ''applicant'' to include guarantors, a lender could ultimately lose its entire debt if the guaranty is invalidated due to an ECOA violation—or the corollary concern that, without a spousal guaranty, a commercial debtor simply could hide assets to cover such debt in his wife's name. The court reasoned that this worst-case-scenario would only occur if the borrower immediately defaulted and the collateral securing the debt had no value—a possibility that could not justify ''strik[ing] down a valid regulation to salvage bad underwriting.''[30]

[23] *Id.* at 384.
[24] *Id.*
[25] *Id.* at 385.
[26] *Id.* (internal quotations omitted).
[27] *Id.* at 386.
[28] *Id.*
[29] *Id.*
[30] *Id.*

Circuit Split: The Eighth Circuit Declines to Defer to the Board's Interpretation. On Aug. 5, 2014, the Eighth Circuit solidified the circuit split on the issue of ECOA's application to spousal guarantors in *Hawkins v. Community Bank of Raymore*.[31] In *Hawkins*, the two wife claimants were required to execute personal guaranties in connection with a series of loans and loan modifications from the defendant bank to their husbands' limited liability company (''LLC'').[32] Neither spousal guarantor had any legal interest in the LLC.[33] When the LLC defaulted, the bank accelerated the loans and demanded payment from the LLC and all of the guarantors.[34] The spousal guarantors filed an action seeking damages and an order declaring that their guaranties were void and unenforceable under the ECOA and Regulation B.[35] Specifically, the wives alleged that the bank had required them to execute the loans solely because they were married to their husbands, and that this constituted prohibited discrimination against them on the basis of their marital status.[36] The district court found that the bank had not violated the ECOA because the wives were not ''applicants'' within the meaning of the ECOA.[37]

The Eighth Circuit agreed with the district court and held that because a spousal credit guarantor is not an ''applicant'' who applies for credit, she is not protected under ECOA.[38] Like the Sixth Circuit in *RL BB*, the Eighth Circuit applied the two-step *Chevron* framework to determine whether it was required to defer to the definition set forth in Regulation B.[39] However, with respect to *Chevron* step one, the court found that the plain language of ECOA unambiguously provides that ''a person is an applicant only if she *requests credit*'' and that the assumption of ''secondary, contingent liability,'' such as the execution of a guaranty, does not constitute a ''request'' for credit.[40] Consequently, the court found that the unambiguous text of ECOA rendered analysis under the second step of the *Chevron* framework unnecessary, and declined to defer to the Board's interpretation of ''applicant.''[41]

The court cited to *Moran* for the proposition that the statutory language of ECOA unambiguously excludes guarantors from its purview, despite the fact that the *Moran* court did not expressly engage in a *Chevron* analysis.[42] The court rejected the plaintiffs' reliance on other circuit decisions that deferred to Regulation B's definition, noting that these cases ''applied the regulatory definition without considering whether the definition warranted *Chevron* deference[.]''[43] The Eighth Circuit also noted that its ruling diverged from the Sixth

[31] 761 F.3d 937 (8th Cir. 2014).
[32] *Id.* at 939.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 940.
[38] *Id.* at 943.
[39] *Id.* at 940–41.
[40] *Id.* at 941–42 (emphasis added).
[41] *Id.* at 942.
[42] *Id.*; *see Moran*, 476 F.3d at 441 (''It is true that courts defer to administrative interpretations of statutes when a statute is ambiguous, and that this precept applies to the Federal Reserve Board's interpretation of ambiguous provisions of the Equal Credit Opportunity Act.'').
[43] *Id.*, n. 4.

Circuit's opinion in *RL BB*, but determined that the Sixth Circuit's finding that ''a guarantor is a third party to the larger application process''—a statement with which the court agreed—was a sufficient basis for the Eighth Circuit to end its inquiry and reject the Board's inclusion of guarantors in its definition of ''applicant.''[44]

The Eighth Circuit further concluded that its holding comported with congressional intent in enacting ECOA. The court recognized that ECOA was designed, in part, ''to curtail the practice of creditors who refused to grant a wife's credit application without a guaranty from her husband.''[45] In the court's view, this purpose would not be served by extending the protections of ECOA to spousal guarantors, as ''by requesting the execution of a guaranty, a lender does not thereby exclude the guarantor from the lending process or deny the guarantor access to credit.''[46] Indeed, the court found that the wives in *Hawkins* had complained of the opposite problem—that is, that they were improperly *included* in the lending process by being required to sign guaranties.[47]

Effect of Hawkins on Future Regulatory Actions and Rulemakings. On Nov. 3, 2014, the spousal guarantors in *Hawkins* filed a petition for a writ of certiorari from the United States Supreme Court.[48] The petition asks the Supreme Court to reverse the Eighth Circuit's decision and resolve the circuit split regarding the treatment of spousal guarantors under ECOA.[49] Should the Supreme Court decide to hear the case, financial institutions and other creditors may finally receive a clear answer regarding whether the Board exceeded its statutory authority in amending Regulation B to extend ECOA's protections to guarantors.[50] An affirmation of the Board's interpretation could signal the potential for future extension of ECOA's protections to other nonapplicant individuals, in addition to spousal guarantors, who are otherwise involved in the lending process.

However, even absent an answer from the Supreme Court regarding the specific issue of ECOA's application to spousal guarantors, the Eighth Circuit's decision in *Hawkins* is significant because it exemplifies an interesting, trending refusal to defer to agency interpretations that significantly expand the scope of a fair lending statute. Notably, the *Hawkins* opinion comes on the heels of the D.C. District's decision in *American Insurance Association v. HUD*, which rejected the Department of Housing and Urban Development's (''HUD'') disparate impact rule under the Fair Housing Act (''FHA'').[51] Writing for the court, Judge Richard Leon found under *Chevron* step one that ''the FHA unambiguously prohibits *only* intentional discrimination[,]'' and that analysis under *Chevron* step two was therefore unnecessary.[52] Judge Leon emphasized that HUD's rule, in the court's view, was ''yet another example of an Administrative Agency trying desperately to write into law that which Congress never intended to sanction.''[53]

HUD has filed a notice of appeal in *American Insurance*, but decisions like it and *Hawkins* are likely to be concerning federal regulators who supervise compliance with fair lending laws. With respect to ECOA, these decisions should serve as a signal to the CFPB, which now administers Regulation B, and the prudential regulators that the broad interpretive authority typically granted to them is not without limits. Indeed, a continuation of this trend of decisions that curb regulatory interpretive authority, possibly through a Supreme Court decision affirming *Hawkins*, should encourage the CFPB and prudential regulators to hew closely to authorizing statutes to see their rules accorded *Chevron* deference.

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[44] *Id.* at 942 (quoting *RL BB*, 754 F.3d at 385).
[45] *Id.* (internal citation omitted).
[46] *Id.*
[47] *Id.*
[48] Petition for a Writ of Certiorari, *Hawkins v. Community Bank of Raymore*, No. 14-520 (U.S. Nov. 3, 2014).
[49] *Id.* at *27–28.
[50] Unless and until the circuit split is resolved and/or Regulation B is amended, creditors outside of the Eighth and Seventh Circuits should assume that the Sixth Circuit rule applies to avoid potential liability for impermissibly requiring spousal guarantees.
[51] 2014 BL 310693 (D.D.C. Nov. 3, 2014).
[52] *Id.* at *24.
[53] *Id.* at *44.

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