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## Credit Discrimination Based on Gender: The Need to Expand the Rights of a Spousal Guarantor Under the Equal Credit Opportunity Act

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## NOTES

# CREDIT DISCRIMINATION BASED ON GENDER: THE NEED TO EXPAND THE RIGHTS OF A SPOUSAL GUARANTOR UNDER THE EQUAL CREDIT OPPORTUNITY ACT

*“Now, as a nation, we don’t promise equal outcomes, but we were founded on the idea everybody should have an equal opportunity to succeed. No matter who you are, what you look like, where you come from, you can make it. That’s an essential promise of America.”<sup>1</sup>*

### ABSTRACT

*This Note focuses on the definition of “applicant” as defined in the Equal Credit Opportunity Act (ECOA) and Regulation B. Specifically, this Note explores the expanded protections offered by the ECOA to spousal guarantors, after the Federal Reserve Board (FRB) expanded the definition of “applicant” by promulgating Regulation B. However, after a circuit split, where the Eighth Circuit, in *Hawkins v. Community Bank of Raymore*, held that a guarantor was not an “applicant” per the ECOA’s definition and the Sixth Circuit, in *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC*, followed Regulation B’s expansion of the definition of “applicant,” a void was created in anti-discriminatory laws meant to prevent gender discrimination in lending practices. To address the void, this Note will argue that it is imperative for Congress to amend the ECOA to include the Spousal Guarantor Rule as previously required by the FRB. Furthermore, this Note argues that a reporting requirement is necessary to measure the impact and effectiveness of the ECOA.*

### INTRODUCTION

Whether it was marching for the right to vote, working in factories during World War II, leading some of the nation’s largest companies, or starting their own businesses, the significant contributions women have made to society are immeasurable.<sup>2</sup> Even with all of these achievements, women continue to face discrimination in many areas of life. Whether the

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1. President Barack Obama, Remarks at the College Opportunity Summit (Dec. 4, 2014).

2. *1941 Women Take Over Factory Work During World War II*, MASSACHUSETTS AFL-CIO, <http://www.massaflicio.org/1941-women-take-over-factory-work-during-world-war-ii> (last visited Mar. 6, 2016) [hereinafter *1941 Women Take Over Factory Work*]; #15 *Indra Nooyi*, FORBES, <http://www.forbes.com/profile/indra-nooyi/> (last visited Mar. 6, 2016); Chad Brooks, *12 Businesses You Didn’t Know Were Started By Women*, BUSINESS NEWS DAILY (July 20, 2015, 1:34 PM), <http://www.businessnewsdaily.com/2156-women-owned-businesses.html>.

measure of gender discrimination is the discrepancy in wages, the small number of female executives, or the difficulty in obtaining a loan, there currently exists a gap between men and women.<sup>3</sup> To combat the effects of gender discrimination, Congress passed various pieces of legislation. In particular, in 1974, Congress enacted the Equal Credit Opportunity Act<sup>4</sup> (ECOA) in an effort to eliminate discriminatory lending practices.<sup>5</sup> Congress tasked the Federal Reserve Board (FRB) with the implementation and enforcement of the ECOA.<sup>6</sup> To achieve this goal, the FRB promulgated and enacted Regulation B to enforce the ECOA.<sup>7</sup>

Prior to the passage of the ECOA, if a woman desired to obtain credit, many lenders required that the woman have a man apply as the applicant for credit.<sup>8</sup> The ECOA explicitly prohibits this conduct.<sup>9</sup> However, guarantors,<sup>10</sup> common in many credit-lending transactions, whether male or female, lack the same gender discrimination protections as applicants under the ECOA. This is because guarantors are not explicitly included within the definition of “applicant” under the ECOA.<sup>11</sup> This void in discrimination protection is especially prevalent in spousal lending situations, where a lender requires an applicant’s spouse to sign as a guarantor to obtain credit.

To better combat credit discrimination based on gender and to avoid gender discrimination by simply transitioning from applicants to guarantors,

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3. Eric Morath, *The Gender Pay Gap Widens as Men’s Earnings Grow Twice as Fast as Women’s*, WALL ST. J. (Oct. 20, 2015, 12:45 PM), <http://blogs.wsj.com/economics/2015/10/20/the-gender-pay-gap-widens-as-mens-earnings-grow-twice-as-fast-as-womens/>; Ben Hallman, *Mortgage Discrimination Study Finds Women Received Fewer Approvals in Wake of Crash*, HUFFINGTON POST (Mar. 12, 2013, 6:27 PM), [http://www.huffingtonpost.com/2013/03/12/mortgage-discrimination\\_n\\_2862834.html](http://www.huffingtonpost.com/2013/03/12/mortgage-discrimination_n_2862834.html); Caroline Fairchild, *Why So Few women Are CEOs (in 5 Charts)*, FORTUNE (Jan. 14, 2015, 10:00 AM), <http://fortune.com/2015/01/14/why-so-few-women-ceos/>; Kenneth R. Harney, *U.S. Penalizes Lenders Over Maternity-Related Mortgage Discrimination*, L.A. TIMES (July 6, 2014, 5:00 AM), <http://www.latimes.com/business/real-estate/la-fi-harney-20140706-story.html>.

4. Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2012).

5. *Equal Credit Opportunity Act – Regulation B*, USF FEDERAL CREDIT UNION, <https://usffcu.org/EqualCreditOpportunityAct.asp> (last visited on Mar. 6, 2015).

6. BD. OF GOVERNORS OF THE FED. RES. SYS., CONSUMER COMPLIANCE HANDBOOK, FEDERAL FAIR LENDING REGULATION AND STATUTES EQUAL CREDIT OPPORTUNITY ACT (REGULATION B) 1 (2015), [http://www.federalreserve.gov/boarddocs/supmanual/cch/fair\\_lend\\_reg\\_b.pdf](http://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_reg_b.pdf) [hereinafter CONSUMER COMPLIANCE HANDBOOK].

7. *See generally* 12 C.F.R. § 202 (1996); Andrea M. Farley, Note, *The Spousal Defense—A Ploy to Escape Payment or Simple Application of the Equal Credit Opportunity Act?*, 49 VAND. L. REV. 1287, 1287 n.2 (1996) (“This regulation was issued by the Board of Governors of the Federal Reserve System pursuant to the Equal Credit Opportunity Act, and is codified at 12 C.F.R. section 202 (1996).”).

8. Gail R. Reizenstein, Note, *A Fresh Look At the Equal Credit Opportunity Act*, 14 AKRON L. REV. 215, 216 (1981) (quoting Donna Dunkelberger Geck, *Equal Credit: You Can Get There From Here—The Equal Opportunity Act*, 52 N.D. L. REV. 381, 388 (1975)).

9. 15 U.S.C. § 1691(a)(1) (2012).

10. *Guarantor*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Someone who makes a guaranty or gives security for a debt.”)

11. 15 U.S.C. § 1691a(b) (2012).

the FRB expanded the definition of “applicant” through Regulation B to include guarantors,<sup>12</sup> thereby providing guarantors with the same standing as an applicant to sue a lender for violating the ECOA.<sup>13</sup> This expansion under Regulation B—known as the Spousal Guarantor Rule—is limited to prohibiting a lender from requiring an applicant’s spouse to sign as a guarantor to a loan.<sup>14</sup> However, the Regulation B definition of applicant, and thereby the Spousal Guarantor Rule, was weakened when the Eighth Circuit split with the Sixth Circuit regarding the differing definitions of “applicant” as defined in the ECOA and Regulation B.<sup>15</sup> The question before both courts was whether a spousal guarantor is an “applicant,” thereby granting the spousal guarantor the same legal rights as an applicant of a loan.<sup>16</sup> Because Regulation B considered guarantors to be an applicant, it gave guarantors the same legal standing as an applicant to sue for discriminatory lending practices. The Eighth Circuit, in *Hawkins v. Community Bank of Raymore*, held that a guarantor was not an “applicant” per the ECOA definition, whereas the Sixth Circuit, in *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC*, expanded the scope of the ECOA by including guarantors within the definition of “applicant,” thus following Regulation B.<sup>17</sup> Although the Supreme Court’s split decision affirms the Eighth Circuit’s holding,<sup>18</sup> it does not render the Spousal

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12. 12 C.F.R. § 202.7(e) (2009).

13. *ECOA and Spouse-Guarantor Rights: Another Court, Another View*, FBT BANKING RESOURCE: FIN. SERVS. BLOG (Sept. 3, 2014), <http://www.fbtbankingresource.com/ECOA-AND-SPOUSE-GUARANTOR-RIGHTS> [hereinafter *ECOA and Spouse-Guarantor Rights*].

14. See 12 C.F.R. § 202.7(d) (2009); Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 4,8018, 4,8019 (Nov. 20, 1985) (“A creditor must comply with rules that prohibit requiring the spouse to guarantee the loan.”); see also *Guidance on Regulation B Spousal Signature Requirement*, FDIC, <https://www.fdic.gov/news/news/financial/2004/fil0604a.html> (last visited Nov. 7, 2014).

15. See *Hawkins v. Cmty. of Raymore*, 761 F.3d 937 (8th Cir. 2014); see also *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380 (6th Cir. 2014); John R. Mussman, *Spotlight on Fair Lending*, REED SMITH: FIN. REG. REP. (Sept. 9, 2014), <https://www.financialregulatoryreport.com/financial-services-regulation-u-s/spotlight-on-fair-lending/>; Richard A. Roth, *Spouses Who Guaranty Loans Aren’t Applicants Under Equal Credit Law*, WOLTERS KLUWER (Aug. 5, 2014), [http://www.dailyreportingsuite.com/banking-finance/news/spouses\\_who\\_guaranty\\_loans\\_aren\\_t\\_applicants\\_under\\_equal\\_credit\\_law](http://www.dailyreportingsuite.com/banking-finance/news/spouses_who_guaranty_loans_aren_t_applicants_under_equal_credit_law).

16. Roth, *supra* note 15; see also *RL BB Acquisition*, 754 F.3d 380; *Hawkins*, 761 F.3d 937.

17. Aaron Ficks, *Eighth Circuit Opens Circuit Split on the Scope of the Equal Credit Opportunity Act*, JD SUPRA (Sept. 23, 2014), <http://www.jdsupra.com/legalnews/eighth-circuit-opens-circuit-split-on-th-62586/>; *Sixth Circuit Strengthens Spousal Guaranty Rule*, FBT BANKING RESOURCE: FIN. SERVS. BLOG (AUG. 12, 2014), <http://www.fbtbankingresource.com/SPOUSAL-GUARANTY-RULE>; *Hawkins v. Cmty. of Raymore*, 761 F.3d 937 (8th Cir. 2014), *petition for cert. filed*, 2014 WL 5762869, at \*23 (U.S. Nov. 3, 2014) (No. 14-520) (“Under the Eighth Circuit’s narrow reasoning, a primarily and unconditionally liable spousal guarantor who wants to renew, extend or continue the credit is not an applicant because Congress unambiguously intended to exclude them from the ECOA’s protections because they did not participate in the initial loan-application process.”)

18. See generally James Freije, *Split Supreme Court Affirms Eighth Circuit Equal Credit Opportunity Act Ruling*, JD SUPRA (Apr. 8, 2016), <http://www.jdsupra.com/legalnews/split-supreme-court-affirms-eighth-17070/>.

Guarantor Rule invalid.<sup>19</sup> Instead, neighboring states have different interpretations of the same federal statute; thus, this jurisdictional split in the law creates a void in anti-gender discrimination laws.<sup>20</sup> Effectively, guarantors who are required to sign for their spouse do not have legal standing to sue a creditor under the ECOA until they themselves have defaulted on the loan. This could lead to more situations of gender discrimination where lenders might require a female spouse to guaranty a loan instead of either being a co-applicant or having no association with the loan. By failing to provide a spousal guarantor the same legal standing as an applicant, the spousal guarantor might face financial and mental distress.

This Note argues that the Eighth Circuit's decision voiding Regulation B's definition of "applicant" was correct. However, to address the void that was created by the Eight Circuit's ruling, this Note will argue that it is imperative for Congress to amend the ECOA to include the Spousal Guarantor Rule as previously required by the FRB. Failure to amend the ECOA to include this provision will negatively affect spousal guarantors, and more specifically, female spousal guarantors. By delaying the spousal guarantor's ability to bring a lawsuit until they are in default, the guarantor might experience financial difficulties, struggle to obtain credit in the future because of their guaranty, and suffer mental and emotional distress from all the problems associated with the discriminatory lending practices.<sup>21</sup> This could prevent women from obtaining credit at the market rate, thereby affecting the potential positive contributions women can make to society, such as starting their own business. Additionally, by failing to expand the scope of the term "applicant," a lender could require an applicant to have their spouse sign as the guarantor instead of as a co-applicant, thereby circumventing the ECOA and leading to discrimination against an individual based on their gender and marital status. Finally, to ensure compliance with the ECOA and to measure its impact, this Note will briefly argue for the addition of a reporting requirement to the ECOA. The reporting requirement will require lenders and borrowers to provide data to the government to ensure that lenders are complying with the ECOA.

Part I of this Note introduces the legislative history of the ECOA and Regulation B. Part II briefly considers whether the ECOA is still necessary and analyzes the current impact of the ECOA. Part III discusses the facts, holdings, and analysis of the cases from the Sixth and Eighth Circuits, respectively. Part IV explains why the Eighth Circuit's holding, rejecting the FRB's definition of "applicant," is the correct ruling, despite its reinforcement of the legislative void of protecting spousal-guarantors from

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19. *ECOA and Spouse-Guarantor Rights*, *supra* note 13.

20. *Supreme Court Issues First Split Decision Since Scalia's Death*, RT (Mar. 22, 2016), <https://www.rt.com/usa/336771-supreme-court-split-decision/>.

21. Brief of Appellants at 28, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065), 2013 WL 6069373, at \*13.

gender discrimination in lending. Finally, Part V argues that this loophole in the ECOA will negatively affect a woman's right to access credit and as such, Congress should amend the ECOA to include guarantors within the definition of "applicant" to allow spousal guarantors who have faced discrimination to have standing to sue the lender before defaulting on the loan. Additionally, this Note will argue that Congress should incorporate a reporting requirement of ECOA violations to measure the effectiveness of the ECOA.

## I. INTRODUCTION TO THE ECOA AND REGULATION B

### A. THE ECOA'S LEGISLATIVE HISTORY

When a court must determine, as part of its analysis, the meaning of a phrase or a word in the legislation, it is of the utmost importance that the court understands Congress's specific intent behind drafting that particular legislation. Therefore, akin to the courts, this Note will begin with an extensive look at the legislative history of the ECOA.

During the 1960s and 1970s, women entered the workforce in greater numbers than in previous United States' history.<sup>22</sup> Accordingly, in 1963, Congress passed the Equal Pay Act, which stipulated that employers must pay women the same amount as men for similar work.<sup>23</sup> Additionally, by this time, consumers in general had become increasingly reliant on credit to finance their purchases and their businesses.<sup>24</sup> However, despite the significant social contributions that women made at the time,<sup>25</sup> lenders regularly denied women the ability to receive credit in their own name simply because of their gender.<sup>26</sup>

In 1972, the National Commission on Consumer Finance issued a report identifying five major patterns of credit discrimination against women.<sup>27</sup> The five major patterns were:

- (1) Single women have more trouble obtaining credit than single men. (2) Creditors generally require a woman upon marriage to reapply for credit, usually in her husband's name. Similar reapplication is not asked of men when they marry. (3) Creditors are unwilling to extend credit to a married woman in her own name. (4) Creditors are usually unwilling to count the

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22. Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950-98 and 1998-2025*, MONTHLY LAB. REV. 3 (Dec. 1999), <http://www.bls.gov/mlr/1999/12/art1full.pdf>.

23. Kimberly J. Houghton, Note, *The Equal Pay Act of 1963: Where Did We Go Wrong?*, 15 LAB. L. 155, 155-56 (1999).

24. Dubravka Ritter, *Do We Still Need the Equal Credit Opportunity Act?*, FED. RES. BANK OF PHILA. 1 (Sept. 2010), <http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2012/D-2012-equal-credit-opportunity-act.pdf>.

25. *1941 Women Take Over Factory Work*, *supra* note 2 (as men went to war during World War II, women stepped up to work in factories that made the equipment needed for war).

26. Reizenstein, *supra* note 8, at 216.

27. *Id.* at 219.

wife's income when a married couple applies for credit. (5) Women who are divorced or widowed have trouble reestablishing credit. Women who are separated have a particularly difficult time, since the accounts may still be in the husband's name.<sup>28</sup>

Further discrimination "evolved out of the widely-held presumption directed at the probability of pregnancy, the subsequent termination of employment upon childbirth, and the general instability and inability of women to control their personal affairs (especially single and divorced women)."<sup>29</sup> Before the ECOA, a married woman had to apply for credit under her husband's name, even if she was creditworthy herself.<sup>30</sup> This was because "[t]he divorced, separated or widowed woman was considered a bad credit risk because she was *without male support, financial or otherwise*."<sup>31</sup> Additionally, many creditors requested information about a woman's choice of birth control and her plans to conceive children.<sup>32</sup> Some creditors went as far as requiring women to sign an affidavit "swearing not to endanger their ability to repay their debts by having children."<sup>33</sup>

Subsequently, in 1973, Congress held numerous hearings on the matter. At a Joint Economic Committee hearing, Representative Martha W. Griffiths<sup>34</sup> stated in her opening remarks that:

[s]ingle women who apply for a mortgage or personal loan are often required to have cosigners even though their incomes are high enough to secure the loan. Married women who work find that lending institutions often discount most of their salaries when they and their husbands apply for a mortgage.<sup>35</sup>

Representative Griffiths added that "[w]omen, married, divorced, or widowed, encounter repeated discrimination in applying for consumer credit. Upon marriage, many credit companies require a woman to reapply for credit under her husband's name, even when she earns adequate

28. *Id.* at 216.

29. *Id.* at 219.

30. *Id.* at 225.

31. *Id.* (quoting Donna Dunkelberger Geck, *Equal Credit: You Can Get There From Here-The Equal Opportunity Act*, 52 N.D. L. REV. 381, 388 (1975)).

32. *Id.* at 217.

33. *Id.* (quoting Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 SAN DIEGO L. REV. 960, 965 nn.28, 29 (1976)).

34. *Griffiths Martha Wright*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, [http://history.house.gov/People/Listing/G/GRIFFITHS,-Martha-Wright-\(G000471\)/](http://history.house.gov/People/Listing/G/GRIFFITHS,-Martha-Wright-(G000471)/) (last visited Mar. 30, 2016) (Martha W. Griffiths was the second women from Michigan elected to the House of Representatives).

35. *Economic Problems of Women: Hearing Before the J. Economic Comm.*, 93rd Cong. 152 (1973) (statement of U.S. Rep. Griffiths, Member, Joint Econ. Comm.) ("When the Federal Home Loan Bank Board conducted a survey of 74 savings and loans, they found that only 22 percent would count all of the wife's salary, 26 percent would count only half her income, 10 percent would count one-quarter and 25 percent would count none.").

income.”<sup>36</sup> If a woman became divorced or widowed, credit companies would not lend to that woman because she did not have a credit record.<sup>37</sup> During the same hearing, there was testimony describing an employee of the Women’s Law Fund in Cleveland saying that it was “un-American to count a woman’s income and that the only way a woman’s income could be counted would be if she were to ‘have a hysterectomy.’”<sup>38</sup>

In response to this evident discrimination, Congress passed the ECOA in 1974.<sup>39</sup> The original goal of the ECOA was to “prohibit credit discrimination based on gender or marital status.”<sup>40</sup> In 1976, Congress amended the ECOA to expand the categories of prohibited credit discrimination.<sup>41</sup> This expansion of the ECOA now stipulated that “[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age.”<sup>42</sup> It is important to note that the ECOA does not create a legal right to credit; it creates a legal right to equal access to credit.<sup>43</sup>

## B. THE ECOA, REGULATION B, AND THE DEFINITION OF “APPLICANT”

Congress gave broad authority to the FRB to promulgate regulations in order to enforce and implement the ECOA.<sup>44</sup> The FRB promulgated Regulation B to interpret the ECOA and to aid in its enforcement.<sup>45</sup> The basic premise of Regulation B was to ensure that “[a] creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.”<sup>46</sup> Specifically, creditors cannot discriminate against an applicant because of “race, color, religion, national origin, sex, marital status, or age.”<sup>47</sup>

36. *Id.*

37. *Id.* (“The irony of these credit practices is that when a woman is divorced, separated, or widowed she often is denied credit by these same credit companies on the grounds that she has no established credit record.”)

38. *Id.* at 192.

39. *See generally* Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1974); *The Equal Credit Opportunity Act and Regulation B*, PRACTICAL GUIDE TO BANK COMPLIANCE 3 (2 ed. 2009) [hereinafter *ECOA & Reg. B*] (“In 1974, the Equal Credit Opportunity Act was enacted into law after the House and Senate were able to reconcile their respective bills regarding credit discrimination.”).

40. Farley, *supra* note 7, at 1288; *see also* Equal Credit Opportunity Act, 15 U.S.C. § 1691 (congressional findings and statement of purpose).

41. Reizenstein, *supra* note 8, at 220 (“Within five months of its effective date, the Act was amended to encompass other categories of discriminatory practices.”).

42. 15 U.S.C. § 1691(a)(1) (1976).

43. Reizenstein, *supra* note 8, at 223.

44. *See ECOA & Reg. B*, *supra* note 39, at 3; 15 U.S.C. § 1691b (2012).

45. *See* CONSUMER COMPLIANCE HANDBOOK, *supra* note 6.

46. 12 C.F.R. § 202.4(a) (2009).

47. *Id.* § 202.2(z).



While the ECOA defines “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[.]”<sup>48</sup> this definition of applicant is narrower as it does not include “guarantor.” Dissatisfied by the narrow definition of applicant, the FRB, in 1985,<sup>49</sup> defined “applicant” in Regulation B as “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.”<sup>50</sup> This definition of applicant explicitly includes guarantors for the limited purpose of the Spousal Guarantor Rule.<sup>51</sup>

Under the Spousal Guarantor Rule, the FRB prohibited a lender from “requir[ing] the signature of an applicant’s spouse” on a credit application, where the borrower met the lender’s requirements for obtaining credit.<sup>52</sup> By reading in the expanded definition of applicant into Regulation B’s section 202.7(d), the applicant’s spouse, if she were required to sign as a guarantor, would have the same legal standing as the applicant to sue a lender for violating the ECOA. The FRB enacted the Spousal Guarantor Rule to address the denial of credit to women without a man’s signature. Prior to the enactment of the ECOA, women, even if creditworthy, were unable to obtain credit without an accompanying male signature.<sup>53</sup> Regulation B prohibits this conduct. To the greatest extent possible, this regulation mitigates an applicant’s need for their spouse to sign as a guarantor to obtain credit.<sup>54</sup> Thus, under a reading of Regulation B’s definition of applicant, a spouse who was required by a lender to sign as a guarantor would have standing to sue the lender for discriminatory lending practices, whereas, under a reading of the ECOA’s definition of applicant, the spousal guarantor would have to wait until she is in default of the loan before she can have standing to sue. By requiring the spousal guarantor to delay a lawsuit until they are in default, the guarantor might experience consequential financial difficulties therefrom.<sup>55</sup>

Since the Spousal Guarantor Rule, as implied by its name, is limited to spousal guarantors, a nonspousal guarantor would not have standing to sue

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48. Equal Credit Opportunity Act, 15 U.S.C. § 1691a(b) (2012).

49. Brief of Respondent at 41, *Hawkins v. Cmty. Bank of Raymore*, 136 S.Ct. 19 (2015) (No. 14-520), 2015 WL 4550210.

50. 12 C.F.R. § 202.2(e) (2012).

51. *Id.* § 202.7(d)(1).

52. *Id.*

53. Diane Pearl, *Rights Women Didn’t Use To Have*, MARIECLAIRE (Aug. 18, 2014), <http://www.marieclaire.com/politics/news/a10569/things-women-couldnt-do-1920/>.

54. See *ECOA & Reg. B*, *supra* note 39, at 30.

55. Brief of Appellants at 28, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065), 2013 WL 6069373, at \*13.

a creditor until the guarantor defaulted on the loan. This distinction is important because the FRB tried to balance the interests of the creditors by protecting them from frivolous lawsuits, while attempting to protect the borrower from discriminatory lending practices. To further balance the creditor's interest in learning as much as possible about a borrower, while still protecting the borrower from discrimination, Regulation B does not preclude a creditor from requesting certain information about a borrower's spouse. The FRB allows a creditor to ask about a spouse, if:

- (i) The spouse will be permitted to use the account;
- (ii) The spouse will be contractually liable on the account;
- (iii) The applicant is relying on the spouse's income as a basis for repayment of the credit requested;
- (iv) The applicant resides in a community property state or is relying on property located in such a state as a basis for repayment of the credit requested; or
- (v) The applicant is relying on alimony, child support, or separate maintenance payments from a spouse or former spouse as a basis for repayment of the credit requested.<sup>56</sup>

Additionally, creditors can ask about marital status if the applicant resides in a community property state;<sup>57</sup> creditors can also ask about the number and ages of the applicant's dependents that a borrower has to support.<sup>58</sup>

To meet the goals of the ECOA, the FRB tasked member banks<sup>59</sup> to comply with the ECOA.<sup>60</sup> Additionally, the FRB tasked many federal agencies, including the Department of Justice, with the administrative enforcement of the ECOA and Regulation B.<sup>61</sup>

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56. 12 C.F.R. § 202.5(c)(2) (2009).

57. *See id.* § 202.5(d)(1) ("Marital status. If an applicant applies for individual unsecured credit, a creditor shall not inquire about the applicant's marital status unless the applicant resides in a community property state or is relying on property located in such a state as a basis for repayment of the credit requested. If an application is for other than individual unsecured credit, a creditor may inquire about the applicant's marital status, but shall use only the terms married, unmarried, and separated. A creditor may explain that the category unmarried includes single, divorced, and widowed persons.").

58. *See id.* § 202.5(d)(3) ("A creditor shall not inquire about birth control practices, intentions concerning the bearing or rearing of children, or capability to bear children. A creditor may inquire about the number and ages of an applicant's dependents or about dependent-related financial obligations or expenditures, provided such information is requested without regard to sex, marital status, or any other prohibited basis.").

59. *The Structure and Functions of the Federal Reserve System*, FED. RES. EDUC., <https://www.federalreserveeducation.org/about-the-fed/structure-and-functions> (last visited Mar. 10, 2016). ("The member banks are stockholders of the Reserve Bank in their District and as such, are required to hold 3 percent of their capital as stock in their Reserve Banks.").

60. 15 U.S.C. § 1691c(a)(1)(b) (2012) ("Enforcing agencies. Compliance with the requirements imposed under this title [15 USCS §§ 1691 et seq.], shall be enforced under: . . . member banks of the Federal Reserve System (other than national banks) . . .").

61. *Equal Credit Opportunity Act*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/hc/e/housing\\_ecoa.php](http://www.justice.gov/crt/about/hc/e/housing_ecoa.php) (last visited Oct. 2, 2014) (The following agencies provide oversight under the ECOA: Consumer Financial Protection Bureau, Comptroller of Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, National Credit Union Association, Federal Trade Commission.).

### C. CONSUMER FINANCIAL PROTECTION BUREAU

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank)<sup>62</sup> which created the Consumer Financial Protection Bureau (CFPB).<sup>63</sup> Among its vast array of powers, the CFPB now oversees Regulation B and thereby the enforcement and implementation of the ECOA.<sup>64</sup> In December 2011, the CFPB updated Regulation B to bring the regulation into compliance with Dodd-Frank. The updates included requirements for creditors to provide applicants with free copies of all appraisals and other written valuations.<sup>65</sup> The CFPB also adopted the FRB's definition of "applicant", which currently includes guarantors.<sup>66</sup> By adopting the FRB's definition of "applicant," the CFPB is ensuring that the ECOA protects spousal guarantors.

## II. THE IMPACT AND NECESSITY OF THE ECOA

It is difficult to measure the economic impact of the ECOA alone. However, when taken together with other acts working in conjunction with each other, the ECOA's impact has been positive. In 2014 alone, the Justice Department has settled over \$1 billion in monetary relief for all types of credit discrimination.<sup>67</sup> This includes recovery under the various acts working in conjunction with the ECOA, including the Fair Housing Act<sup>68</sup> and the Servicemembers Civil Relief Act.<sup>69</sup> In a recent article by Dubravka Ritter, a Senior Industry Specialist at the FRB of Philadelphia, Ms. Ritter wrote, "[d]isparate treatment of protected classes in credit markets is certainly less common than it was 40 years ago. Disparate impact, however, may persist so long as credit qualifications that lenders consider are affected by markets where discrimination continues to occur."<sup>70</sup> Thus, "[i]t is for this reason that the ECOA continues to be relevant today."<sup>71</sup>

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62. See generally Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 2, 124 Stat. 1376, 1386 (2010) (codified in 12 U.S.C. § 5301 (2012)).

63. Dodd-Frank Act § 1021, 12 U.S.C. § 5511.

64. See CFPB *Consumer Laws and Regulations: Equal Credit Opportunity Act (ECOA)*, CONSUMER FIN. 1 (June 2013), [http://files.consumerfinance.gov/f/201306\\_cfpb\\_laws-and-regulations\\_ecoa-combined-june-2013.pdf](http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf).

65. *Id.*; see also 12 C.F.R. § 1002 (2011).

66. 12 C.F.R. § 1002.2.

67. *Protecting Borrowers From Credit Discrimination in All Forms*, U.S. DEP'T OF JUSTICE (Aug. 1, 2014), <http://www.justice.gov/opa/blog/protecting-borrowers-credit-discrimination-all-forms> [hereinafter *Protecting Borrowers*] ("These cases include the record \$335 million settlement of a 2011 lawsuit against Bank of America for the activities of Countrywide Financial and the \$234 million settlement of a 2012 lawsuit against Wells Fargo Bank.").

68. See Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2012).

69. Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901–4043 (2012); see also *Protecting Borrowers*, *supra* note 67.

70. Ritter, *supra* note 24, at 1.

71. *Id.* at 38.

Ms. Ritter also noted that evidence of discrimination in consumer credit is difficult to measure because there is relatively little to no data on such discrimination.<sup>72</sup> This is due in part to the fact that there is no reporting requirement similar to the one found in the Home Mortgage Disclosure Act (HDMA).<sup>73</sup> “Nevertheless, statistically significant differences between [protected classes and base groups] remain even after accounting for a variety of factors and using a range of econometric techniques.”<sup>74</sup> From this, it is evident that discrimination still exists in lending practices; therefore, the protections offered by the ECOA and Regulation B should not be scaled back, but rather expanded to protect those most at risk of credit discrimination.

### III. THE CIRCUIT SPLIT CASES

#### A. THE SIXTH CIRCUIT’S DECISION

In *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, the Sixth Circuit expanded the scope of the ECOA’s definition of “applicant” by reading in Regulation B’s definition of “applicant,” to include guarantors.<sup>75</sup> The case arose from an appeal by defendant Starr Stone Dixon.<sup>76</sup> The Sixth Circuit overruled the decision of the district court, which held that the defendant could not “assert a violation of [the ECOA] and its implementing regulation, Regulation B, as an affirmative defense.”<sup>77</sup>

Around 2005, Starr’s husband, Bernard Dixon, invested millions of dollars into two residential developments—one named Bridgemill Commons and the other named Mabry Farms.<sup>78</sup> By 2008, during the Great Recession, the investments were nearly \$10 million in debt.<sup>79</sup> Mabry Farms owed approximately \$3.2 million to United Community Bank and Bridgemill Commons owed \$6.4 million to Regions Bank.<sup>80</sup> The listed borrower on the Regions Bank loan for the Bridgemill Commons development was Bridgemill Commons Development Group, LLC (BCDG), a company owned by Bernard specifically for the development of the two properties. Bernard sought to refinance the investments and approached a loan officer at BB&T Bank (BB&T).<sup>81</sup>

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72. *See id.* at 29.

73. *Id.*; *see also* 12 U.S.C. § 2803 (2012).

74. Ritter, *supra* note 24, at 29.

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

76. *Id.* at 381.

77. *Id.*

78. *Id.*

79. *Id.* at 381–82.

80. *Id.* at 382.

81. *Id.*

After reviewing the loan application, BB&T concluded that Bernard and his company were not independently creditworthy for a loan and needed additional collateral.<sup>82</sup> As additional collateral, Bernard pledged approximately 40,000 shares of BB&T stock and a corporate debenture and Starr pledged approximately 40,000 shares of BB&T shares, which she owned individually.<sup>83</sup> To insure the loan further, both Bernard and Starr individually executed a personal guaranty.<sup>84</sup> The parties disputed whether the loan officer had required Starr to execute a guaranty.<sup>85</sup> Bernard insists that Bryan *demand*ed that Starr provide a guaranty.<sup>86</sup> The court explained documentary evidence showed that Starr was “required to co-sign the notes with her future release subject to negotiation.”<sup>87</sup> When the loan became due, BCDG paid less than \$2 million of the principal, and thus defaulted on the loan.<sup>88</sup> As such, Starr, as a guarantor, became liable for the loan. Starr claimed that the actions of the lender, by *requiring* Starr to sign as a guarantor so that her husband’s company could obtain a loan, was a clear violation of the ECOA and Regulation B.

The court raised two issues: First, “whether Regulation B’s definition of ‘applicant,’ which differs from the definition in [the] ECOA, is entitled to deference such that guarantors may raise [the] ECOA claims. Second . . . if a spouse-guarantor can assert a violation of Regulation B – and therefore of [the] ECOA – as an affirmative defense.”<sup>89</sup>

The court acknowledged that the ECOA’s definition of “applicant” does not explicitly include guarantors. However, because Regulation B’s definition of “applicant” does include “guarantor,” the court utilized the two-step inquiry from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (also known as *Chevron* deference) to determine if the court should defer to the FRB’s interpretation of the ECOA and thereby its definition of “applicant” in Regulation B.<sup>90</sup> At step one of the inquiry “[the court] must ask whether ECOA’s definition of ‘applicant’ unambiguously excludes guarantors, or whether the statute is ambiguous in the issue.”<sup>91</sup> The Sixth Circuit held that the term “applicant” is ambiguous as defined in the ECOA, “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

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 383.

89. *Id.* at 384.

90. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

91. *RL BB Acquisition*, 754 F.3d at 384; *see also Chevron*, 467 U.S. at 842–43 (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

category that includes guarantors.”<sup>92</sup> The court reached this conclusion by first looking at the dictionary definitions of “applies” and “credit.”

“Applies,” as defined in the Oxford English Dictionary means “to make an appeal or a request esp. formally and often in writing and usually for something of benefit to oneself,” 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.”<sup>93</sup> Therefore, the court concluded that although a guarantor does not approach a creditor to seek credit, a guarantor is a third party to a larger application process.<sup>94</sup> The court delved into the technicality of how a guarantor approaches a creditor and concluded that technically a guarantor approaches a creditor in order to offer up his or her own personal liability if a borrower defaults.<sup>95</sup> The court also acknowledged that although one permissible reading of this definition would indicate that only the applicant can apply for credit, the “test could just as easily encompass all those who offer promises in support of an application – including guarantors, who make formal requests for aid in the form of credit for a third party.”<sup>96</sup>

Next, the court found ambiguity in the statutory definition of the word “credit.” The ECOA defines “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.”<sup>97</sup> The court interpreted this definition to mean that in the ECOA, “an ‘applicant’ requests credit, but a ‘debtor’ reaps the benefit. The use of these two different terms suggests that the applicant and the debtor are not always the same person.”<sup>98</sup> The court thus concluded, “[if] 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.”<sup>99</sup>

At step two of the *Chevron* deference analysis, the court had to determine whether the regulation stemmed from a permissible construction of the statute.<sup>100</sup> The court gave deference to the FRB’s definition of “applicant.” The court looked at the history of Regulation B and found that the FRB originally proposed that guarantors be deemed applicants throughout the regulation; however, it was limited to the Spousal-Guarantor

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92. *RL BB Acquisition*, 754 F.3d at 384–85.

93. *Id.* at 385.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*; 15 U.S.C. § 1691a(d) (2012).

98. *RL BB Acquisition*, 754 F.3d at 385.

99. *Id.*

100. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“The court does not simply impose its own construction on the statute . . . Rather, 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.”).

Rule.<sup>101</sup> The court finally concluded that including guarantors within the meaning of applicant was not arbitrary, capricious, or manifestly contrary to the statute.<sup>102</sup> Furthermore, the court reasoned that Congress amended the statute multiple times since the FRB adopted Regulation B, but Congress never attempted to remove “guarantor” from the FRB’s definition of “applicant.” Therefore, the Sixth Circuit court did not feel compelled to remove guarantors from the definition.<sup>103</sup> The court held that the ECOA protections apply to guarantors, and as such, a spousal guarantor can bring an independent lawsuit for ECOA violations.<sup>104</sup>

## B. THE EIGHTH CIRCUIT’S DECISION

In *Hawkins v. Community Bank of Raymore*, the Eighth Circuit came to the opposite decision of the Sixth Circuit, holding that the ECOA clearly defined “applicant” and thus, the definition should not include the Regulation B’s definition of “applicant.” In *Hawkins*, Gary Hawkins and Chris Patterson were the only members of a residential development company named PHC Development, LLC (PHC).<sup>105</sup> Between 2005 through 2008, Community Bank of Raymore (Community) loaned PHC more than \$2,000,000 to finance the development of a residential subdivision.<sup>106</sup> To secure the loan, Gary Hawkins’ wife, Valerie, and Chris Patterson’s wife, Janice, executed personal guaranties.<sup>107</sup> In April 2012, PHC defaulted on the loan; thus, Valerie and Janice became personally liable for the loan payment.<sup>108</sup>

Valerie and Janice filed an action against Community, alleging that Community had required them to execute the guaranties securing PHC’s loans because they were married to their husbands.<sup>109</sup> They argued that the guaranties were unenforceable because the lender obtained the guaranties in violation of the ECOA, and that the court should not void the FRB’s definition of “applicant” and thereby impede the efforts of the ECOA to eradicate discriminatory lending practices.<sup>110</sup> Valerie and Janice also argued

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101. *RL BB Acquisition*, 754 F.3d at 386.

102. *Id.*; see also *Chevron*, 467 U.S. at 844.

103. *RL BB Acquisition*, 754 F.3d at 386.

104. *Id.* at 387.

105. *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 939 (8th Cir. 2014); Brief of Appellants at 6, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065), 2013 WL 6069373, at \*6 (“Whereas the Spouses’ respective husbands, Gary Hawkins and Chris Patterson, were members and officers of PHC either in their individual capacity or as a trustee, the Spouses were no members, officers, or otherwise interested in PHC.”).

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

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*; Brief of Appellants at 13, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065), 2013 WL 6069373, at \*8 (“Defining guarantors as ‘applicants’ with regards to signature requirements best forwards the ECOA’s purpose of eradicating gender and marital

that if the FRB's definition of "applicant" was not read into the ECOA, it would require spousal guarantors to wait until the commencement of legal action against them to assert an affirmative defense as to the illegality of the guaranty.<sup>111</sup> By requiring the guarantor to wait, the guarantor might "experience financial difficulty, struggle to obtain individual credit because of these large contingent liabilities, and suffer mental and emotional distress resulting from the inability to obtain credit."<sup>112</sup>

Similar to the Sixth Circuit, the issue before the court was whether the court should apply the Regulation B or the ECOA definition of "applicant." To answer this administrative question, the court turned to the *Chevron* two-step analysis.<sup>113</sup> Applying the first step, the court concluded that the "text of the ECOA clearly provides that a person does not qualify as an applicant under the statute solely by virtue of executing a guaranty to secure the debt of another."<sup>114</sup> Under the ECOA, an applicant must apply to a creditor for credit. Since the court found that Congress provided a clear definition of "applicant" in the ECOA, the FRB lacked the discretion to take an expansive interpretation of "applicant," by including, among others, guarantors. Therefore, the FRB was bound by the ECOA's definition as determined by the Eighth Circuit.<sup>115</sup>

Specifically, the court looked to the dictionary definition of "apply." "Apply means to make an appeal or request especially formally and often in writing and usually for something of benefit to oneself."<sup>116</sup> From this definition, the court concluded that, "the plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit."<sup>117</sup> Subsequently, the court considered the definition of guaranty: "A 'guaranty' . . . is 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 a default."<sup>118</sup> From this, the court concluded that a guarantor does not request credit and thus, does not qualify as an applicant under the ECOA. Therefore, the protections of the ECOA are not available to a spousal guarantor.

The court went on to refute the holding and rationale of the Sixth Circuit's decision.<sup>119</sup> The Eighth Circuit did not find that an individual's

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status based credit discrimination. The Court should avoid eliminating entire aspects of the Federal Reserve Board's ECOA implementation scheme upon which consumers and lenders have relied for decades without Congressional interference or amendment.").

111. Brief of Appellants, 2013 WL 6069373, at \*28.

112. *Id.*

113. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

114. *Hawkins*, 761 F.3d at 941.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*; see also 38 AM. JUR. 2D *Guaranty* § 1 (2014).

119. *Hawkins*, 761 F.3d at 941–42.



assumption of a secondary, contingent liability amounted to a request for credit.<sup>120</sup> “A guarantor engages in different conduct, receives different benefits, and exposes herself to different legal consequences than does a credit applicant.”<sup>121</sup> The court pointed to a Seventh Circuit decision, in which Judge Posner stated, “there is nothing ambiguous about ‘applicant’ and no way to confuse an applicant with a guarantor.”<sup>122</sup> Therefore, because Congress’s definition of “applicant,” according to the Eighth Circuit was unambiguous in the ECOA, and that definition did not include “guarantor,” guarantors are not offered the same protections as applicants under the ECOA.<sup>123</sup>

#### IV. THE EIGHTH CIRCUIT’S RULING IS JUDICIALLY CORRECT

Judicially, the Eighth Circuit was correct to deny Regulation B’s expansion of the word “applicant.” First, Regulation B’s definition of “applicant” fails the *Chevron* deference test. At step one of the inquiry, the court must ask “[i]f the intent of Congress is clear.”<sup>124</sup> Because Congress clearly and explicitly defined “applicant” in the ECOA, the court should end its *Chevron* analysis altogether.<sup>125</sup> If there is no ambiguity in Congress’s definition, the court does not need to entertain the second step of the inquiry. Therefore, the FRB is required to follow Congress’s unambiguously expressed intent and cannot implement their own definition.

Second, by looking at the dictionary definitions of “apply”<sup>126</sup> and “guaranty,”<sup>127</sup> the court correctly concluded that the applicant is the person who applies for the benefit. The guarantor does not request credit and as such, the guarantor is not an applicant. Typically, a guarantor does not expect any personal benefit; rather they know that the applicant will be the one who receives the benefit. Since the ECOA’s definition of “applicant”

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120. *Id.* at 942.

121. *Id.* at 941–42.

122. *Id.* at 942 (citing *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436, 441 (7th Cir. 2007)).

123. *Id.*

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

125. 15 U.S.C. § 1691a(b) (2012); *Chevron*, 467 U.S. at 842–43 (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). When Congress grants an agency this authority, the courts give controlling weight to the agency’s definition “unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844.

126. *Hawkins*, 761 F.3d at 941 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 105 (1971) (“To ‘apply’ means ‘to make an appeal or request esp[ecially] formally and often in writing and usually for something of benefit to oneself.”)).

127. *Id.* at 941 (“A ‘guaranty’ . . . is 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 a default.”).

does state “any person who applies to a creditor,”<sup>128</sup> by reading in the definition of “apply,” the Eighth Circuit correctly held that “applicant” does not include “guarantor,” because the guarantor does not apply for credit as the applicant does. In the ECOA, the term “applicant” applied to any person who sought credit.<sup>129</sup> The logical conclusion from this would be that an applicant is the person who applies for credit and thereby the person who approaches the lender. A guarantor does not approach the lender to inquire about credit for oneself, but instead personally guarantees payment to the lender on behalf of the applicant, so that the applicant can receive a loan.

Third, although the FRB sought to include “guarantor” in the definition of “applicant” in 1976,<sup>130</sup> after receiving comments on the proposed change, the FRB provided that “a guarantor, surety, endorser or similar party is not an applicant.”<sup>131</sup> The FRB concluded that the scope of the ECOA was broad enough to prevent credit discrimination on its own.<sup>132</sup> Only in 1985 did the FRB change the definition of “applicant” in Regulation B, thus coming into direct conflict with Congress’s intent.<sup>133</sup> The FRB redefined “applicant” because they were dissatisfied with Congress’s decision to limit the cause of action under the ECOA to an “aggrieved applicant.”<sup>134</sup> The FRB believed that allowing guarantors to sue under the ECOA would enhance the protection of individuals susceptible to discrimination. However, the ultimate decision to change (and thereby expand) the definition of “applicant” rests solely with Congress.<sup>135</sup>

Fourth, in *Community Bank of Raymore’s Brief (Appellee Brief)*, the appellee looked at Congress’ intent in passing the ECOA. “[T]he essential prohibition in [the] legislation is directed at discrimination *against applicants*.”<sup>136</sup> Congress did not intend to protect guarantors in this legislation and clearly only intended to protect applicants. Further, President Ford, in his signing statement of the ECOA, acknowledged that a person “to whom credit is denied is entitled to know of the reason for that denial.”<sup>137</sup> The President’s statement indicates that he believed the ECOA’s

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128. 15 U.S.C. § 1691a(b).

129. *Id.*

130. *Hawkins*, 761 F.3d at 944 (Colloton J., concurring); *see also* Equal Credit Opportunity, 41 Fed. Reg. 29,870, 29,871 (July 20, 1976).

131. *Hawkins*, 761 F.3d at 944 (Colloton J., concurring); *see also* Equal Credit Opportunity, 41 Fed. Reg. 49,123, 49,124, 49,132 (Nov. 8, 1977).

132. *Hawkins*, 761 F.3d at 944 (Colloton J., concurring).

133. Brief of Appellee, at 21, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065), 2013 WL 6979611, at \*14.

134. *Hawkins*, 761 F.3d at 944; Brief of Respondent at 41, *Hawkins v. Cmty. Bank of Raymore*, 136 S.Ct. 19 (2015) (No. 14-520), 2015 WL 4550210.

135. *Hawkins*, 761 F.3d at 945.

136. Brief of Appellee at 20, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065), 2013 WL 6979611, at \*14 (emphasis in original).

137. Statement on Signing the Equal Credit Opportunity Act Amendments of 1976, 1 Pub. Papers 250 (Mar. 23, 1976).

purpose was to protect the person who was denied credit—the “applicant.” Because a guarantor cannot be denied credit, it is not surprising that the word guarantor does not appear in the ECOA’s definition of applicant.

Finally, in Hawkins’ brief (Appellant Brief), the appellants argue that Congress has not taken any action to change the FRB’s expanded interpretation of the term “applicant.”<sup>138</sup> The basic premise of the appellant’s argument is that because Congress did not affirmatively act to change Regulation B’s amendment to the term “applicant” when the FRB expanded its definition, Congress must believe that the FRB’s expanded definition is not in conflict with its own definition under the ECOA.<sup>139</sup> Just because Congress did not act to override the decision of the agency does not indicate that the FRB’s definition supersedes the clear intent of Congress. Congress’ inaction or silence does not equate to approval of the FRB’s actions.

The “fundamental principle of statutory construction . . . [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it used.”<sup>140</sup> Thus, when the ECOA is considered as a whole, it is evident that Congress did not intend to include guarantors within the definition of “applicant.”<sup>141</sup> “The context here is that the word ‘applicant’ appears in the ECOA over 50 times.”<sup>142</sup> Congress could have applied the ECOA broadly by prohibiting discrimination against “persons” instead of limiting it to “applicants.”<sup>143</sup> Instead, Congress chose to limit the reach of the ECOA specifically to “applicants.” Thus, when Congress creates legislation, and an agency promulgates regulation that is contrary to the clear and unambiguous intent of Congress, the agency is bound by Congress’s intent.

## V. CONGRESS SHOULD AMEND THE ECOA

Although the Eighth Circuit was correct in its ruling, the decision unfortunately leaves spousal guarantors without proper recourse should they fall victim to discriminatory lending practices. Credit discrimination still occurs today, and as such, the ECOA remains relevant and necessary to prevent credit discrimination. By mid-2014, the Department of Justice attained over \$1 billion in monetary relief for violations of the ECOA and tangent acts.<sup>144</sup> Specific to gender-based credit discrimination, in 2013, a study found that women in Chicago were 24 percent less likely to receive a

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138. Brief of Appellants at 31, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065), 2013 WL 6069373, at \*14.

139. *Id.* at 30–31.

140. *Deal v. United States*, 508 U.S. 129, 132 (1993).

141. Brief of Respondent at 28–29, *Hawkins v. Cmty. Bank of Raymore*, 135 S.Ct. 1492 (2015) (No. 14-520), 2015 WL 4550210.

142. *Id.* at 29.

143. *Id.*

144. See *Protecting Borrowers*, *supra* note 67.

new home mortgage than men were.<sup>145</sup> Additionally, lenders were thirty-nine percent less likely to refinance a woman's mortgage than a man's mortgage.<sup>146</sup> Another study found that the Department of Housing and Urban Development has been investigating numerous claims that lenders were denying loans to women on maternity leave.<sup>147</sup> There also has been extensive coverage of the difference in pay between men and women. Research has shown that "college-educated millennial men made \$20,000 more per year than women with the same education level."<sup>148</sup> Although there is no data that shows that women guarantors are the ones who solely face credit discrimination, from these various examples of the hardships that women face in their daily lives, it is not farfetched to imagine that women are also more likely than not to be the ones directly impacted by gender discrimination in lending practices.

While the ECOA clearly and explicitly defines "applicant," Congress should expand the definition to include guarantors. However, the expansion should be limited to the Spousal Guarantor Rule originally implemented by the FRB,<sup>149</sup> thus expanding the ECOA's protection only to the spousal guarantors. By adding this provision, spousal guarantors who are the victim of discriminatory lending practices due to their marital status or gender, would now have sufficient legal standing to sue the lender before defaulting on the loan. Additionally, by limiting the definition of "applicant" to spousal guarantors as opposed to all "guarantors," lenders will be better protected from frivolous lawsuits, since not every guarantor would have standing to sue for ECOA violations. Furthermore, this provision prevents the circumvention of the ECOA. For example, husbands may be required to guarantee their wives loans in order to ensure that a male is there to "guarantee" a female's loan. While the wife can sue the lender as an applicant, the husband would not be able to. This specifically puts an undue burden on the wife to obtain the *permission* of her husband to obtain a loan. By granting a spousal guarantor standing to sue a lender, a lender would not require a spouse to sign as a guarantor, where the spouse can sign as a co-applicant or the spouse's signature is unnecessary. Whether it is requiring females to have their spouse sign as a guarantor or denying a spousal

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145. Lisa Prevost, *Investigating Sex Discrimination*, N.Y. TIMES (Feb. 12, 2013), [http://www.nytimes.com/2013/02/24/realestate/investigating-sex-discrimination-by-lenders.html?\\_r=1](http://www.nytimes.com/2013/02/24/realestate/investigating-sex-discrimination-by-lenders.html?_r=1) [hereinafter Prevost, *Investigating Sex Discrimination*] ("A settlement announced this month involves a Navy veteran who said a PNC Mortgage representative in Trumbull, Conn., told her she had to be back at work from maternity leave to obtain a Veterans Affairs loan.").

146. See Hallman, *supra* note 3.

147. See Prevost, *Investigating Sex Discrimination*, *supra* note 145.

148. Charlotte Alter, *Millennial Women Are Still Getting Paid Less Than Men*, TIME (June 13, 2014), <http://time.com/2870940/millennial-women-are-still-getting-paid-less-than-men/>.

149. 12 C.F.R. § 202.7(d)(1) (2009).

guarantor the standing to sue a lender for ECOA violations, women are unfairly disadvantaged.<sup>150</sup>

Failing to expand the definition of “applicant” to include a spousal guarantor will create financial difficulty for the guarantor as they “struggle to obtain individual credit because of [the] large contingent liabilities, and suffer mental and emotional distress resulting from the inability to obtain credit.”<sup>151</sup> The guarantee would “appear on the spouse’s credit report and impact her credit scores.”<sup>152</sup> If the applicant defaults on the debt, “the spouse’s credit reports will show the delinquencies, thereby tarnishing her credit history and ability to secure credit – even if she pays the debt.”<sup>153</sup> Additionally, this split ruling between the Sixth and Eighth Circuits creates confusion in the lending industry, as there have been numerous conflicting decisions on this matter.<sup>154</sup> Therefore, it is in the best interest of all parties involved that Congress amend the ECOA to alleviate judicial uncertainty.

An argument could be made that as credit decisions become more automated with credit more commonly being determined by computer algorithms, opportunities for discrimination have been reduced.<sup>155</sup> While gender-based credit discrimination has decreased since the passage of the ECOA, it still exists today.<sup>156</sup> Further, as seen in *Hawkins* and *RL BB Acquisition, LLC*, the guarantors in both cases alleged credit discrimination because they were married to their husbands. In *Hawkins*, because of the liabilities Valerie faced as a guarantor in default, she suffered damage to her credit and her ability to qualify for credit in the future.<sup>157</sup> Thus, although the credit process is automated, creditors still have a significant amount of influence on each individual loan. This leaves open the possibility that a creditor would require a spouse to sign as a guarantor to a loan, where the applicant is otherwise creditworthy. Therefore, Congress should strengthen the ECOA so that a spousal guarantor would have standing to sue a lender when they are required to sign as a guarantor for their spouse’s loan where it is otherwise unnecessary.

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150. While male spousal guarantors face the same undue burden, based on the above-mentioned examples of the hardships that women face, it is more likely than not that women are more likely to face the consequences of this void in the law.

151. Brief of Appellants at 28, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065), 2013 WL 6069373, at \*13.

152. Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *Hawkins v. Cmty. Bank of Raymore*, 135 S.Ct. 1492 (2015) (No. 14-520).

153. *Id.* at 26–27.

154. *Compare* *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (holding that guarantor was not an “applicant” for credit within the meaning of Equal Credit Opportunity Act), *with* *Silverman v. Eastrich Multiple Inv’r Fund, L.P.*, 51 F.3d 28 (3d Cir. 1995) (allowing a guarantor to be considered an applicant).

155. Ritter, *supra* note 24, at 37–38 (“Disparate impact, however, may persist so long as the credit qualifications that lenders consider are affected by markets where discrimination occurs.”).

156. Hallman, *supra* note 3.

157. Brief of Appellants at 40, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) (No. 13-3065), 2013 WL 6069373, at \*16.

Finally, as stated above, there is currently no law that requires reporting and surveying of discrimination in consumer credit.<sup>158</sup> While the topic of this Note is about the circuit split and the need to amend the ECOA to redefine “applicant,” it is important to advocate for a reporting requirement. The absence of a reporting requirement creates difficulty in measuring the impact of discrimination.<sup>159</sup> As such, future legislatures cannot amend the laws as needed to prevent discrimination. Therefore, the ECOA should incorporate a reporting requirement, similar to that found in the HDMA to improve the documentation of gender-based credit discrimination, which in turn would provide invaluable information to draft future legislation.<sup>160</sup>

## CONCLUSION

Women have faced and continue to face discrimination in many areas of life, including in lending practices. While legislation such as the ECOA has helped mitigate the impact of such discrimination and aided in the advancements women contribute to society, it has not completely eradicated the problem. Although there is no indication that lenders will have a woman reapply for credit under her husband’s name once she is married,<sup>161</sup> there could still be other forms of gender discrimination. While the Eighth Circuit was judicially correct in their ruling on Congress’s interpretation of the term “applicant,” as a matter of policy, Congress should amend the ECOA’s definition of “applicant” to include spousal guarantors as defined in Regulation B by the FRB.<sup>162</sup> This amendment to the ECOA would not negatively or drastically impact the lending industry, as almost all lenders likely follow Regulation B as written.<sup>163</sup> Instead, this amendment will simply ensure that everyone has equal access to credit. The positive contributions women make to societal advancement should not be hindered simply because they are required to be a guarantor to their husband’s loans. It is now on Congress to address this problem by adopting Regulation B’s definition of “applicant.”

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158. Ritter, *supra* note 24, at 29.

159. *Id.* at 29–30.

160. *See generally* 12 U.S.C. § 2803 (2012).

161. Reizenstein, *supra* note 26, at 225.

162. 12 C.F.R. § 202.7(d)(1) (2009).

163. *ECOA and Spouse-Guarantor Rights*, *supra* note 13.

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