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Preview of a Post-*Chevron* World: The Seventh Circuit Upholds Regulation B's Discouragement Prohibition as Consistent with ECOA

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With *Loper Bright's* recent death blow to *Chevron* deference, some commentators have been predicting substantial constriction of the administrative state and the narrowing or limiting of the powers of federal regulators.

For a variety of reasons, it's certainly too soon to say. The administrative state is vast. There are more than 400 agencies and sub-agencies in the United States, and Congress enacts laws and delegates authority to agencies to adopt and implement regulations. In many statutory schemes, such as the Equal Credit Opportunity Act (ECOA), Congress confers authority to agencies to adopt regulations to carry out the statutes' purposes and gives the executive branch power to enforce the laws.

This is seen in *Consumer Financial Protection Bureau v. Townstone Financial, Inc.*, a decision recently issued by the Seventh Circuit. The Court interpreted ECOA *de novo* and did not defer to the agency's regulation. In its independent review, it reviewed the statutory scheme and found Regulation B's discouragement section consistent with ECOA. This is an interesting preview of the world post-*Chevron*.

***Townstone*: background**

Townstone is a CFPB enforcement action initially filed in 2020 claiming ECOA violations for Townstone's statements allegedly discouraging Black prospective applicants in the Chicago area from applying for mortgage loans, citing statements by Townstone's CEO and a senior loan officer on its long-form

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commercial advertisement radio show and podcast, as well as statistics regarding Townstone's lending to black applicants in Chicago. CFPB claims Townstone's conduct was discouragement on a prohibited basis of potential applicants, a violation of Regulation B. It asserts that Townstone's business acts and practices led to fewer Black prospective applicants applying for credit than would have otherwise been the case.

At issue in *Townstone* was the "discouragement" prohibition of Regulation B, 12 C.F.R. § 1002.4 (formerly, § 202.4(b)). In Regulation B, the Federal Reserve Board (and now the CFPB) adopted regulations to carry out the purposes of ECOA. The discouragement rule prohibits creditors from making statements in advertising or otherwise that would discourage on a prohibited basis "applicants or prospective applicants" from making or pursuing credit applications.

The district court dismissed the *Townstone* action in early 2023, holding that ECOA's statutory antidiscrimination prohibition applies only to "applicants" and not "prospective" applicants. The district court applied the test for *Chevron* deference, finding ECOA's statutory prohibition unambiguous and therefore under *Chevron's* first step declined to apply Regulation B's broader discouragement language extending to prospective applicants.

Seventh Circuit decision

The CFPB appealed, and the Seventh Circuit heard oral arguments in fall 2023 and issued its decision on July 11, 2024, just a few weeks after the *Loper Bright* decision. Acknowledging *Loper Bright's* overruling of *Chevron* in a footnote, the Seventh Circuit stated that it would consider the ECOA interpretation issues *de novo*, and it did not defer to CFPB's interpretation of ECOA.

The Seventh Circuit found Regulation B's discouragement provision consistent with the ECOA statutes and Congress's statutory directive/prohibitions. Considering ECOA's text "as a whole," the court found that it prohibits not only "outright discrimination" against credit applicants, but also the "discouragement of prospective applicants for credit." The Court noted that in ECOA § 1691b(a), Congress conferred upon the agency broad authority to enact regulations to carry out ECOA's purposes, including regulations "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." Conferring authority to prevent "circumvention or evasion" indicates that ECOA "must be construed broadly to effectuate its purpose of ending discrimination in credit applications."

Additionally, the Court found, other ECOA provisions "strongly confirm" that discouraging applications for credit violates ECOA. Congress amended ECOA's civil liability provision so that the regulatory enforcement agency is required to refer the matter to the attorney general with recommendations to file a civil action whenever the agency has reason to believe a creditor has

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engaged in a pattern or practice of discouraging or denying credit applications on a prohibited basis under ECOA. 15 U.S.C. § 1691e(g).

The Court held that the authority granted to regulators "to prevent circumvention or evasion" of ECOA makes clear that prohibited discouragement must include discouragement of **prospective** applicants as well as applicants. The Court reasoned: "The term 'applicant' cannot be read in a fashion to frustrate the articulated purpose of the statute." Additionally, ECOA prohibits discrimination with respect to any aspect of a credit transaction. That includes actions taken by a creditor before an applicant ultimately submits their credit application.

Accordingly, the Court held that the CFPB's complaint states a claim for relief and reversed the dismissal. Remanding the case to the district court, the Court passed no judgment on the merits, allowing the case to proceed. Townstone and its attorneys have said publicly that they will continue to contest the CFPB's enforcement action and may seek review of this decision by the Supreme Court.

Key takeaways

There are a number of takeaways from the Seventh Circuit's *Townstone* decision.

First, *Townstone* applies to enforcement actions and turns in part on the broad enforcement authority conferred to the regulatory enforcement agency. In a private ECOA action, however, the analysis would be different, as only "aggrieved applicants" may sue for ECOA violations, 15 U.S.C. § 1691e(a). As courts have noted, the ECOA regulatory enforcement powers are more expansive than the private right of action authorized by § 1691e.

Second, *Townstone* has important implications for the CFPB's fair lending work. The Seventh Circuit has affirmed Regulation B's discouragement provision and held that it is consistent with ECOA. This is a significant victory for CFPB since the decision validated its legal authority under Regulation B to bring the case in the first place. A contrary result would have weakened the agency's fair lending authority by nullifying a regulation that has been in place since the 1970s. The *Townstone* case will proceed on the merits of the unlawful discouragement claim and Townstone's defenses, including its First Amendment challenge.

Third, *Townstone* reflects broader questions beyond just ECOA and fair lending. Namely, it may be a bellwether of the post-*Chevron* world. For example:

ECOA's delegation to the agency to adopt regulations "to prevent circumvention or evasion" is not a one-off grant of authority. Other statutory schemes granting CFPB authority (e.g., the Dodd-Frank Act, EFTA, RESPA) also broadly confer authority to adopt regulations for various purposes—preventing evasion, facilitating compliance, effectuating statutory purposes, making adjustments or

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exceptions, or, in the case of TILA, imposing additional requirements. CFPB presumably will continue to lean into these broad grants of authority to adopt regulations or interpretations that may seemingly stretch or exceed the empowering statute. And, as in *Townstone*, courts will interpret those statutes *de novo* to determine whether the regulations are consistent with the statutes, as they no longer will defer to an agency's statutory interpretation.

In *Townstone*, the Seventh Circuit found that Regulation B's discouragement provision is consistent with ECOA's plain terms. As support, it cited the CFPB's authority to prevent evasion and circumvention but did not discuss the specific parameters of that authority. In future cases, courts may be asked to determine the scope of delegated grants of rulemaking authority. They may grapple with questions such as: how far can an agency deviate in a regulation from a **specific** statutory provision to effectuate a **general**, delegated purpose in a different part of the same statute? Agencies do not have unlimited berth. Further, will courts defer to agency factfinding and policy rationales cited for broad regulations to show the regulation's fit within the agency's general, delegated authority? *Loper Bright* allows for agency interpretations to receive *Skidmore* deference. But in practice, will these justifications have the "power to persuade" the courts?

When agencies utilize their general, delegated rulemaking authority to deviate from statutory mandates, that deviation can benefit industry stakeholders. For example, when CFPB enacted its changes to Regulation Z to effectuate the Dodd Frank Act's mortgage market reforms, CFPB declined to implement certain statutory requirements, utilizing its TILA section 105(a) authority to prescribe regulations to facilitate compliance or for other specified purposes. One such provision was the Dodd Frank Act's ban on upfront mortgage points and fees. In the final loan originator rule, CFPB explained that implementing the statute would have been too unsettling to a mortgage market only a few years removed from the 2008 financial crisis. Thus, delegated agency authority may be exercised in deviation from a statute's mandate to adjust or mitigate the regulatory burden and thereby serve the industry.

Contact us

If you have any questions about *Townstone* or other implications of *Chevron*, please contact Marci Kawski, Mike G. Silver, Lisa Lawless, or your Husch Blackwell attorney.

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