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STANDING IS NO GUARANTEE FOR A GUARANTOR: THE CIRCUIT SPLIT OVER THE SPOUSAL-GUARANTOR PROVISION OF THE ECOA

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I. INTRODUCTION

In 1974, Congress passed the Equal Credit Opportunity Act (ECOA or the Act) which made it unlawful for any financial institution or other firm engaged in the extension of credit to discriminate on the basis of sex or marital status.[1] Significant changes were made to the Act in 1976, which included the authorization of the Federal Reserve Board to make any regulation necessary to carry out the Act's purpose.[2] Collectively, these regulations are known as Regulation B.[3] The Act was, in part, a product of calls made by the National Commission on Consumer Finance requesting a re-evaluation of the lending process in an effort to ensure that all individuals have access to credit.[4] While "the practice of requiring a woman's husband to co-sign . . . is quickly diminishing,"[5] instances of discrimination still occur in today's credit market.[6] Specifically, cases today frequently involve instances of husbands applying for loans that require their wives to sign as guarantors, regardless of the husbands' creditworthiness.[7] These practices violate Regulation B's prohibition against requiring a spouse's signature on a credit instrument if the applicant is independently creditworthy.[8]

Early on, there was little litigation regarding credit discrimination under the ECOA. The fact that Regulation B spells out, in detail, the

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1. *See* Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974), codified as amended at 15 U.S.C. § 1691 (1994).

2. *See* Equal Credit Opportunity Act, Pub. L. No. 94-239, 90 Stat. 251 (1976), codified at 15 U.S.C. § 1691(a).

3. *See* Federal Reserve Board Regulation B, 12 C.F.R. § 202 (1976).

4. *See* Andrea Farley, *NOTE: The Spousal Defense—A Ploy to Escape Payment or Simple Application of the Equal Credit Opportunity Act?*, 49 VAND. L. REV. 1287, 1291 (1996) (citing NAT'L COMM'N ON CONSUMER FIN., REPORT ON CONSUMER CREDIT IN THE UNITED STATES 151 (1972)).

5. Ami L. diLorenzo, *Regulation B: How Lenders Can Fight Back Against the Affirmative Use of Regulation B*, 8 U. MIAMI BUS. L. REV. 215 (2000).

6. For an extensive analysis of specific instances of discrimination under the ECOA, see Joan Kirshberg, *Discrimination Against Credit Applicant on Basis of Marital Status under Equal Credit Opportunity Act* (15 U.S.C.A. § 1691), 55 A.L.R. FED. 458 (1981).

7. The guarantor of a loan is an individual who promises to be responsible for the debt or obligation of another individual.

8. *See* 12 C.F.R. § 202.7(d)(1). The spouse is *permitted* to sign as a guarantor, but the lender cannot *require* that the spouse's signature be on the instrument.

types of information that can and cannot be asked of an applicant likely is the main reason that courts have not experienced a flood of litigation stemming from the ECOA.[9] However, in the past decade, district court cases interpreting and applying the ECOA and the regulations accompanying it have been on the rise. Cases being brought before the courts consider questions such as the proper remedy available to a guarantor for an ECOA violation and whether a guarantor can assert an ECOA defense even after the statute of limitations has expired.[10]

Recent federal court cases have challenged the assumption that a guarantor has standing to bring a claim under the ECOA. Specifically, courts are questioning the amount of deference that should be given to the Federal Reserve Board's decision to expand the scope of the Act to include guarantors as "applicants" under the ECOA. The Sixth Circuit Court of Appeals[11] and the Eighth Circuit Court of Appeals[12] have varying interpretations with vastly different consequences on guarantors' rights. This Casenote seeks to answer the question of whether a guarantor has standing under the ECOA because of the Federal Reserve Board's decision that a guarantor is considered an applicant.

Part II of this Casenote explores the Equal Credit Opportunity Act by analyzing the history, purpose, adaptation, interpretation, and enforcement of the legislation. Part III explores the existing case law, focusing on the contentious issue of standing in district and state courts, the decisions of the split circuit courts, and the rationale behind the courts' varying interpretations of the law. Part IV explains how the Sixth Circuit was correct in giving the Federal Reserve Board's definition deference, reviews the failures of the Eighth Circuit's decision, and offers a prediction about the future of Regulation B. Finally, Part V provides a summary of the existing state of the law and explores the future implications of the ECOA.

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9. *See* Ralph J. Rohner, *Equal Credit Opportunity Act*, 34 BUS. LAW. 1423, 1424 (1979) (discussing reasons why the Truth in Lending Act has produced an explosion of litigation but the ECOA produced relatively little during its first four years in effect).

10. Empire Bank v. Dumond, No. 13-CV-0388-CVE-PJC, 2013 U.S. Dist. LEXIS 169984, at *10 (N.D. Okla. Dec. 3, 2013) (deciding if the statute of limitations should be tolled for guarantors claiming an ECOA defense), *summary judgment granted in part, denied in part*, 28 F. Supp. 3d 1179 (N.D. Okla. 2014), *mot. denied*, 13-CV-0388-CVE-PJC, 2014 U.S. Dist. LEXIS 93737 (N.D. Okla. July 10, 2014); Bank of the West v. Kline, 782 N.W.2d 453, 454 (Iowa 2010) (determining whether the ECOA can be used as an affirmative defense to an action by a creditor).

11. RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 386 (6th Cir. 2014) (finding that guarantors were applicants and therefore have standing).

12. Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 941 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 1492 (2015) (finding that the Federal Reserve Board's definition of applicant should not be given deference and therefore guarantors lack standing).

II. LEGISLATIVE PROVISIONS AND ENFORCEMENT

A. The Equal Credit Opportunity Act

Social change throughout the 1960s served as the backdrop for the inception of the ECOA in 1974. In a report released by the National Commission on Consumer Finance in 1972 (the Commission), the widespread problem[13] of gender-based credit discrimination was exposed.[14] The Commission discovered that married women experienced great difficulty obtaining loans without the presence of their husband's signature, even if they did not represent a significant credit risk.[15] Congress quickly focused its efforts on correcting the lending procedure to eliminate any discriminatory practices aimed at women and, at one point, considered drafting the bill so that it would not address any class other than women.[16]

Congress's solution to issues of discrimination was the Equal Credit Opportunity Act.[17] Passed in 1974, the Act made it "unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction."[18] The Act defined 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."[19] However, two years later, Congress found it necessary to provide protection for a broader class of people,[20] and therefore, amended the Act to prohibit discrimination against applicants based on race, color, religion, national

13. Discriminatory practice employed by credit providers included but were not limited to assigning a value to sex or marital status, asking women about their use of birth control and ability to have children, discounting income earned by women, perceptions that income from alimony or child support was too unreliable, varying terms of credit, and requiring women recently married to reapply for loans received when they were single. *See* Earl M. Maltz & Fred H. Miller, *The Equal Credit Opportunity Act and Regulation B*, 31 OKLA L. REV. 1, 2 (1978).

14. *See* Farley, *supra* note 4 (citing Hearings Before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 93d. Cong., 2d Sess. (1974)).

15. Anne J. Geary, *Equal Credit Opportunity – An Analysis of Regulation B*, BUS. LAW. 31, 1641 at 1652-53 (Apr. 1976).

16. *See* Farley, *supra* note 4, at 1289 n.11 (citing Subcommittee Hearings, 93d. Cong., 2d Sess. at 317-18 (1974)).

17. *See* Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974), codified as amended at 15 U.S.C. § 1691 (1994).

18. *Id.* § 701(a).

19. *Id.* § 702(b).

20. It should be noted that this is the first expansionary policy applied to the ECOA and Regulation B by either Congress or the Federal Reserve Board. *See* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (1976), codified as amended at 15 U.S.C. § 1691.

origin, age, and "for other purposes."[21]

The ECOA protects debtors by preventing discrimination against an applicant simply because the applicant is a member of a specified class of people.[22] Any analysis of the Act also should be done with an understanding that its scope is considerably broader than other comparable consumer credit protection regulations[23] such as the Truth in Lending Act or the Consumer Leasing Act.[24]

B. Regulation B

The Act gives the Bureau of Consumer Financial Protection (the Bureau) the authority to "prescribe regulations" to carry out the purposes of the Act.[25] This grant of power gave the Bureau authority to draft Regulation B.[26] Regulation B was implemented to offer creditors details on which practices are and are not appropriate under the Act.[27] Additionally, the Federal Reserve Board published "model application forms that creditors could adopt or adapt" to reduce the risk of a violation of the Act.[28] Regulation B prohibits inquiries regarding race, marital status, sex, and age on the premise that "if creditors cannot inquire about or note applicants' personal characteristics . . . they are less likely unlawfully to consider the information in connection with a credit transaction."[29] Regulation B also includes a spousal-guarantor provision which expressly prohibits requiring the signature of a spouse if the applicant is individually creditworthy.[30]

Throughout its existence, Regulation B largely has remained

21. The "other purposes" that the act refers to are elaborated on in the text of the act and include discrimination against an applicant because all or part of their income is derived from a public assistance program or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. Equal Credit Opportunity Act, Pub. L. No. 94-239, 90 Stat. 251 (1976), codified at 15 U.S.C. § 1691(a). Additional changes have been made to the Act through amendments in 1991 and 2010.

22. *See* 15 U.S.C. § 1691(a).

23. *See* Earl M. Maltz & Fred H. Miller, *The Equal Credit Opportunity Act and Regulation B*, 31 OKLA. L. REV. 1, 2-3 (1978).

24. The Truth in Lending Act was passed in 1968 and is designed to promote the informed use of credit by requiring that creditors disclose terms and costs to consumers regarding credit transactions. The Consumer Leasing Act, passed in 1976, requires that certain provisions be in lease agreements for personal property lasting longer than four months.

25. Equal Credit Opportunity Act, 15 U.S.C. § 1691b(a) (2010).

26. Regulation B of the ECOA, 12 C.F.R. § 202 (1975).

27. *See* Rohner, *supra* note 9.

28. *Id.*

29. Equal Credit Opportunity, 68 Fed. Reg. 13144, 13147. Regulation B also prohibits creditors from asking applicants about their childbearing capabilities, their former spouses, or any child support payments they may receive. *Id.* at 13164.

30. *See* 12 C.F.R. § 202.7(d)(1).

unchanged. However, since its creation in 1976, the language of Regulation B has been revised slightly by amendments passed in 1985 and 2003. These amendments were designed to expand the number of individuals covered by the Act and provide more protection to those who fall under its authority.

In the 1985 amendment, Congress modified the definitions of several key terms. [31] The most frequently discussed change is to the definition of the term "applicant".[32] While the definitions used in the original version of Regulation B were similar to those used by Congress in the Act,[33] this amendment made substantive changes to the definition of the term applicant as it applied in Regulation B.[34] Under Regulation B's original definition of applicant, guarantors were expressly excluded from protection under the Act.[35] The 1985 amendment to Regulation B, however, expanded the definition of applicant to explicitly include guarantors.[36] The broadening of this definition has sparked debate in courts at both the state and federal levels and has resulted in new claims brought under the ECOA.

While the Board has had opportunities to return to the original definition of applicant since the 1985 amendment—most notably, a rejected proposal in 1995 and an amendment passed in 2003—it has refused to do so. In fact, the only significant change to Regulation B since 1985 was an amendment passed in 2003 that expanded the form of "self-checks" that a creditor can perform to ensure the creditor is not engaging in discriminatory practices.[37] The most recent change to Regulation B occurred in 2010 when Congress shifted authority over Regulation B from the Federal Reserve Board to the Bureau of

31. Both the ECOA and Regulation B have sections that define important words. The changes made in 1985 were made to the definitions section of Regulation B. *See* 12 C.F.R. § 202.2.

32. *See* Equal Credit Opportunity; Revision of Regulation B, 50 Fed. Reg. 48018 (Nov. 20, 1985) (also making changes to the phrase "empirically derived, demonstrably and statistically sound, credit scoring system").

33. *Compare* Equal Credit Opportunity Act, 15 U.S.C. § 1691a(b) *and* Regulation B of the ECOA, 12 C.F.R. § 202.2(e).

34. *See* Equal Credit Opportunity; Revision of Regulation B, 50 Fed. Reg. 48018 (Nov. 20, 1985) (also making changes to the phrase "empirically derived, demonstrably and statistically sound, credit scoring system").

35. *See* Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28, 31 (3d Cir. 1995) (citing 12 C.F.R. § 202.2(e)(1985)).

36. "Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers and similar parties." 50 Fed. Reg. 48018.

37. A self-test, as defined by 12 C.F.R. § 202.15(b)(1)(i), is "any program, practice, or study that: [i]s designed and used specifically to determine the extent or effectiveness of a creditor's compliance with the Act or this regulation."

Consumer Financial Protection.[38]

Since its creation in 1976, the language of Regulation B has been expanded by the amendments passed in 1985 and 2003. These amendments led to the inclusion of more individuals covered and the provision of more protections to those who fall under its authority. However, not all people protected under the Act and Regulation B have access to the same remedies.

C. Claims under the Equal Protection Act

Even though the Bureau of Consumer Financial Protection has the power to promulgate regulations necessary to carry out the purpose of the Act, the Bureau is not granted exclusive responsibility to enforce it.[39] The Act provides a list of federal agencies that are responsible for the enforcement of the ECOA within the scope of their regulatory authority.[40] For example, the Securities and Exchange Commission has the power to enforce the ECOA with respect to brokers and dealers pursuant to the Securities Exchange Act of 1934.[41] Additionally, "[e]xcept to the extent that enforcement of the requirements imposed under [the Act] is specifically committed to some other Government agency," general enforcement authority is reserved for the Federal Trade Commission (the FTC).[42] Accordingly, the FTC and the eleven listed government agencies have authority to make rules respecting their own procedures when enforcing compliance with the Act.[43]

Any creditor who fails to comply with the provisions of the ECOA is subject to civil liability in suits brought by individual plaintiffs or a class of plaintiffs.[44] If there is reason to believe that a creditor has developed a pattern of noncompliance with the Act, the case can be referred to the Attorney General, and the creditor may be held liable for further damages. The United States district courts have jurisdiction over any

38. Equal Credit Opportunity Amendment Act of 2010, Pub. L. No. 111-203, 124 Stat. 2083, (2010), codified at 15 U.S.C. § 1691b.

39. 15 U.S.C. § 1691c.

40. Acts (and enforcing agencies) subject to the provisions of the ECOA include the Federal Deposit Insurance Act (Federal Savings Association, Federal Reserve System, Federal Deposit Insurance Corporation), Federal Credit Union Act (Administrator of the National Credit Union Administration), Acts to regulate commerce (Secretary of Transportation), Federal Aviation Act (Secretary of Transportation), Packers and Stockyards Act (Secretary of Agriculture), Farm Credit Act (Farm Credit Administration), Securities Exchange Act (Securities and Exchange Commission), Small Business Investment Act (Small Business Administration), and the Consumer Financial Protection Act (Bureau of Consumer Financial Protection). 15 U.S.C. § 1691c(a)(1)-(9).

41. 15 U.S.C. §1691(c)(a)(7)

42. *See id.* § 1691c(c).

43. *See id.* § 1691c(d).

44. 12 C.F.R. § 202.16(b)(1).

claim made under the ECOA, so long as that claim is made within the prescribed five-year statute of limitations period.[45]

After initiation of a wrongful action, the Act allows the aggrieved applicant to seek recovery of actual damages, putative damages, equitable and declaratory relief, and recovery of costs and attorney fees.[46] Most importantly, however, before any potential plaintiff can consider herself an aggrieved applicant under the protection of the ECOA, she must first show that she is an "applicant" with standing to bring suit. Although the definitions in the Act and Regulation B may seem straightforward, differing interpretations have resulted in a considerable amount of litigation.

III. JUDICIAL INTERPRETATION

A plaintiff must have standing to bring suit under the Equal Credit Opportunity Act. Prior to the 1985 amendment to the definition of "applicant" in Regulation B, the only person with standing was the person who applied for—and received—the benefit of the credit. However, changing the definition of "applicant" broadened the scope of the Act to include anyone who "may become contractually liable . . . includ[ing] guarantors."[47] Initially, courts accepted this amendment and assumed that guarantors had standing to bring suit. However, recent judicial opinions have questioned the Board's authority to change the definition of "applicant" and have found that the alteration may not warrant deference because it contravenes the intent of Congress. This dispute has reached its climax, culminating in a circuit split between the Eighth Circuit[48] and the Sixth Circuit.[49]

A. The Eighth Circuit Decision

Hawkins v. Community Bank of Raymore[50] rose to the Eighth Circuit on appeal from the Western District of Missouri. The plaintiff, Valerie Hawkins, is the wife of Gary Hawkins. Mr. Hawkins is one of two members of a Missouri limited liability company, PHC Development,

45. Regardless of the amount in controversy, United States federal courts always have jurisdiction over claims under the ECOA. 15 U.S.C. § 1691e(f).

46. However, the putative damages that a plaintiff is able to collect are limited to "an amount not greater than $10,000." *Id.* § 1691e(b).

47. 12 C.F.R. § 202.2(e).

48. Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 1492 (2015).

49. RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 382 (6th Cir. 2014).

50. *Hawkins*, 761 F.3d at 937.

LLC.[51] The plaintiff had no interest in the company her husband owned.[52] Between 2005 and 2008, the defendant, Community Bank of Raymore (Community), made four loans totaling over $2 million to PHC to fund the development of a subdivision.[53] For each loan, the plaintiff and her husband executed personal guaranties to secure the loans.[54]

PHC failed to meet the obligations of the loan. As a result, the defendant declared the loans in default and sought recovery from the plaintiff and her husband as guarantors.[55] The plaintiff filed suit against the bank, claiming that Community had violated the ECOA by requiring her to execute personal guaranties on the loans solely by reason of her marriage to Mr. Hawkins.[56] The plaintiff sought damages in addition to an order from the court declaring that the guaranties were void and unenforceable.[57] The district court awarded summary judgment to Community, and Hawkins appealed.[58]

On appeal, Community argued that Mrs. Hawkins was not within the class of persons protected by the ECOA because she was not an "applicant" under the language of the Act.[59] In essence, the issue on appeal was whether the protections of the ECOA allowed a guarantor to seek recovery for marital-status discrimination under the Act. The Eighth Circuit affirmed the judgment of the district court, finding that "a guarantor is not protected from marital-status discrimination by the ECOA"[60] because a guarantor is not an applicant and, therefore, the guarantor does not have standing to bring suit.

The appellate court recognized that the 1985 amendment to Regulation B did revise the statutory definition of applicant to extend protection to guarantors.[61] However, the court determined that the Board was acting in direct conflict with the intention of Congress by broadening the definition in Regulation B.[62] If the definition from Regulation B were afforded deference, then Mrs. Hawkins—as a guarantor—would be permitted to bring suit under the Act. On the other

51. Henceforth known as "PHC." *Id.* at 939.

52. *Id.*

53. Each loan was modified several times as well. *Id.*

54. *Id.*

55. *Id.*

56. *Hawkins*, 761 F.3d at 939.

57. *Id.*

58. *Id.* at 940.

59. *See* Brief for Defendant-Appellee at 22, Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065).

60. *Hawkins*, 761 F.3d at 942.

61. *Id.* at 940.

62. *See generally id.*

hand, if the definition were not given deference, then her claim would be barred due to her lack of standing. To reach a decision, the court applied the two-step framework for statutory interpretation established by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[63]

In *Chevron*, the Supreme Court reviewed the regulation promulgated by the Environmental Protection Agency in 1981 interpreting the definition of "stationary source" as it was used in the Clean Air Act Amendment of 1977.[64] The Court sought to determine if the interpretation was within the scope envisioned by Congress when the Clean Air Act was originally passed.[65] The *Chevron* Court noted at the outset that any judicial review of an agency's construction of a statute begins with two threshold questions.[66] The first question confronting a court is "whether Congress has directly spoken to the precise question at issue."[67] If congressional intent is clear, then the inquiry ends there. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[68] If an interpretation meets both of these conditions, deference should be given to the agency's interpretation because of its granted authority to create regulation for the effective administration of the Act.

In *Hawkins*, the Eighth Circuit examined whether there was clear congressional intent in determining who qualified as an applicant. With all three judges in agreement,[69] the three-page opinion of the court concluded that "[b]ecause the text of the ECOA is unambiguous . . . we will not defer to the Federal Reserve's interpretation of applicant . . . ."[70] In support of their conclusion, the Eighth Circuit pointed to dicta from the Seventh Circuit Court of Appeals in *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC*.[71] *Moran* found that "there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor."[72] Moreover, the Seventh and Eighth Circuits feared

63. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

64. The 1977 amendment imposes certain requirements on states that have not achieved the national air quality standards established by the EPA.

65. *See generally Chevron*, 467 U.S. 837.

66. *Id.* at 842.

67. *Id.*

68. *Id.* at 843.

69. One judge wrote a concurring opinion. *See* Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 943-45 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 1492 (2015) (Colloton, J., concurring).

70. *Hawkins*, 761 F.3d at 942.

71. *Id.* at 942 (referencing Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co., LLC, 476 F.3d 436 (7th Cir. 2007). *Moran* dealt with a franchisor of a grocery store trying to collect a loan provided to the franchisee after the franchisee lost the store to bankruptcy. The franchisee and his wife both guarantied the loan personally.

72. Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co., LLC, 476 F.3d 436, 441 (7th Cir. 2007).

interpreting "applicant" to include guarantors because it might "open vistas of liability" that the ratifying Congress would not have been willing to accept.[73]

The Eighth Circuit's decision drew support from preceding district court decisions that denied the Board's interpretation of an applicant. The workability of the Board's interpretation of "applicant" was challenged by the Eastern District of Missouri in *Champion Bank v. Regional Development, LLC*.[74] The court asserted that a wife, claiming she was wrongly made a guarantor, could not seek recovery under the Act.[75] The court reasoned that the complainant cannot seek the method of recovery reserved for a protected class of people while simultaneously claiming that she is not part of that protected class of people.[76] The court rejected the claim saying that the circular and illogical results prevented a remedy, thus making it impossible for the wife to be made whole by the Act.[77]

B. The Sixth Circuit Decision

In *RL BB Acquisition, LLC v. Bridgemill Common Development Group, LLC*,[78] the Sixth Circuit was confronted with a case that raised the same legal issues presented in *Hawkins*. In *Bridgemill*, the defendants, Starr Stone Dixon (Starr) and H. Bernard Dixon (Bernard), are husband and wife. Bernard invested millions of dollars in two residential developments, one of which was named Bridgemill Commons, through loans received by BCDG—a company Bernard had created to purchase the Bridgemill Commons Development.[79] However, the financial crisis in 2008 yielded nearly $10 million in losses on this investment.[80] Bernard approached BB&T Bank about refinancing his debt on both investments, and provided detailed financial information on both himself and his wife.[81]

BB&T appraised the Bridgemill investment and valued it at $5.65 million.[82] As a result of the appraisal, BB&T concluded that "Bernard

73. *Id.*

74. *See generally* Champion Bank v. Reg'l Dev., LLC, No. 4:08CV1807, 2009 U.S. Dist. LEXIS 40468 (E.D. Mo. May 13, 2009).

75. *See id.* at *8.

76. *See id.* at *8-9.

77. *See id.* at *8.

78. RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380 (6th Cir. 2014).

79. *Id.* at 381-82.

80. *Id.*

81. *Id.* at 382.

82. *Id.*

and BCDG were not independently creditworthy for a loan large enough to refinance" the loans on both investments.[83] In an effort to bolster the loan, Bernard and Starr each pledged 40,000 shares of BB&T stock,[84] and Bernard executed a personal guaranty on the loan. While the parties dispute how Starr became personally liable for the loan,[85] Starr testified that she felt tremendous pressure from the bank to sign the personal guaranty. In addition, a summary of the loan requirements offered at trial stated "Starr will be required to co-sign the notes . . . ."[86] On June 4, 2008, the loan was processed and BCDG issued a note to BB&T for a final value of $6.4 million.[87]

The note came due on June 5, 2010, and by that date, the defendants had paid less than $2 million towards the principal sum. After a series of transfers, RL BB Acquisition, LLC acquired the rights to collect on the guaranties offered by Starr and her husband. The plaintiff asserted five causes of action at trial including a breach of guaranty claim against Starr.[88] Both Starr and the plaintiff moved for summary judgment on the matter, and the district court found that while the amount of damages was unresolved, the plaintiff had proven that Starr was liable under the guaranty.[89] Starr timely appealed to the Sixth Circuit Court of Appeals.[90]

Like the Eighth Circuit, the Sixth Circuit began its analysis by recognizing that the Act's protections and remedies only were available to "applicants" for credit.[91] Noting that the "ordinary tools of statutory construction"[92] should be used, the Sixth Circuit applied the test articulated in *Chevron*.[93]

To analyze whether Congress had directly addressed the issue, the Court focused on two terms within the language of the Act: "applies" and "credit."[94] The term "apply" is defined as the following: "to make

83. *Id.*

84. Starr owned her 40,000 shares of stock independently. *Bridgemill*, 754 F.3d at 382.

85. The BB&T representative claims that Bernard suggested that Starr execute a personal guaranty, but Bernard claims that the representative required Starr to execute the guaranty. *Id.*

86. *Id.* (internal quotation marks and brackets omitted).

87. *Id.*

88. *Id.* at 383

89. *Bridgemill*, 754 F.3d at 383.

90. *Id.*

91. *Id.* at 384.

92. *Id.* (citing City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863, 1868 (2013) (referencing the fact that courts have "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

93. *Bridgemill*, 754 F.3d at 384 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

94. *Id.* at 385.

an appeal or request esp[ecially] formally and often in writing and usu[ally] for something of benefit to oneself"[95] or "to 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."[96] The court found that the definition created ambiguity with regard to the intent of Congress; while guarantors do not usually approach lenders asking for credit for themselves, "a guarantor does formally approach a creditor in the sense that the guarantor offers up [his or] her own personal liability . . . if the borrower defaults."[97]

Additionally, the court found that the term "credit" further obfuscates any congressional intent through its definition in the ECOA: "the right granted by a creditor to a debtor to defer payment of debt . . . ."[98] The applicant approaches the lender to request credit but it is the debtor who reaps the benefit of using the credit.[99] As a result, the court found it possible that "[t]he use of these two different terms suggests that the applicant and the debtor are not always the same person."[100] The ambiguity present in both terms is sufficient to support a finding that Congress never directly spoke to this issue.

The next step in the *Chevron* test is to determine whether the regulation stems from a permissible construction of the statute.[101] Given that "considerable weight should be accorded to an executive department's construction of a statutory scheme," the court found that the Board's interpretation of an applicant was one of the "natural meanings" of an "applicant."[102] Having found that both steps of the *Chevron* test were satisfied, the court concluded that the Board's interpretation should be afforded deference.[103] Therefore, the court concluded that the district court erred in finding that Starr could not seek relief under the spousal-guarantor rule of the ECOA.[104]

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95. *Id.* (citing Webster's Third New Int'l Dictionary 105 (1993) (brackets in original)).

96. *Id.* (citing Oxford English Dictionary (3d ed. 2008), *available at* http://www.oed.com/view/Entry/9724) (internal brackets and emphasis omitted).

97. *Id.* at 385.

98. *Id.* at 385 (citing 15 U.S.C. § 1691a(d)).

99. *Bridgemill*, 754 F.3d at 385.

100. *Id.*

101. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

102. *See Bridgemill*, 754 F.3d at 385-86 (citing Harris v. Olszewski, 442 F.3d 456, 467 (6th Cir. 2006) (internal quotation marks omitted)); *Chevron*, 467 U.S. at 844.

103. *Bridgemill*, 754 F.3d at 386. The Sixth Circuit's finding is in line with the Supreme Court of Iowa in Bank of the West v. Kline, 782 N.W.2d 453 (Iowa 2010); the Eastern District of Pennsylvania in Integra Bank v. Freeman, 839 F. Supp. 326 (E.D. Pa. 1993); the Northern District of Oklahoma in Citgo Petroleum Corp. v. Bulk Petroleum Corp., No. 08-CV-654-TCK-PJC, 2010 U.S. Dist. LEXIS 106495 (N.D. Okla. Oct. 5, 2010); and the Third Circuit in Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28 (3d Cir. 1995).

104. *See Bridgemill*, 754 F.3d at 386.

IV. ANALYSIS

This section of the Casenote will briefly review the circuit courts' application of the *Chevron* test. This analysis will determine that the Sixth Circuit is correct, the Board's interpretation of the definition of an applicant complies with the requirements of statutory interpretation, and that courts should afford deference to the Board's interpretation. Additionally, this section will consider the policy promoted by the Act and discuss the threat to those policy concerns if the Eighth Circuit's reasoning is adopted as controlling law. Finally, this section briefly will speculate on the future of Regulation B, including the appropriate avenues for resolution of disputes in this issue of law.

A. The Federal Reserve Board's Amendment to the Definition of Applicant Deserves Deference.

The courts in *Hawkins* and *Bridgemill* correctly concluded that the *Chevron* test must be employed to determine if a regulatory agency's statutory interpretation should be afforded deference. The Sixth Circuit's analysis correctly found that the Board's definition should be afforded deference while the Eighth Circuit incorrectly found the statute unambiguous and therefore did not give deference to the Board. The *Chevron* test begins with the determination of whether Congress has directly spoken to the specific issue at hand.[105]

1. Congress Has Not Directly Spoken to the Specific Issue at Hand.

For a statutory interpretation to fail this portion of the test, Congress must have spoken directly to the issue interpreted by the regulatory agency. Additionally, the intent of Congress must be "unambiguously expressed."[106] However, if any ambiguity exists, Congress is deemednot to have spoken directly about the issue.

The Eighth Circuit concluded that Congress's intent was unambiguous with regard to the definition of an "applicant." The court found that the expansion of the term applicant was inappropriate when using the definition of the term "apply" as given in Webster's Third New International Dictionary.[107] Through this definition, the Eighth Circuit determined that the "plain language . . . unmistakably provides

105. *Chevron*, 467 U.S. at 842.

106. *Id.* at 843.

107. *See* Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 941 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 1492 (2015) (defining "apply" as "to make an appeal or request especially formally and often in writing and usually for something of benefit for oneself.") (internal brackets omitted).

that a person is an applicant only if she requests credit."[108] This perception ignores the distinct possibility that an individual can request credit to be provided to another person—much the same way guarantors offer their assets in support of the issuance of credit to the debtor.

However, the Sixth Circuit approached the same question and found that the expanded definition was appropriate. The court began the analysis by examining the definitions of the language used in the statute—specifically, the definition of "applies" and "credit."[109] Ultimately, the court concluded that under the language of the Act, an applicant is a party that requests credit while a debtor is the party that reaps the benefits of the credit.[110] There is overlap in the definitions of these terms and their separate use suggests that the applicant and the debtor may not always present as the same individual.[111] Therefore, "[i]f an applicant is not necessarily the debtor, it would be reasonable to conclude that the applicant could be a third party, such as a guarantor."[112] The overlapping definition of these terms presents the same problem considered in *Chevron*. There, the Supreme Court found that the statute's overlapping terms and imprecise language directed at the applicability of the terms were indications that the terms "intended to enlarge, rather than to confine, the scope of the agency's power . . . ."[113] The same reasoning applies with respect to the definition of "applicant." It is reasonable to conclude that this overlap indicates that Congress intended to enlarge the Board's authority. The interpretation of the terms "applies" and "credit" within the Act clearly creates ambiguity when compared to the finding of the Eighth Circuit.

Reading the congressional history of the Act reveals that Congress neither contemplated nor foresaw a situation where spouses would needlessly be brought in to the credit transaction.[114] Indeed, the spousal-guarantor provision is not mentioned in the language of the Act. Yet, it is exclusively provided for in Regulation B.[115] Therefore, the spousal-guarantee was created by the regulatory agency, not Congress. This offers further support for the conclusion that the extension of the word "applicant" with respect to the spousal-guarantee provision was not specifically spoken to or considered by Congress and, thus, its

108. *Id.*

109. *See supra* note 97 and accompanying text for more of a discussion on the court's analysis.

110. *See* RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 385 (6th Cir. 2014).

111. *Id.*

112. *Id.*

113. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 862 (1984).

114. *See* Farley, *supra* note 4, at 1290 (Congress only expressed an intention to stop the discriminatory exclusion of women from the credit process.).

115. *See* 12 C.F.R. § 202.7(d)(1).

intention is ambiguous.

Finally, proof of Congress's intent can be gleaned from the 2010 amendment to the Act. In 2010, Congress made extensive changes to the Act including a revision of the amount of information that must be collected from certain lenders. Despite the opportunity to make any changes or clarifications with regard to the Act's interpretation, Congress chose not to correct the Board's then fifteen-year-old modification of the term applicant. If an agency makes an interpretation of a law, and subsequent amendments do not "correct the misapplication of [] Congress's intent," this choice reveals strong evidence that the regulators were correct.[116] Drawing on the Sixth Circuit's analysis, not only is there ambiguity in Congress's intent with regard to applicants, but Congress's failure to address the issue in the 2010 amendment can be interpreted as tacit agreement with the Board.

The Board's interpretation of an "applicant" satisfies the first prong of the *Chevron* test because there is, at the very least, no direct expression of intent made by Congress that is not subject to ambiguity. This ambiguity gives the Board authority to fill any gaps left by Congress in an effort to carry out the purpose of the Act.[117] Additionally, it can be deduced that Congress agreed with the Board's interpretation by their inaction when they had an opportunity to correct any misapplications of the Act.

2. The Regulation Stems from a Permissible Construction of the Statute.

For a statutory construction to be permissible, it is not necessary to "conclude that the agency construction was the only one it permissibly could have adopted."[118] Neither is it required that a court hearing a claim on the issue agree with the agency construction of the statutory language.[119] The second step of the *Chevron* analysis merely requires that "at least one of the natural meanings of applicant includes guarantors."[120]

Demonstrating that an interpretation is permissible is not a challenging task. The Supreme Court has recognized that it is within the power of a regulatory agency to "fill any gap left [within a statute],

116. Patrick Gregory, *Loan Guarantors Not Protected from Marital-Status Discrimination*, 83 U.S.L.W. 207 (2014) (quoting an Aug. 8, 2014 interview with John M. Duggan).

117. *See Chevron*, 467 U.S. at 843-44.

118. Alliance for Cmty. Media v. F.C.C., 529 F.3d 763, 778 (6th Cir. 2008).

119. *Id.*

120. RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 385-86 (6th Cir. 2014) (citing Harris v. Olszewski, 442 F.3d 456, 467 (6th Cir. 2006) (internal quotation marks omitted).

implicitly or explicitly, by Congress."[121] Because the statutory language is ambiguous regarding the extension of the term applicant to include guarantors, the Federal Reserve Board was permitted to fill the gap. The only requirement placed on the Board is that the regulation must be reasonable.[122] The Board's interpretation of an applicant is reasonable because the definition of apply can include a third party such as a guarantor.[123]

In addition to being rational, the interpretation is narrowly tailored and thus indicative of the great care and consideration exercised in its adoption. The Board drafted the 1985 amendment to the definition of applicant with substantial caution.[124] The first proposal of the 1985 amendment interpreted all guarantors as applicants, which would have given all guarantors standing to sue under the Act.[125] However, the final version only expanded the definition to include a spousal-guarantor.[126] The Board took care to expand the definition of applicant to include guarantors that were subject to discrimination while maintaining the integrity of the Act by not granting all guarantors standing to bring suit. Because the interpretation is reasonable and narrowly tailored to serve the purpose for which it was created, the statutory interpretation is permissible under part two of the *Chevron* test.

The expansion of the definition of applicant to cover guarantors under the spousal-guaranty provision of Regulation B should be afforded deference because the regulation fills a gap implicitly left by Congress and is a permissible construction of the statute. While this conclusion directly rejects the Eighth Circuit's decision, this finding is in line with most other courts across the country.[127] The court in *Moran*, which the Eight Circuit primarily rests its argument on, offers little more than an off-handed dismissal of the definition contained within Regulation B.[128] *Moran* also does not attempt to provide a competing interpretation of the regulation.[129] The Sixth Circuit's holding in *Bridgemill* is a more thorough application of the *Chevron* test and reaches the appropriate result by finding that the Board's definition of applicant deserves

121. *Chevron*, 467 U.S. at 843 (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

122. *See* Astrue v. Capato, 132 S. Ct. 2021, 2034 (2012).

123. For the definitions of "apply," see *supra* notes 95, 96, and accompanying text.

124. *See Bridgemill*, 754 F.3d at 386.

125. *See* Equal Credit Opportunity; Revision of Regulation B, 50 Fed. Reg. 48018 (Nov. 20, 1985).

126. *Id.* The Board reasoned that the special relationship between spouses warranted additional protection from the Act.

127. *See* Empire Bank v. Dumond, No. 13-CV-0388-CVE-PJC, 2013 U.S. Dist. LEXIS 169984 (N.D. Okla. Dec. 3, 2013).

128. Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co., LLC, 476 F.3d 436, 441 (7th Cir. 2007).

129. *See Bridgemill*, 754 F.3d at 386.

deference from the courts.

B. The Eighth Circuit's Interpretation of Who Is an Applicant Threatens the Purpose of the Act.

Not only was it improper for the Eighth Circuit to deny deference to the Board's interpretation of applicant, accepting the Eighth Circuit's interpretation of applicant creates serious problems with the Act. Adopting the reasoning of the Eighth Circuit undercuts the authority and expertise of the regulatory agency, adversely affects the financial independence of women, and diminishes the Act's ability to achieve its purpose.

1. The Regulatory Agency Has the Authority and Expertise to Appropriately Enforce the Act.

Congress entrusted the Board with the responsibility of assuring that the Act achieved its purpose for over forty years. Over that time, the Board amended Regulation B just three times. The Federal Reserve Board has extensive experience overseeing credit transactions and monetary policy and procedures. The Board was given its authority because it was deemed objectively qualified by Congress to oversee this Act. Regulation B and its subsequent amendments were attempts by the Board to further the purpose of the Act. Therefore, courts should respect the expertise of the Board when the action of the Board comes into question.

The Supreme Court has recognized that a regulatory agency's construction of a statutory scheme should be accorded considerable weight.[130] Additionally, the purpose behind Congressional delegation to a regulatory agency is that Congress cannot attend to the requirements of the administration of the Act. The administration requires frequent updating of the provisions of the Act and capable handling of modern issues unforeseen at the time of the Act's inception. Passing this responsibility to Congress likely would lead to neglectful administration and ultimately fail to provide meaningful protection to borrowers.

By expanding the definition of "applicant," the Board sought to protect the right of spousal choice and provide a remedy for guarantors when creditors violate this right. The expansion was intended to update the Act to protect women against modern forms of discrimination. Economic gains made by women as a result of the ECOA would have been jeopardized had the 1985 amendment to Regulation B not been

130. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

passed. Without the freedom to pass regulation that will withstand judicial review, the regulatory agency cannot promulgate regulation as the Act proscribes. The regulatory agency must be able to act as a stand-in for Congress, and courts must permit the agency to enact regulation in furtherance of the Act's purpose. The expertise and experience of the Board makes it the most qualified party to interpret the statutory language of the Act.[131] By rejecting the Board's interpretation of applicant, the Eighth Circuit not only risks the efficient administration of the Act, but also cheapens the grant of power given to the Board.

2. Denying Standing to Guarantors Risks the Financial Independence of Women.

With certain exceptions, if an applicant offers a qualified person other than a spouse to guarantee their loan, creditors are required to allow that choice. Requiring a spouse to guarantee a loan merely because of their marital status threatens the financial security of women. The threat to the financial independence of a woman has significant ramifications in both the woman's present and future credit standing.

A guarantor is an integral part of the credit process. Guarantors provide security to the lender and make the issuance of credit more feasible. But, to require a wife to subject herself to liability when she has no connection to the loan places the wife at risk of long-term financial harm. Business loans, like those issued in *Hawkins* and *Bridgemill*, often are granted for large sums of money and require that the debtor offer a significant amount of collateral to ensure the loan is profitable for the bank. If the debtor defaults, the spousal-guarantor will be required to pay back the value of the loan. This shifts tremendous financial responsibility off of the debtor and on to the spousal-guarantor.

The short term financial burden of the spousal-guarantor can also lead to significant long-term effects on the guarantor's financial well-being. This most easily can be seen through a hypothetical situation where a wife wrongfully is made a guarantor to a loan on which her husband later defaults. By signing a guaranty, the wife becomes liable to pay back the loan. Because the ECOA—as interpreted by the Eighth Circuit—does not offer a remedy for guarantors, she will not be able to bring suit under the Act. If the wife is unable to fulfill the payment, she likely will have to file for bankruptcy and her credit rating will suffer as a result. With a lower credit rating, the wife will have a more difficult

131. *See* Patrick Gregory, *supra* note 116 (quoting an Aug. 8, 2014 interview with Winnie Taylor).

time receiving credit in the future, and any credit she does receive will require the signature of a co-signor or guarantor. In this situation, the wife finds herself in a position where—because of the discriminatory actions of a creditor—she is unable to receive credit for herself in the future.

3. Denying Standing to Guarantors Diminishes the Act's Ability to Further Congressional Intent.

The ECOA was passed to "protect married women from discriminatory credit practices and to provide all applicants the opportunity to establish individual credit."[132] This protection explicitly applies to every aspect of a credit transaction.[133] Congress characterized discrimination based on gender as irrational, and envisioned that the Board would have significant flexibility in its enforcement of the Act to prevent any kind of irrational discrimination.[134] As mentioned above, the Bureau, formerly the Board, is responsible for ensuring that the Act furthers Congress's intent.[135] Congress entrusted the Board with so much authority in pursuit of its purpose that Congress removed the definition of "discrimination" from the original bill so that the Board would have broad discretion to determine what conduct would be prohibited.[136] Therefore, including guarantors as applicants under Regulation B's spousal-guarantor provision was an attempt by the Board to further the purpose of the Act. The Eighth Circuit's finding should not be adhered to because it dilutes the Act's original purpose and undercuts Congress's intent to give the Board deference.

The discrimination that Congress contemplated at the outset of the ECOA were acts that prevented women from taking part in the credit process. More generally, Congress sought to "prevent loans from being conditioned automatically on the securing of the signature of the non-borrowing spouse."[137] This general purpose does not contemplate requiring one spouse's signature over another. The modern forms of discrimination that have been contested under the Act have concerned wives who wrongfully have been included in the credit process. Both this form and the form originally contemplated by Congress are types of

132. *See* Farley, *supra* note 4, at 1288.

133. 15 U.S.C. § 1691(a).

134. *See* Miller v. Am. Exp. Co., 688 F.2d 1235, 1238 (9th Cir. 1982) (citing S. Rep. No. 94-589, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 403, 405-06).

135. *See supra* note 7.

136. *See Miller*, 688 F.2d at 1238 (citing Conference Report No. 93-1429, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6148, 6152-53).

137. Mayes v. Chrysler Credit Corp., 167 F.3d 675, 676 (1st Cir. 1999).

discrimination targeted at a spouse. Both reflect marital status discrimination and, therefore, should be impermissible under the Act.

Without the amendment to the definition of an applicant, creditors would be able to circumvent the intention of the Act by requiring women wrongfully to assume liability for a loan. Permitting such situations, as the Eighth Circuit does, "eliminates entire aspects of the [Board's] implementation scheme."[138] Failure to adhere to the Board's interpretation would permit creditors to benefit from these discriminatory practices—a result that Congress never intended.

The flawed interpretations extend down to the district court.[139] The decision in *Champion Bank*[140] hinders the implementation of the Act's purpose by ignoring the difference between a spouse that *should not* have been made a party to the loan and a spouse that *is not* party to the loan. The *Champion* court is correct in that a spouse who is not party to a loan cannot seek recovery under the Act. However, a spouse wrongfully made a guarantor still is a guarantor with the right to all protections offered by the Act. To accept the argument in *Champion* would mean that a spouse, even if wrongfully made a guarantor and harmed by the actions of a creditor, would not have any remedy under the Act.

Finally, the court in *Silverman v. Eastrich Multiple Investor Fund, L.P.*[141] found that "conferring standing upon guarantors places no additional requirements upon creditors[,]" because it does not subject the creditor to any additional liability than if the creditor had adhered to the law in the first place.[142] Creditors are not permitted to require a spousal guaranty regardless of the definition of an applicant.[143] However, the only change made after the Board's amendments is that the guarantor can seek to recover for damages from the creditor's wrongful conduct.

The Board's interpretation of an applicant should not only be afforded deference, but enactment of this interpretation is essential for the successful promotion of the Act's purpose. The Eighth Circuit's reasoning would threaten the gains made by women over the lifetime of the Act and undermines both the Bureau's ability to create regulation in the future and the congressional purpose behind the Act.

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138. Citgo Petroleum Corp. v. Bulk Petroleum Corp., No. 08-CV-654-TCK-PJC, 2010 U.S. Dist. LEXIS 106495, at*26 (N.D. Okla. Oct. 5, 2010).

139. Champion Bank v. Reg'l Dev., LLC, No. 4:08CV1807 CDP, 2009 U.S. Dist. LEXIS 40468 (E.D. Mo. May 13, 2009).

140. *Id.* at *8 (arguing that a guarantor could not seek recovery as a guarantor while simultaneously deny being a guarantor).

141. Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28 (3d Cir. 1995).

142. *Id.* at 33.

143. 12 C.F.R. § 202.7(d)(1).

C. The Future of Regulation B

Resolution of the circuit split is critically important for the successful enforcement of the Act and Regulation B. Resolution is especially critical for the creditor, because every time the creditor attempts to collect on a guaranteed loan, someone challenges the enforcement of this unclear statute.[144] These frequent challenges cause the creditor's costs of the loan to increase. Without a clear ruling from the Supreme Court or an amendment to the Act that adopts the Board's definition of applicant, litigation will only continue to appear under this Act.

1. The Supreme Court

Interpretation by the Supreme Court would be the fastest way for this issue of law to be resolved. In an attempt to resolve this issue, the Supreme Court granted certiorari in *Hawkins v. Community Bank of Raymore*, and heard arguments on October 5, 2015.[145] However, because of the untimely death of Justice Antonin Scalia, on March 22, 2016, the Supreme Court issued a one-sentence order announcing that the Court was equally divided on the issue and that the Eighth Circuit decision was affirmed.[146] Unfortunately, the Supreme Court decision, which has no precedential value, leaves more questions than answers and, because *Bridgemill* has not been appealed to the Supreme Court, a resolution to this issue does not seem imminent.

2. Statutory Amendment

While Supreme Court review indeed would clarify this area of law, an amendment to the Act, however, probably would be the most effective. There is no need for Congress to alter the structure or implementation of the Act. Instead, an amendment should change the definition of "applicant" to expressly include guarantors, and, potentially, could read: "The term 'applicant' means any person[, *including a guarantor for the purpose of the spousal-guaranty provision*,] 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 the previously established credit limit."[147] This change is similar to the amendment made to Regulation B. While this method of

144. *See* Patrick Gregory, *supra* note 116 (quoting an Aug. 8, 2014 interview with Thomas Stahl).

145. Oral Argument, Hawkins v. Cmty. Bank of Raymore (Oct. 5, 2015) (No. 14-520), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-520_3e04.pdf.

146. Hawkins v. Cmty. Bank, 194 L.Ed.2d 163 (U.S. 2016).

147. 15 U.S.C. § 1691a(b).

resolution would clarify any ambiguity in this area, the process also likely would be more complex and require additional time. Regardless of how the statutory language ultimately is structured, Congress would want to show clear, explicit intent to include guarantors in the definition of persons who have standing under the Act.

V. CONCLUSION

The 1985 amendment to Regulation B expanded the definition of an applicant as it applies to the spousal-guarantor provision.[148] Specifically, it was expanded to include guarantors in the definition of "applicant."[149] Recent litigation has questioned if courts are required to provide deference to the Board's interpretation. The Eighth Circuit held in *Hawkins* that the Board's interpretation should not be provided deference, because the interpretation is contrary to Congress's intent. The Eighth Circuit found that this, therefore, denied guarantors standing under the Act.[150] However, in *Bridgemill*, the Sixth Circuit, as well as the majority of lower courts, found that Congress has not specifically addressed the issue of applicants under the spousal-guarantor provision of Regulation B.[151] These courts argue that deference should be provided to the regulatory agency's interpretation of the statutory language, because Congress has left gaps in the construction of the Act, thus resulting in ambiguity.[152] The Board is within its granted authority to fill the gaps left by Congress with reasonable interpretations of any ambiguous wording. Therefore, the Sixth Circuit was correct in its ruling that the Board's interpretation requires deference.

In addition, the Board's interpretation of "applicant" is virtually required in order to ensure that the Act's purpose is being promoted. If the interpretation of the Eighth Circuit were to control this area of law, the purpose of the act would be undercut, the economic and social gains women have made in the credit process would be threatened, and the authority of the regulatory agency would be undermined. The policy behind the Act is to prevent any form of discrimination within any aspect of the credit process. Accepting the arguments made by the Eighth Circuit in *Hawkins* contravenes these policy considerations that are at the heart of the Act's implementation. Conversely, adopting the

148. *See* Equal Credit Opportunity; Revision of Regulation B, 50 Fed. Reg. 48018 (Nov. 20, 1985).

149. *Id.*

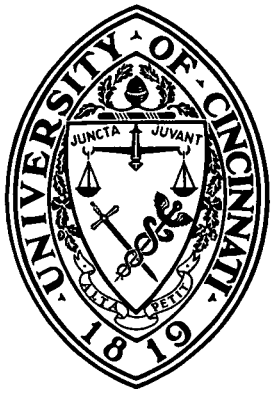
150. *See* Hawkins v. Cmty. Bank of Raymore, 761 F.3d 937, 942 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 1492 (2015).

151. RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC, 754 F.3d 380, 385 (6th Cir. 2014).

152. *Id.*

holding from the Sixth Circuit's decision not only supports the purpose of the Act, but equips the Act to address modern day issues of discrimination that were unforeseen at the time of the Act's creation.

Moving forward, either the Supreme Court or Congress will need to resolve this contested issue of statutory interpretation. The best resolution to this issue will be the adoption of the interpretation of the Sixth Circuit and a holding that the spousal-guaranty provision of Regulation B of the ECOA provides standing to guarantors.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