Notes

No Guarantee for a Spousal-Guaranty: A Critical Analysis of Regulation B's Spouse-Guarantor Rule under the Equal Credit Opportunity Act (ECOA) and Conflicting Federal Circuit Court Interpretations of the Term "Applicant" under *Chevron*'s Two-Step Analysis

Natasha G. Beckford†

† Natasha G. Beckford, J.D. from Seton Hall University School of Law, 2016; M.A. in Public Policy, Stony Brook University, 2010; B.A. in Political Science and Psychology, Stony Brook University, 2009. I would like express my sincere gratitude to my faculty advisor, Professor Linda E. Fisher, for her continuous guidance throughout the writing process. I would also like to thank my family, friends and colleagues for their unconditional love and support. I am the woman I am today because of my faith, tenacity and strong foundation. "She is clothed in strength and dignity, and she laughs without fear of the future." Proverbs 31:25.

I. INTRODUCTION

Gender and marital status-based credit discrimination remains rampant across the nation. Pregnant women and married women on maternity leave are continuously denied mortgages and other lines of credit because of the erroneous fear held by creditors that they will either not reenter the workforce or, due to their stereotypical familial responsibilities, default on their loans. Despite Congress's great effort to combat discrimination through enacting the Equal Credit Opportunity Act (ECOA or "the Act")[1] and the Federal Reserve's promulgation of Regulation B,[2] marital status-based discrimination is still on the rise.[3] Thus, the Federal Reserve (and now the Consumer Financial Protection Bureau (CFPB))[4] is correct in applying a broader interpretation of the definition

[1] 15 U.S.C. § 1691, *et seq.* (2012).
[2] *See* 12 C.F.R. § 202.1, *et seq.* (2013).
[3] *See* Press Release, U.S. Dep't of Hous. and Urban Dev., HUD Announces $5 Million Wells Fargo Settlement After Complaints of Discrimination Against Women on Maternity Leave or Pregnant (Oct. 9, 2014), https://archives.hud.gov/news/2014/pr14-124.cfm [http://perma.cc/62P2-69PA] [hereinafter Press Release].
[4] Congress originally made the Federal Reserve responsible for promulgating the purpose of ECOA, but in 2010 Dodd-Frank transferred this obligation to the newly created CFPB. *See* JEREMIAH BATTLE, JR. ET AL., NATIONAL CONSUMER LAW CENTER, CREDIT DISCRIMINATION 10 (6th ed. 2013) ("[T]he Dodd-Frank Act makes the CFPB [Consumer Financial Protection Bureau] the agency currently responsible for regulation and enforcement of the ECOA."). For purposes of simplicity, this comment refers to the Federal Reserve and the CFPB collectively as the Federal Reserve.

of "applicant" under the ECOA, and thereby allowing a spouse-guarantor to seek protection and remedies for an ECOA violation for the purpose of enforcing the Regulation's Spouse-Guarantor Rule.

Prior to the Eighth Circuit's 2014 holding in *Hawkins v. Cmty. Bank of Raymore*,[5] many courts rightfully allowed a spouse-guarantor to seek ECOA protection and remedies for violations of the ECOA.[6] But the Eighth Circuit's recent, unduly restrictive, reading of the ECOA's definition of "applicant" for the purpose of enforcing the Spouse-Guarantor Rule failed to grant principal deference to the Federal Reserve's interpretation of the ECOA.[7] As an unfortunate result, the Eighth Circuit created a circuit split which undermined the Federal Reserve's interpretation of the ECOA.[8] The Eighth Circuit's decision incentivizes more ECOA violations when such violations are already on the rise.[9] The ECOA should be liberally construed in favor of consumers, not lenders, and neither the Eighth Circuit nor other federal circuits should be permitted to undercut the underlying purpose of the ECOA by narrowly interpreting the Act. On March 2, 2015, the United States Supreme Court granted certiorari in the *Hawkins* case to decide whether spousal-guarantors are unambiguously excluded from being Equal Credit Opportunity Act (ECOA) "applicants."[10] The Court affirmed the *Hawkins* decision by an equally divided Court on March 22, 2016.[11]

This comment argues that the Supreme Court should include spouse-guarantors under the ECOA to further the purpose of combating, among other things, gender and marital status-based discrimination. Part II of this comment introduces the perpetuation of gender and marital status-based discrimination leading to the enactment of the ECOA and the Federal Reserve's broadened definition of "applicant" under Regulation B's Spouse-Guarantor Rule. Part III reviews the Supreme Court's two-step analysis formulated in *Chevron U.S.A., Inc. v. NRDC, Inc.*[12] used to determine whether an agency's interpretation of a statute it administers is entitled to deference.[13] Part IV examines the recent circuit split between the Sixth Circuit's decision in *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*,[14] and the Eighth Circuit's decision in *Haw-*

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[5] 761 F.3d 937, 943 (8th Cir. 2014).
[6] *See* RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 386 (6th Cir. 2014) ("Our conclusion accords with the vast majority of courts that have examined this issue.").
[7] *See Hawkins*, 761 F.3d at 942 ("Because the text of the ECOA is unambiguous regarding whether a guarantor constitutes an applicant, we will not defer to the Federal Reserve's interpretation of applicant . . . .").
[8] *Id.*
[9] *See* Press Release, *supra* note 3 ("Since 2010, 190 maternity leave discrimination complaints have been filed with HUD, resulting in more than 40 settlements for a total of nearly $1.5 million.").
[10] *See Hawkins*, 761 F.3d at 940 (explaining that the case turns on the definition of the applicant).
[11] 761 F.3d 937 (8th Cir. 2014), *aff'd per curiam*, 136 S. Ct 1072 (2016).
[12] 467 U.S. 837 (1984).
[13] *Id.* at 844.
[14] 754 F.3d 380 (6th Cir. 2014).

kins in applying *Chevron*'s two-step analysis to the Federal Reserve's broadened definition of "applicant" under the ECOA. Finally, Part V highlights the manner in which the Eighth Circuit failed to properly apply *Chevron*'s two-step test in its review of the Federal Reserve's broadened definition of "applicant," and discusses the implications of the Supreme Court adopting a narrower definition of the term "applicant" under the ECOA.

II. The ECOA Historical Background and the Federal Reserve's Spouse-Guarantor Rule

Prior to 1974, it was well-documented that lenders would customarily require creditworthy women who sought individual credit to obtain their husband's signature to guaranty their loan(s).[15] In 1974, however, Congress enacted the Equal Credit Opportunity Act "to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit."[16] In 1976, Congress amended the Act to broaden the prohibited conduct to include race, religion, and other traits.[17] Accordingly, the ECOA prohibits its creditors from discriminating against any credit applicant on the basis of race, color, religion, national origin, sex or marital status, or age.[18] Congress charged the Federal Reserve with promulgating regulations to carry out the statute's purpose.[19] Regulation B resulted from Congress's directive.[20] Regulation B aims to prevent discriminatory practices by creditors whilst promoting "the availability of credit to all creditworthy applicants."[21]

Despite the Federal Reserve's best effort of promulgating Regulation B to carry out the statute's purpose, it was evident that gender-based credit discrimination continued to pervade the American markets. In 1979, the Federal Trade Commission (FTC)[22] successfully challenged the practices of a credit corporation that used information by consumer reporting agencies to divide credit applications into "divorced," "wid-

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[15] *See* CMF Va. Land, L.P. v. Brinson, 806 F. Supp. 90, 96 (E.D. Va. 1992) (discussing the previous practice of lenders requiring the guarantee signatures of husbands whose wives sought credit).
[16] *RL BB Acquisition, LLC*, 754 F.3d at 383 (citing Mays v. Buckeye Rural Elec. Coop., Inc., 277 F.3d 873, 876 (6th Cir. 2002) (quotation marks omitted)).
[17] *Id.*
[18] 15 U.S.C. § 1691(a)(1) (2012).
[19] 15 U.S.C. § 1691b(a) (2012).
[20] *RL BB Acquisition, LLC*, 754 F.3d at 383.
[21] *Id.*
[22] 15 U.S.C. § 45(a)(1) (2015) (the Federal Trade Commission (FTC) is an independent federal agency charged by Congress with protecting American consumers from "unfair methods of competition" and "unfair or deceptive acts or practices" in the marketplace).

owed," or "single" when evaluating applications for its consumer credit plans.[23] Judicial efforts were necessary to combat gender-based credit discrimination as well. In 1982, the Ninth Circuit correctly held that a lender violated the ECOA after requiring a loan applicant, who qualified independently, to procure her husband's signature on the loan documents.[24] Such discriminatory conduct by creditors clearly violates the ECOA and continues to have a detrimental impact on women.

More recently, the U.S. Department of Housing and Urban Development (HUD)[25] "has focused on ending maternity leave-related lending discrimination."[26] Since 2010, HUD has received 190 claims of maternity leave discrimination, "resulting in more than 40 settlements for a total of nearly $1.5 million."[27] One of HUD's first cases "resulted in a Department of Justice settlement with Mortgage Guarantee Insurance Corporation (MGIC), the nation's largest mortgage insurance provider, which established a $511,250 fund to compensate 70 people, and pay a $38,750 civil penalty."[28] Other settlements include a $45,000 settlement with Bank of America in 2013 and a $750,000 settlement with Cornerstone bank in 2011.[29]

In one of its most recent press releases, HUD announced a $5 million settlement with Wells Fargo Home Mortgage, the nation's largest provider of home mortgage loans.[30] Six families from across the nation alleged that Wells Fargo denied them mortgage loans because of their gender, familial status, or unwillingness to sacrifice their maternity leave.[31] Additionally, discriminatory remarks were made "to and against women who were pregnant or who had recently given birth."[32] Several women were told that they had to either forfeit maternity leave or be denied a home loan.[33] As a result, some women suffered from emotional distress because they were unable to spend time with their infants and had difficulty finding emergency childcare.[34] These findings establish that gender and marital status-based credit discrimination remains problematic in the American markets.

The Federal Reserve promulgated Regulation B to combat gender and marital status-based discrimination.[35] The Spouse-Guarantor Rule is

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[23] Matter of Westinghouse Credit Corp., 94 F.T.C. 1280, at *3 (1979).
[24] Anderson v. United Fin. Co., 666 F.2d 1274, 1277 (9th Cir. 1982).
[25] *See* 24 C.F.R. § 1.1 (HUD is a cabinet department overseeing home mortgage lending practices).
[26] Press Release, U.S. Dep't of Hous. and Urban Dev., *supra* note 3.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See* 12 C.F.R. § 202.1(b) (2016) (stating that the purpose of Regulation B is "to promote the availability of credit to all creditworthy applicants without regard to . . . sex [or] marital status [and

a provision of Regulation B that prohibits creditors from requiring a spousal-guaranty even if a guaranty is required to secure a loan.[36] Although creditors are prohibited from requiring a spouse-guarantor, a spouse may voluntarily serve as a guarantor.[37] Furthermore, the Spouse-Guarantor Rule prohibits creditors from requiring a spousal signature, except when the spouse is a joint applicant, on any credit document if the applicant is individually creditworthy for the loan requested.[38] Limited exceptions "allow a creditor to require an applicant's spouse's signature if the creditor reasonably believes the signature is necessary to satisfy the debt in the event of default."[39] A creditor can be subject to actual damages, punitive damages, and attorney's fees if it violates the ECOA and Regulation B.[40] In order for the protections and remedies of the ECOA to apply, the aggrieved spouse must be an "applicant" for the purpose of enforcing Regulation B's Spouse-Guarantor Rule.[41]

The ECOA defines an "applicant" as "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."[42] The definition under the ECOA does not expressly include guarantors. But Regulation B's definition of "applicant" expanded in 1985 to include guarantors for the purpose of enforcing the Spouse-Guarantor Rule.[43] Although this may be interpreted to mean that guarantors and similar parties are *not* otherwise applicants, "guarantors, sureties, and similar parties would seem to fall within the definition of those 'who may become contractually liable' on the obligation."[44] Prior to 1985, Regulation B "limited applicants to those who may *be* contractually liable, while the 1985 amendment changed that phrasing to those who may *become* contractu-

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other factors] . . . [and] prohibits creditor practices that discriminate on the basis of any of these factors.").

[36] *See* 12 C.F.R. §§ 202.7(d)(5), 1002.7(d)(5) (2016) (explaining that a spousal-guaranty is when a lendee's spouse serves as a co-signer for the credit requested).

[37] *Id.*

[38] *See* RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 383 n.3 (6th Cir. 2014) (citing 12 C.F.R. §§ 202.7(d)(1), 1002.7(d)(1) (2016)).

[39] *Id.* (citing 12 C.F.R. §§ 202.7(d)(2)-(4), 1002.7(d)(2)-(4)).

[40] *See* 15 U.S.C. § 1691(e) (2011) (discussing provisions for actual damages (a), punitive damages (b), and attorney fees and costs(d)).

[41] 15 U.S.C. § 1691e (a) (2011).

[42] 15 U.S.C. § 1691a(b) (2011).

[43] *See* BATTLE, JR. ET AL., *supra* note 4, at 23–24 (explaining the expansion of the definition of "applicant"); *see also* Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018 [hereinafter Equal Credit Opportunity] (Nov. 20, 1985) ("The Board has revised the definition of 'applicant' in paragraph (e) to include guarantors, sureties, endorsers, and similar parties for purposes of § 202.7(d), which contains rules regarding signatures.").

[44] *See* BATTLE, JR. ET AL., *supra* note 4, at 24.

ally liable."[45] This change made guarantors (who are not initially liable but who may become liable) into "applicants."[46]

Furthermore, Regulation B's definition of "applicant" could correctly "be viewed as an effort to unambiguously overrule some earlier cases to the contrary and not as an attempt to modify the ability of guarantors more generally to qualify as applicants."[47] But because the ECOA does not expressly include guarantors in its definition of "applicant," the Eighth Circuit prohibited aggrieved spouse-guarantor protections and remedies under the ECOA.[48] As this Comment explains in part V, *infra*, however, this interpretation is too stringently construed.

III. *CHEVRON'S* TWO-STEP ANALYSIS

An administrative agency such as the Federal Reserve usually has power to exercise only the authority conferred to it by Congress.[49] But Congressional delegations of authority are not always clear, especially when "the legislative delegation to an agency on a particular question is implicit rather than explicit."[50] As a result, agencies interpret any ambiguities in the statutes they administer in order to carry out Congress's delegation. An agency's interpretation, however, is not always granted deference by lower courts. Accordingly, courts apply *Chevron*'s two-step analysis when evaluating whether an agency's interpretation of a statute *it administers*[51] is entitled to deference.

Chevron's two-step analysis was established in 1984. In *Chevron*, the United States Supreme Court held that a court must answer two questions when reviewing an agency's construction of a statute it administers.[52] A court must first determine whether Congress has expressly addressed the question at issue.[53] If Congress has expressly addressed the question at issue, the court and agency's inquiry into the matter ends and Congress's express intent controls.[54] But if the statute is silent or ambiguous on the question at issue, and an agency has interpreted it, the court

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[45] *Id.*; *see also* Equal Credit Opportunity, *supra* note 43.
[46] BATTLE, JR. ET AL., *supra* note 4, at 24.
[47] *Id.*
[48] *See* Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 943 (8th Cir. 2014) (affirming summary judgment granted to Bank in ECOA claim on basis that guarantor plaintiffs were not applicants within the meaning of the ECOA).
[49] Louisiana Pub. Serv. Comm'n. v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").
[50] Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).
[51] *See id.* at 842 ("When a court reviews an agency's construction of the statute which it administers . . . .").
[52] *Id.* at 842–43.
[53] *Id.* at 842.
[54] *Id.* at 842–43.

must determine whether the agency's interpretation is a permissible construction of the statute.[55]

As the Supreme Court in *Chevron* noted, if Congress explicitly leaves a gap for the agency to fill, the agency is expressly permitted to interpret the particular statutory provision by regulation.[56] Furthermore, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[57] Although legislative delegation to an agency on a particular question is not always explicit, a court may not use its own statutory construction in lieu of a reasonable one made by the agency's administrator.[58] Most notably, the Supreme Court has long recognized that considerable weight should "be accorded to an executive department's construction of a statutory scheme . . . ."[59]

In *Chevron*, the Supreme Court was tasked with determining whether the Environmental Protection Agency (EPA) regulation, implementing permit requirements for nonattainment states pursuant to the Clean Air Act Amendments of 1977[60] was a reasonable interpretation of the term "stationary source."[61] The Supreme Court recognized that the relevant part of the amended Clean Air Act did not expressly define what Congress deemed a "stationary source" and that the question at issue was not expressly addressed in the legislative history.[62] Nonetheless, the Supreme Court held that the EPA's interpretation of "stationary source" was reasonable for the agency to make.[63]

The Supreme Court reasoned that although a word may have its own meaning "not to be submerged by its association. . . . [T]he meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea."[64] The Court also indicated that the legislative history and policies of the Clean Air Act motivated the EPA's definition of "stationary source."[65] The EPA's broadened definition of "stationary source" was not only consistent with its environmental objectives and policy concern of promoting reasonable economic growth, but was also supported by private studies.[66] Ulti-

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[55] *Id.* at 843.
[56] *Id.* at 842–43.
[57] *Id.* at 844.
[58] *Id.*
[59] *Id.*
[60] 42 U.S.C. § 7502 (2015).
[61] *Chevron*, 467 U.S. at 837.
[62] *Id.* at 841.
[63] *Id.* at 845.
[64] *Id.* at 860–61 (citing Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923)).
[65] *Id.* at 863.
[66] *Id.*

mately, the Supreme Court granted deference to the EPA's interpretation of the term "stationary source" under the Clean Air Act and the Supreme Court's holding in *Chevron* served as the analytical framework for determining whether an agency's interpretation of a statute it administers is entitled to deference.[67]

A. Ascertaining Congressional Intent and Step One of *Chevron*

In order to ascertain whether Congress intended to include guarantors within its definition of "applicant" under the ECOA, courts must examine the meaning of the term itself "as well as the language and design of the statute as a whole."[68] The Supreme Court's decision in *Household Credit Services Inc. v. Pfennig*[69] is illustrative. In *Household Credit Services*, the Supreme Court determined whether the Federal Reserve Board's Regulation Z, which excluded over-the-limit fees from the definition of "finance charge," conflicted with the Truth in Lending Act (TILA).[70] Congress defined "finance charge" as "all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit."[71] Although TILA did not expressly address whether over-the-limit fees were included within the definition of "finance charge," the Sixth Circuit had held that "Regulation Z's explicit exclusion of over-the-limit fees from the definition of 'finance charge' conflicted with" TILA.[72]

The Supreme Court disagreed. It reasoned that, in holding that over-the-limit fees were not unambiguously included within the meaning of "finance charge," the Sixth Circuit failed to examine the critical phrase "incident to the extension of credit" *within* Congress's definition of "finance charge."[73] The Supreme Court further reasoned that the phrase "incident to" did not clarify whether "a substantial (as opposed to a remote) connection is required."[74] The Supreme Court also examined TILA's related provisions and determined that the related provisions provided more support for the Federal Reserve's interpretation of the statute.[75] As a result, the Supreme Court deferred to the Federal Reserve's interpretation of TILA and expounded that the Sixth Circuit was required

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[67] *Id.* at 842–43.
[68] Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232 (2004).
[69] *Id.* at 239 (citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)).
[70] *Id.* at 235.
[71] *Id.* at 239 (citing 15 U.S.C. § 1605(a)).
[72] *Id.* at 237.
[73] *Id.* at 239.
[74] *Id.* at 241.
[75] *Id.* at 241–43.

to examine not only the particular statutory language at issue but also the language and design of the statute as a whole before reaching its conclusion.[76]

Similarly, in *General Dynamics Land Systems v. Cline*[77] the Supreme Court broadly construed the term "age" under the Age in Employment Act of 1976 (ADEA) after examining the term within the language and design of the statute as a whole.[78] The Supreme Court rejected the respondent's argument that the ordinary meaning of the term "age" was controlling and that its plain meaning should be used throughout the entire statute.[79] The Supreme Court noted that age does not have the same meaning wherever the ADEA uses it,[80] emphasizing that statutory language must be read in context from the words around it.[81] Justice Thomas, dissenting in *General Dynamics Land Systems*, noted that "the plain language of the ADEA clearly allows for suits brought by the relatively young when discriminated against in favor of the relatively old."[82] Nevertheless, after considering the design of the statute as a whole, the Majority held that the ADEA's legislative history rejected the natural meaning of the term "age."[83]

B. Step Two of *Chevron*'s Analysis: Determining Whether to Grant Principal Deference to an Administrative Agency's Interpretation of a Statute it Administers

An agency's interpretation of any ambiguity in a statute it administers is controlling unless demonstrably arbitrary, capricious, or contrary to the statute.[84] In *Ford Motor Credit Co. v. Milhollin*,[85] the Supreme Court decided whether TILA[86] required "that the existence of an acceleration clause always be disclosed on the face of a credit agreement."[87] The respondents in *Ford Motor* financed their automobile purchases through standard retail installment contracts assigned to a finance com-

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[76] *Id.* at 239.
[77] 540 U.S. 581 (2004).
[78] *Id.* at 594–95.
[79] *Id.*
[80] *Id.* at 595–96.
[81] *Id.* at 596 (citing Jones v. United States, 527 U.S. 373, 389 (1999) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).
[82] *Id.* at 603 (Thomas, J., dissenting).
[83] *Id.* at 586.
[84] Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004).
[85] 444 U.S. 555 (1980).
[86] Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (2012) (commonly referred to as TILA).
[87] *Ford Motor Credit Co.*, 444 U.S. at 557.

pany.[88] Each contract provided that "respondents were to pay a precomputed finance charge, and, as required by TILA and implementing Federal Reserve Board Regulation Z, the front page of each contract disclosed and explained certain features of the contract."[89]

The respondents' contract contained the requisite facial disclosures, with the exception of an acceleration clause found in the body of the respondents' contract.[90] Consequently, the respondents sued the finance company arguing that the acceleration clause violated TILA and Regulation Z because the acceleration clause was not on the face of their contract.[91]

The respondents in *Ford Motor* argued that TILA and the Federal Reserve Board's Regulation Z expressly mandated facial disclosure of acceleration clauses because TILA required creditors to disclose "default, delinquency, or similar charges payable in the event of late payments."[92] A provision of Regulation Z also required disclosure of the "amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."[93] In granting principal deference to the Federal Reserve Board's interpretation of TILA, the Supreme Court held that acceleration clauses could not be equated with "default, delinquency, or similar [charge]" subject to disclosure under TILA and Regulation Z because the Federal Reserve reached this decision with caution.[94] The Supreme Court noted that the Federal Reserve Board's construction of TILA should be dispositive unless demonstrably irrational.[95] The Supreme Court further noted that not only should the Federal Reserve Board's interpretation of TILA be given considerable respect, but also that "Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law."[96] In short, the Supreme Court granted principal deference to the Federal Reserve Board's interpretation of TILA because its interpretation of the statute was rational. Likewise, the Federal Reserve's broadened definition of "applicant" under the ECOA should be dispositive because its interpretation of the ECOA is rational.[97]

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[88] *Id.*

[89] *Id.* (citing 15 U.S.C. § 1631; 12 C.F.R. § 226.6(a) (1979)).

[90] *Id.* at 558.

[91] *Id.*

[92] *Id.* at 558 (citing 15 U.S.C. §§ 1638 (a)(9), 1639 (a)(7)).

[93] *Id.* at 560.

[94] *Id.* at 561.

[95] *Id.* at 565.

[96] *Id.* at 566.

[97] *See* RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 386 (6th Cir. 2014).

IV. The Circuit Split: Determining Whether to Grant Deference to the Federal Reserve's Broadened Definition of "Applicant" Under the ECOA

Prior to 2007, a vast majority of federal courts correctly decided that Regulation B's definition of "applicant" was entitled to deference under the ECOA.[98] This was short-lived, however, as Seventh Circuit dicta in *Moran Foods*, Inc., v. Mid-Atlantic Mkt. Dev. Co.[99] frustrated this universal deference to Regulation B.[100] Some lower courts have subsequently relied on this dicta in denying standing to spouse-guarantors for the purpose of enforcing the Spouse-Guarantor Rule.[101]

In *Moran Foods*, the Seventh Circuit denied standing to a wife who guaranteed her husband's debt because she failed to establish discrimination under ECOA.[102] But the Seventh Circuit noted that even if the wife-guarantor could establish discrimination under ECOA, she would not be considered an applicant for the purpose of enforcing the Spouse-Guarantor Rule.[103] According to the Seventh Circuit, the definition of "applicant" under the ECOA was not ambiguous, and an applicant could not be confused with a guarantor.[104] The Seventh Circuit reasoned that "to interpret 'applicant' as embracing 'guarantor' opens vistas of liability that the Congress that enacted the Act would have been unlikely to accept."[105]

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[98] *Id.* at 386; *see also* Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28, 30–31 (3d Cir. 1995) (accepting the Federal Reserve Board's broadened definition of "applicant" under the ECOA); Mayes v. Chrysler Credit Corp., 167 F.3d 675, 677 (1st Cir. 1999) ("The paradigm case is the spouse who is wrongly made to co-sign or guarantee a debt but may be unconscious of the violation . . . ."); Citgo Petroleum Corp. v. Bulk Petroleum Corp., 2010 U.S. Dist. LEXIS 106495, at *26 (N.D. Okla. Oct. 5, 2010) (declining to follow *Moran Foods* and adhering to Regulation B's broadened definition of "applicant"); F.D.I.C. v. Medmark, Inc., 897 F.Supp. 511, 514 (D. Kan. 1995) (concluding that 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 the ECOA).

[99] 476 F.3d 436 (7th Cir. 2007).

[100] *See* id. at 441 (doubting that the ECOA "can be stretched far enough to allow" the interpretation of "applicant" as including a guarantor).

[101] *See, e.g.*, Champion Bank v. Reg'l Dev., LLC, No. 4:08CV1807 CDP, 2009 U.S. Dist. LEXIS 40468, at *7 (E.D. Mo. May 13, 2009) (agreeing with dicta in *Moran Foods*); *see also* Arvest Bank v. Uppalapati, No. 11-03175-CV-S-DGK 2013 U.S. Dist. LEXIS 1937, at *11 (W.D. Mo. Jan. 7, 2013) (agreeing with the reasoning adopted by the court in *Champion Bank* and *Moran Foods*).

[102] Moran Foods, Inc., 476 F.3d at 441.

[103] *Id.*

[104] *Id.*

[105] *Id.*

A. The Sixth Circuit Grants Deference to Regulation B's Broadened Definition of "Applicant" under the ECOA and The Eighth Circuit Creates a Circuit Split

In *RL BB Acquisition*,[106] the Sixth Circuit correctly granted deference to Regulation B's definition of "applicant" under *Chevron*'s two-step analysis. In *RL BB Acquisition*, a franchisee for numerous fast food chains sought to refinance $10 million of his debt, which resulted from a global financial crisis.[107] Upon reviewing the franchisee's personal financial statement, the bank determined that the franchisee and a company he owned were not independently creditworthy for a loan.[108] The franchisee's wife alleged, however, that the loan was subsequently approved after she was required to become a spouse-guarantor.[109] The Sixth Circuit rightfully held that the wife was an applicant for the purpose of enforcing the Spouse-Guarantor Rule, which entitled her to raise ECOA claims against the bank.[110] The Sixth Circuit's victory, however, was short-lived. Approximately two months after *RL BB Acquisition* was decided, the Eighth Circuit's decision in *Hawkins* created a circuit split by narrowly interpreting Regulation B's definition of "applicant" under *Chevron*'s two-step analysis.[111]

The recent Eighth Circuit Court case, deciding whether the Federal Reserve's broadened definition of "applicant" includes guarantors for the purpose of enforcing the Spouse-Guarantor Rule, establishes that a spouse-guarantor may no longer be able to seek protection and remedies under the ECOA.[112] In *Hawkins*, two owners of a Limited Liability Company (LLC) secured four loans to fund the development of a residential subdivision.[113] After each loan modification, the owners of the LLC and their wives executed personal guaranties in favor of the bank to secure the loans.[114] When the owners of the LLC failed make loan payments, the bank declared the loan in default, accelerated the loans and demanded payment from the LLC owners and their wives.[115] The wives sought damages and to void their guaranties under the ECOA, after alleging that the bank required them to execute the guaranties solely because

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[106] RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380 (6th Cir. 2014).
[107] *Id.* at 381–82 (6th Cir. 2014)
[108] *Id.* at 382.
[109] *Id.*
[110] *Id.* at 384–87.
[111] *See* Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 941 (8th Cir. 2014) (interpreting the ECOA's definition of "applicant" to not include guarantors).
[112] *Id.* at 941-42.
[113] *Id.* at 939.
[114] *Id.*
[115] *Id.*

they were married to their respective husbands.[116] The Eighth Circuit, citing to the Seventh Circuit dicta in *Moran Foods*, incorrectly held that the wives were not considered applicants for the purpose of enforcing the Federal Reserve's Spouse-Guarantor Rule and therefore could not raise ECOA claims.[117]

B. The Sixth and Eighth Circuit's Conflicting Application of *Chevron*'s Two-Step Analysis

In deciding whether the Federal Reserve's broadened definition of "applicant" includes guarantors for the purpose of enforcing the Spouse-Guarantor Rule, the Sixth and Eighth Circuit were required to apply *Chevron*'s two-step analysis.[118] Both courts first decided whether the definition of applicant under the ECOA explicitly excluded guarantors, or whether the ECOA was ambiguous on the issue.[119] The Sixth Circuit correctly held that the definition of applicant under the ECOA was ambiguous because "it could be read to include third parties who do not initiate an application for credit, and who do not seek credit for themselves—a category that includes guarantors."[120] The Sixth Circuit's decision rested on the terms, "applies" and "credit" in the definition of applicant under the ECOA.[121] The term "applies" in the dictionary means "to make an appeal or a request formally and often in writing and [usually] for something of benefit to oneself,"[122] or "[t]o make an approach to (a person) for information or aid; to have recourse or make application *to*, to appeal *to*; to make a (formal) request for."[123] The Sixth Circuit, therefore, reasoned that a guarantor, although not personally requesting credit, "does formally approach a creditor in the sense that the guarantor offers up her own personal liability to the creditor if the borrower defaults."[124]

The Sixth Circuit further reasoned that "the term 'credit' furthered the ambiguity of the statutory definition."[125] The ECOA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or

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[116] *Id.*
[117] *See id.* at 941–42.
[118] RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 384 (6th Cir. 2014).
[119] *Id.*
[120] *Id.* at 384–85.
[121] *Id.* at 385.
[122] *Id.* at 385 (citing Webster's Third New International Dictionary 105 (1993)).
[123] *Id.* at 385 (citing Oxford English Dictionary (3d ed. 2008), http://www.oed.com/view/Entry/9724 [http://perma.cc/PQG3-3UFX]).
[124] *RL BB Acquisition, LLC*, 754 F.3d at 385.
[125] *Id.*

incur debts and defer its payment or to purchase property or services and defer payment therefor[e]."[126] Therefore, "an 'applicant' requests credit, but a 'debtor' reaps the benefit."[127] These two terms, according to the Sixth Circuit, suggested that an applicant does not necessarily always have to be the debtor. Accordingly, "the applicant could be a third party, such as a guarantor."[128]

Conversely, the Eighth Circuit did not defer to the Federal Reserve's interpretation of applicant under Regulation B.[129] The Eighth Circuit focused on the term "apply" in the definition of applicant under the ECOA, and the term "guaranty," reasoning that "the plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit."[130] A "guaranty" is defined as "a promise to answer for another person's debt, default, or failure to perform. More specifically, a guaranty is an undertaking by a guarantor to answer for payment of some debt, or performance of some contract, of another person in the event of default."[131] According to the Eighth Circuit, a guarantor only desires for a borrower to be extended credit from a lender, but does not individually request credit or get involved in the credit application process.[132] Therefore, the Eighth Circuit reasoned that a guarantor "engages in different conduct, receives different benefits, and exposes herself to different legal consequences than does a credit applicant."[133]

The Eighth Circuit noted that the underlying purpose of the ECOA is to ensure that women have "fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrower's marital status."[134] But according to the Eighth Circuit, this policy consideration is inapposite to guarantors because, although guarantors may be improperly *included* in the lending process due to marital status, they are not improperly *excluded* due to their marital status.[135] Consequently, the Eighth Circuit held that *Chevron*'s first step could not be established by a guarantor because they do not request credit.[136] Additionally, the Eighth Circuit did not apply *Chevron*'s second step analysis.

The Sixth Circuit continued *Chevron*'s two-step analysis by determining whether Regulation B was a permissible construction of the

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[126] 15 U.S.C. § 1691a(d) (2012).
[127] *RL BB Acquisition, LLC*, 754 F.3d at 385.
[128] *Id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004)).
[129] *Hawkins*, 761 F.3d at 942.
[130] *Id.* at 941.
[131] *Id.* (citing 38 AM. JUR. 2D GUARANTY § 1 (2014)).
[132] *Id.*
[133] *Id.* at 942.
[134] *Id.*
[135] *Id.*
[136] *Id.*

ECOA.[137] The Sixth Circuit correctly found that the term applicant includes guarantors in at least one of its natural meanings, and as a result, Regulation B's interpretation is a permissible construction of the ECOA.[138] The Sixth Circuit further noted that the Federal Reserve reached the decision with caution.[139] Specifically, "when the Federal Reserve began the process of amending Regulation B to cover guarantors, it initially proposed that guarantors would be deemed applicants throughout the regulation,"[140] permitting guarantors to sue for any Regulation B violation.[141] The Sixth Circuit further expounded that the final version of Regulation B's definition of applicant was limited to the Spouse-Guarantor Rule "in response to the concerns of industry commenters who believed that the unlimited inclusion of guarantors and similar parties in the definition might subject creditors to a risk of liability for technical violations of various provisions of the regulation."[142]

V. The Federal Reserve's Broadened Definition of "Applicant" Is Supported by the Underlying Purpose of the ECOA and Demands Deference by the Supreme Court

Federal circuits should liberally construe the ECOA to implement its central goal of eradicating gender and marital status-based credit discrimination in the American marketplace.[143] The ECOA is designed to protect and provide remedies for individuals who have been unlawfully discriminated against by creditors, and should be broadly interpreted in favor of consumers to satiate the underlying Congressional purpose.[144] Many Courts rejected unduly restricting interpretations of the Act and its regulations, and began to uphold broader language interpretations.[145] Ac-

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[137] *RL BB Acquisition, LLC*, 754 F.3d at 385.
[138] *Id.* at 385–86 (quoting Harris v. Olszewski, 442 F.3d 456, 467 (6th Cir. 2006)).
[139] *Id.* at 386.
[140] *Id.* (citing 50 Fed. Reg. 48,018, 48,020 (Nov. 20, 1985)).
[141] *Id.*
[142] *Id.*
[143] *See* Bros. v. First Leasing, 724 F.2d 789, 793–94 (9th Cir. 1984) (discussing the plain purpose of ECOA).
[144] *See, e.g.*, Silverman v. Eastrich Multiple Inv'r Fund, L.P., 51 F.3d 28, 33 (3d Cir. 1995) (noting the broad remedial provisions in the ECOA); *see also* Bros., 724 F.2d at 793 (literal language of the ECOA must be construed so as to effectuate its underlying purposes); Jochum v. Pico Credit Corp. of Westbank, 730 F.2d 1041, 1047 (5th Cir. 1984) ("A regulation should be interpreted in a manner that effectuates its central purposes.").
[145] *See, e.g.*, United States v. ITT Consumer Fin. Corp., 816 F.2d 487, 489 (9th Cir. 1987); *Bros.*, 724 F.2d at 793-94 ("We must construe the literal language of the ECOA in light of the clear, strong purpose evidenced by the Act and adopt an interpretation that will serve to effectuate that purpose."); Williams v. AT & T Wireless Servs., Inc., 5 F. Supp. 2d 1142, 1147 (W.D. Wash. 1998).

cordingly, lower courts should grant deference to the Federal Reserve's broadened definition of applicant under the ECOA to prevent lenders from avoiding liability by using spouse-guarantors as a proxy for gender-based credit discrimination.

Although the definition of applicant under the ECOA does not explicitly include guarantors, federal courts should defer to the Federal Reserve's interpretation of ECOA because the definition of applicant under the ECOA is not only ambiguous but also broad enough to include spouse-guarantors.[146] Spouse-guarantors should be recompensed for a creditor's violation of the law.[147] Furthermore, judges do not fully understand the complex nature of ECOA and should not attempt to interpret the Act without sufficiently relying on precedent. If federal courts are permitted to narrowly construe the term applicant under the ECOA, lenders will be incentivized to discriminate against spouse-guarantors because a spouse-guarantor would not be able to seek protection and remedies. Moreover, the Spouse-Guarantor Rule is limited to *spouses* for the purpose of enforcing Regulation B's Spouse-Guarantor Rule, and is therefore not over-inclusive. The rule serves to prohibit gender-based discrimination primarily targeted towards married women in the American credit markets.

A. The Definition of "Applicant" Under the ECOA is Broad Enough to Include Spouse-Guarantors

The Supreme Court's reasoning in *Chevron* suggests that there is an implicit Congressional delegation to the Federal Reserve to determine whether the term applicant includes a spouse-guarantor under the Spouse-Guarantor Rule. Courts must only determine whether the Federal Reserve's response to the issue is based on a permissible construction of the ECOA. As the Supreme Court correctly noted, "Judges are not experts in the field, and are not part of either political branch of the Government."[148] Thus, the Supreme Court has continuously granted principal deference to administrative interpretations seeking to interpret statutes or to reconcile conflicting policies, which depend upon more than ordinary knowledge due to the regulatory scheme's complexity and technicality.[149] Thus, if the Federal Reserve's definition of applicant is a reasonable construction of the statute, "[the court] should not disturb it unless it

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[146] *RL BB Acquisition, LLC*, 754 F.3d at 384–86.
[147] *Id.*
[148] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 865 (1984).
[149] *See id.* at 844 (citing Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943); NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953)).

appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[150]

In *Moran Foods*, the Seventh Circuit offered no competing interpretation of the term applicant under the ECOA "apart from its offhanded dismissal of Regulation B's definition."[151] The Seventh Circuit also failed to consider Congressional silence on the issue. Specifically, Congress has not invalidated the Federal Reserve's broadened definition of applicant, and since *Moran Foods* was decided, an extensive amendment to the ECOA was made.[152] Guarantors are thus arguably applicants for the purpose of enforcing the Spouse-Guarantor Rule because, although Congress has had ample opportunity and notice, it has not proactively invalidated Regulation B's definition of applicant.

The Federal Reserve Board, therefore, did not exceed its authority by broadening the definition of applicant under the ECOA, as posited by Judge Colloton in his concurrence opinion in *Hawkins*.[153] Judge Colloton asserted that guarantors were not included in the natural reading of the term "apply" and that "unusual meanings of 'apply' that encompass making a request on behalf of another is not sufficient to make a term ambiguous for purposes of *Chevron*."[154] But consistent with the Supreme Court's reasoning in *Chevron*, *Household Credit Servs.*, and *Gen. Dynamics Land Sys. Inc.* respectively, the Sixth Circuit correctly examined the terms "applies" and "credit" within the meaning of applicant under the ECOA *along with* the larger context of the ECOA whilst applying step one of *Chevron*.[155] Specifically, the Sixth Circuit noted that the ECOA prohibited discrimination "with respect to any aspect of a credit transaction."[156] Furthermore, the Sixth Circuit correctly noted that the ECOA has broad remedial goals.[157] This context confirms what the plain language reveals: that the definition of applicant under the ECOA is broad enough to include guarantors and the statute is ambiguous.[158] Conversely, the Eighth Circuit in *Hawkins* failed to examine the surrounding language of the term applicant under the ECOA *as well as* the language and design of the statute as a whole.[159] As a result, the Eighth Circuit in *Hawkins* did not appropriately ascertain whether the term applicant under the ECOA was broad enough to include guarantors.

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[150] *Chevron, U.S.A., Inc.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 382–83 (1961)).
[151] *RL BB Acquisition, LLC*, 754 F.3d at 386.
[152] *Id.*
[153] Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 943 (8th Cir. 2014) (Colloton, J., concurring), *aff'd by an equally divided court*, 136 S. Ct. 1072 (2016).
[154] *Id.*
[155] *RL BB Acquisition, LLC*, 754 F.3d at 385.
[156] *Id.* (citing 15 U.S.C. § 1691(a) (2012) (emphasis added)).
[157] *Id.*
[158] *Id.*
[159] *Hawkins*, 761 F.3d at 941.

Judge Colloton further asserted that the Federal Reserve Board "seemed to recognize the plain meaning of 'applicant' in the first decade after the ECOA was enacted."[160] But simply because the Federal Reserve seemed to recognize the plain meaning of the term applicant for approximately one decade does not mean that the Federal Reserve could not subsequently expand it.[161] In *Chevron*, the Supreme Court posited that the fact that an agency "has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute."[162] Since the 1985 Federal Reserve's expanded definition of applicant, including guarantors for the purpose of enforcing the Spouse-Guarantor Rule, there have been neither testimonies, reports, nor congressional findings to the contrary.[163] Therefore, the Federal Reserve's acknowledgment of the narrow definition of applicant under the ECOA from its enactment until 1985 is unpersuasive.

Similarly, prior to 2007, a vast majority of federal courts of appeals granted deference to Regulation B's broadened definition of applicant. After the influential 2007 dicta in the Seventh Circuit case of *Moran Foods*, however, numerous lower courts have diverged from this deferential precedent.[164] As the Supreme Court noted before deciding *Gen. Dynamics Land Sys. Inc.*, "[T]he Court of Appeals and the District Courts have read the law the same way, and . . . have enjoyed virtually unanimous accord in understanding the ADEA to forbid only discrimination preferring young to old."[165] The Court further noted that the strength of the consensus was "enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view."[166] Accordingly, the strength of the deferential consensus until 2007 establishes that the definition of applicant under the ECOA was and currently is ambiguous, and congressional silence on the issue supports adherence to this view.

Furthermore, in *Hawkins*, the Eighth Circuit acknowledged that the policies of the ECOA "focus on ensuring fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrowers' marital status."[167] But the Eighth Circuit posited that guarantors are not applicants because they are improperly *included* rather

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[160] *Id.* at 944 (Colloton, J., concurring).

[161] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 863 (1984) ("[A]n initial agency interpretation is not instantly carved in stone.").

[162] *Id.* at 864.

[163] BATTLE, JR. ET AL., *supra* note 4, at 23–24. *See also* RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 384 (6th Cir. 2014).

[164] *See RL BB Acquisition, LLC*, 754 F.3d at 386 (citing Empire Bank v. Dumond, No. 13-CV-388, 2013 U.S. Dist. LEXIS 169984, at *6 (N.D. Okla. Dec. 3, 2013) (collecting cases)).

[165] Gen. Dynamics Land Sys. Inc. v. Cline, 540 U.S. 581, 593 (2004).

[166] *Id.* at 594.

[167] Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 942 (8th Cir. 2014).

than excluded from the lending process and are not denied access to credit.[168] This argument is also unpersuasive because credit applicants who are victims of ECOA violations are eventually *included* in the credit transaction by unlawful means. A spouse who is unlawfully required by a lender to secure his or her spouse's signature on a loan has formally applied for credit and would necessarily be improperly *included* in the credit transaction, though he or she was implicitly denied access to credit in the first instance. Although the spouse-applicant would be protected under the ECOA because of his or her formal application for credit, the spouse-guarantor would not. Therefore, both formal applicants and spouse-guarantors who are improperly included in the lending process by unlawful means should be protected under the ECOA.

B. Regulation B's Definition of "Applicant" Is Not Demonstrably Irrational and Demands Deference

In *RL BB Acquisition*, the Sixth Circuit reasoned that the Federal Reserve's reasoning was not "arbitrary, capricious, or manifestly contrary to the statute" and was therefore entitled to deference under the second step in *Chevron*'s two-step analysis.[169] But the Eighth Circuit did not reach the second step in *Chevron*'s two-step analysis to determine Regulation B's rational interpretation because it reasoned that the definition of applicant under the ECOA unambiguously excluded guarantors.[170] As exemplified by the Sixth Circuit in *RL BB Acquisition*, however, the definition of applicant under the ECOA is still unclear and arguably includes guarantors.[171] Thus, the Eighth Circuit should have determined only whether the Federal Reserve's broadened definition of applicant for the purpose of enforcing the Spouse-Guarantor Rule was rational and appropriately balanced.

Because the term applicant under the ECOA is ambiguous, Regulation B's broadened yet demonstrably rational definition of applicant for the purpose of enforcing the Spouse-Guarantor Rule should be binding on lower courts. The Sixth Circuit in *RL BB Acquisition* rightfully reasoned the Federal Reserve's broadened definition of applicant under the

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[168] *Id.*

[169] RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 386 (6th Cir. 2014) (quoting Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (quotation marks omitted).

[170] *Hawkins*, 761 F.3d at 942.

[171] *RL BB Acquisition, LLC*, 754 F.3d at 386.

ECOA was demonstrably rational.[172] The Sixth Circuit's correct reasoning is most analogous to the Supreme Court's reasoning in *Household Credit Servs.*[173] The Supreme Court in *Household Credit Servs.* expounded that the concept of "meaningful disclosure" underlying TILA's purpose does not mean *more* disclosure.[174] Instead, it "describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [information overload].'"[175] Regulation B, like Regulation Z under TILA, strikes an appropriate balance, because Regulation B only applies to spouses in enforcing the Spouse-Guarantor Rule, and it is not over-inclusive, as only a spouse-guarantor is protected by ECOA. Accordingly, the Federal Reserve Board gave considerable thought to competing interests on both ends of the spectrum with respect to Regulation B, just as it did when it promulgated Regulation Z under TILA.

Additionally, the Supreme Court in *Ford Motor* recognized that it would have been equally reasonable for the Federal Reserve Board to adopt the respondent's alternative interpretation of the statute and regulation.[176] Instead, the Supreme Court granted considerable deference to the agency's interpretation of TILA. TILA, like the ECOA, was enacted by Congress to help consumers by preventing the unlawful conduct of lenders.[177] Specifically, the broad purpose of TILA is to promote the informed use of credit by disclosing meaningful credit terms so that consumers can make informed decisions regarding any credit made available to them.[178] TILA also protects consumers against inaccurate and unfair credit practices.[179] Therefore, both TILA and the ECOA protects consumers in the credit markets. Moreover, the Federal Reserve Board's opinion construing the ECOA through Regulation B, like TILA through Regulation Z, must also be dispositive because its broadened definition of applicant is rational and appropriately balanced to provide protection to consumers in the credit markets.

The Supreme Court has repeatedly held that an agency's construction of its own regulation is authoritative, noting that agencies have an in-depth understanding of the complex nature of market credit practices.[180] The Supreme Court would likely regard the Eighth Circuit's de-

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[172] *See* RL BB Acquisition, LLC, 754 F.3d at 386 (holding guarantors can "seek relief for violations of the spouse-guarantor rule").

[173] Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)).

[174] *Id.*

[175] Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1990) (citing S. Rep. 96–73, p.3 (1979) (accompanying S. 108, Truth in Lending Simplification and Reform Act)).

[176] *Ford Motor Credit Co.*, 444 U.S. at 569 (1980).

[177] *See* 15 U.S.C. § 1601(a) (2012).

[178] *Id.*

[179] *Id.*

[180] *See, e.g.*, Power Reactor Dev. Co. v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO, 367 U.S. 396, 408 (1961) ("We see no reason why we should not accord to the Commission's

cision in *Hawkins* as embarking "upon a voyage without a compass when it disregards the agency's views."[181] Specifically, this is because the Eighth Circuit neither correctly applied step one of *Chevron* nor determined whether the Federal Reserve's interpretation of the ECOA was rational or appropriately balanced.[182] Instead, the Eighth Circuit narrowly construed the ECOA and ignored the Federal Reserve's extensive experience dealing with gender-based credit discrimination. Thus, the Federal Reserve Board's broadened interpretation of the definition of applicant under the ECOA should be controlling.

VI. Conclusion

Gender and marital status-based credit discrimination are still prevalent in the marketplace today. Consequently, the Spouse-Guarantor Rule under Regulation B of the ECOA should be liberally construed to effectively disincentivize gender-related credit discrimination that remains widespread in the credit markets. The Supreme Court should not adopt the Eighth Circuit's restrictive interpretation of the ECOA, because it runs afoul of the underlying purpose of the ECOA. The Supreme Court has acknowledged that a statute must not necessarily be construed in its natural meaning but should instead be construed by its legislative history, including its underlying purpose.[183] The Supreme Court has also acknowledged that principal deference should be granted to administrative interpretations, unless discernibly irrational.[184] Accordingly, although the natural meaning of the term applicant under the ECOA does not expressly include guarantors, the meaning of the term in the context of prohibiting gender and marital status-based credit discrimination supports the broadened meaning under Regulation B. The danger of not granting deference to the Federal Reserve's broadened definition of applicant under the ECOA includes, but is not limited to, lenders using spouse-guarantors as a proxy for securing credit by unlawful means, which emasculates the legislative intent of the ECOA. Creditors will be more inclined to violate the ECOA because they are aware that a spouse-guarantor will no longer be able to seek protection and remedies under

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interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision.").

[181] *Ford Motor Credit Co.*, 444 U.S. at 568.

[182] *See* Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 942 (8th Cir. 2014).

[183] *See* Gen. Dynamics Land Sys. Inc. v. Cline, 540 U.S. 581, 593 (2004) (describing how to interpret legislation).

[184] *Ford Motor Credit Co.*, 444 U.S. at 565.

the ECOA in particular jurisdictions. Additional protection is required to effectively combat the widespread gender and marital status-based credit discrimination existing in the credit markets.