To: Patrice Ficklin, Assistant Director
From: [redacted], Counsel
Re: Bureau Rulemaking Authority
Date: 8/3/2015

Question Presented: Indirect automobile finance companies compensate automobile dealers for charging inflated, subjective, nonrisk-related interest rates which are typically higher than the purely objective, risk-related interest rates actually called for by the indirect lender's underwriting standards. This practice has a disparate impact on African-American and Latino consumers. Does the Consumer Financial Protection Bureau (the Bureau) have appropriate rulemaking authority pursuant to the Equal Credit Opportunity Act (ECOA)[1] to promulgate a regulation prohibiting lenders from compensating dealers based on the terms of a loan?

Answer: The Bureau has authority to promulgate a rule prohibiting compensation that varies based on the terms of a loan. As the agency responsible for the interpretation and application of ECOA, the Bureau is free to promulgate rules pertaining to issues not directly addressed by the text of ECOA and to clarify ambiguities in the statute. Because ECOA's grant of rulemaking authority is expansive and calls for the Bureau to promulgate rules to further the broad purposes

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[1] 15 U.S.C. § 1691 *et seq.* (2006), *amended by* Pub. L. No. 111-203, § 1085, 124 Stat. 1376, 2083 (2010). ECOA states, in pertinent part:

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
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> (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
> (2) because all or part of the applicant's income derives from any public assistance program; or
> (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

of the Act; ECOA does not address the issue of auto dealer compensation; and Congress included within ECOA's definition of "creditor" assignees to the underlying credit transaction, but did not define the level of participation necessary to incur liability; the Bureau has discretion to promulgate a rule prohibiting compensation that varies based on the terms of a loan. The greatest obstacles to such a rule would be overcoming the notion that Congress has already directly spoken to the issue—and thereby precluded the Bureau from acting—as well as potential challenges asserting that the regulation is an unreasonable or impermissible interpretation of ECOA.

Discussion:

Overview of Issue—Indirect Automobile Compensation, Disparate Impact

When consumers finance an automobile purchase through a dealer, the dealer normally originates the loan for the consumer—usually in the form of a retail installment sales contract (RISC). Dealers typically sell their RISCs to bank and nonbank indirect auto lenders shortly after these loans are originated. During the origination process, dealers submit an applicant's information to indirect lenders; the lenders, in turn, inform the dealer of the risk-based interest rate at which the dealer would agree to purchase the RISC. Indirect auto lenders allow the dealers significant discretion to mark up these risk-based interest rates; dealers will therefore offer financing on terms not as favorable as what the lender agreed to. Loan originators often are compensated based on the amount of this markup, which creates an incentive to offer higher rates. The markups are not transparent to the consumer, and permitting dealer markups has been shown to have a disparate impact on protected class borrowers.

Comment [CCD1]: To be fair, the following description may not be entirely accurate. Based on conversations I have had with various individuals, it seems no one truly understands the full details of what transpires between the dealers and the lenders; furthermore, it seems that the precise level of involvement or participation by the lenders in the origination process is not completely understood.

For example, if an indirect lender tells a dealer that—based on the proffered applicant information—it would purchase the RISC at a 6% risk-based interest rate, the dealer would offer financing to the applicant with an interest rate of, at most, 8.5%. This rate is negotiable, but some consumers may not know this, may not feel comfortable haggling with a dealer, or—even when a negotiation takes place—may not ultimately walk away with the purely risk-based interest rate. Indirect auto lenders deny involvement in this scheme because, they claim, they do not originate the financing nor do they negotiate rates with consumers. Yet, indirect auto lenders often engage directly with auto dealers in the process of setting a consumer's contract rate; after all, the dealers rely on the indirect lenders' loan criteria in setting the offered rate.

i. *Legal Framework*—

"Congress has specifically designated the [Bureau] . . . as the primary source for interpretation and application of" ECOA, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980), and as a result the Bureau has significant leeway in promulgating regulations to implement that Act.[2] *See Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 976 n.3 (7th Cir. 2004) ("Where Congress has expressly delegated to an agency the responsibility of articulating standards governing a particular area, the courts must accord the ensuing regulation substantial deference."). Accordingly, the Bureau's properly-promulgated regulations are entitled to deference under the *Chevron*[3] doctrine. *See Astrue v. Capato*, 132 S. Ct. 2021, 2033–

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[2] In 2010 Congress consolidated rulemaking authority under the Federal consumer financial laws—including ECOA—in the Bureau; moreover, courts are directed to treat the Bureau's rules interpreting ECOA as "if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of" the statute. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(b)(4)(A)–(B), 124 Stat. 1376, 1981 (2010) (to be codified at 12 U.S.C. § 5512).

[3] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

34 (2012) ("*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.") (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).[4]

Under *Chevron*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. 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. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. 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.

Chevron, 467 U.S. at 842–43 (emphasis added).

That the Bureau's regulations implementing ECOA would be accorded *Chevron* deference is supported by the fact that—before the transfer of rulemaking authority from the Federal Reserve Board to the Bureau[5]—courts showed that exact level of deference to the Fed when it promulgated its own ECOA-implementing regulations. *See, e.g., Miller v. Am. Exp. Co.*, 688 F.2d 1235, 1238 (9th Cir. 1982) (upholding the Board's definition of credit discrimination as

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[4] *Mead* added a gloss to the Chevron analysis; essentially, *Mead* works as an antecedent question before you engage in *Chevron* analysis. It is a prerequisite to *Chevron*, in a way. The nuances are immaterial to this discussion, however, because here "Congress [has] delegated authority to the [Bureau] generally to make rules carrying the force of law, and [the Bureau's] interpretation claiming deference w[ould be] promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–27. Thus, *Chevron* undoubtedly applies to the Bureau's ECOA-related rulemakings.

[5] *See* Pub. L. No. 111-203, § 1029A, 124 Stat. 1955, 2005 (2010) (codified at 12 U.S.C. § 5511 note (Supp. 2011).

including the termination of credit upon the death of a spouse. The court noted that "[i]n passing the ECOA, Congress contemplated that the Board would have significant flexibility in its enforcement authority"); *see also Dorsey v. Citizens & S. Fin. Corp.*, 678 F.2d 137, 139 (11th Cir. 1982) (vacated and remanded on other grounds). To date, at least one court has intimated that the *Chevron* framework applies to the Bureau's interpretations of the laws it is responsible for administering. *See First Premier Bank v. U.S. Consumer Fin. Prot. Bureau*, 819 F. Supp. 2d 906, 914–20 (D.S.D. 2011).[6]

There are, of course, limits to the scope of every agency's rulemaking authority. While *Chevron* held that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," 467 U.S. at 843–44, the decision also cautioned that "legislative regulations are given controlling weight *unless they are arbitrary, capricious, or manifestly unjust to the statute*." *Id.* at 844 (emphasis added); *see also Diaz v. Va. Hous. Dev. Auth.*, 117 F. Supp. 2d 500, 507 (E.D. Va. 2000) ("[D]eference and respect must be paid to ECOA's mandate and the lawmaking authority and expertise of the Board, '*so long as [the Board's] lawmaking is not irrational*' . . . .") (emphasis added) (alteration in original) (quoting *Milhollin*, 444 U.S. at 568). This limiting principle applies no less to the Bureau's regulations. *Cf. Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (holding that the Board's interpretation of a statutory definition in the Bank Holding Act was not "an accurate or reasonable interpretation" of the statute).

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[6] Intimated only, because—while the Bureau was a named party in that case—the regulation at issue was transferred from the Board to the Bureau; the Bureau had not yet had the chance to adopt its own interpretation and was simply defending the Board's regulation by virtue of a provision in Dodd–Frank automatically substituting the Bureau for the Board in litigation. *See First Premier Bank*, 819 F. Supp. 2d at 910 n.1.

a. *Analysis: Step One of the* Chevron *Analysis—Silence or Ambiguity?*

As the Bureau is the primary source of interpretation and application of ECOA, a properly-promulgated regulation affecting the compensation paid by auto lenders to dealers based on the terms or conditions of an auto loan[7] should be accorded *Chevron* deference. *Cf. Household Credit Svcs. v. Pfennig*, 541 U.S. 232, 238–39 (2004). Thus, it must first be determined whether ECOA "directly sp[eaks] to the precise question at issue." *Chevron*, 467 U.S. at 843. Admittedly, this task is not a precise science.[8] *Compare Rust v. Sullivan*, 500 U.S. 173, 184 (1991), *with I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Here, however, there is a strong basis for concluding that ECOA does *not* speak to the precise issue.

i. Silence—

The text of ECOA does not mention lender-paid compensation or markups; thus, the statute is silent and the Bureau can, under *Chevron*, address the issue with a reasonable regulation. *Compare Mayo Found. for Med. Educ. and Research v. United States*, 131 S.Ct. 704, 711 ("We begin our analysis with the first step of the two-part framework announced in *Chevron*, and ask whether Congress has directly addressed the precise question at issue. We agree with the Court of Appeals that Congress has not done so. The statute . . . does not [] attend to the precise question whether medical residents are subject to FICA.") (citation omitted)

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[7] This memo assumes that such a regulation would take the form of a rule forbidding compensation based on the terms or conditions of the loan; however, a rule limiting the types of compensation available, or a rule setting a lower cap than is currently utilized, could be alternative approaches.

[8] *See* Note, *"How Clear is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687, 1691 (2005) ("[C]ourts have answered the question whether Congress has directly spoken to the precise question at issue in a notoriously erratic manner. In deciding whether the inquiry should end at Step One, [c]larity or ambiguity is the test, and courts have not been consistent in the level of clarity that they require.") (alteration in original) (internal quotations omitted).

(internal quotations omitted), *with Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436, 441 (7th Cir. 2007) ("It is true that courts defer to administrative interpretations of statutes when a statute is ambiguous, and that this precept applies to the Federal Reserve Board's interpretation of ambiguous provisions of the Equal Credit Opportunity Act. But there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor.") (citations omitted).

ii. Ambiguity—

Besides the fact that the statutory text does not specifically address lender-paid compensation, there are ambiguities in the text of ECOA that could serve as "gaps" or "hooks" allowing the Bureau to promulgate a rule prohibiting compensation based on the terms of a loan. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) ("If . . . the agency's statutory interpretation fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give that judgment controlling weight.") (internal quotation marks omitted); *Mayo*, 131 S.Ct. at 711 (concluding that the first prong of *Chevron* was satisfied in part because Congress "d[id] not define the term 'student.'"). First, the delegation of authority under ECOA is expansive and broadly-worded, and would obviously be implicated by any potential rulemaking. That provision reads:

> The Bureau shall prescribe regulations to carry out the purposes of this title. *These regulations may contain but are not limited to such classifications, differentiation, or other provision*, and may provide for such adjustments and exceptions for any class of transactions, *as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.*

15 U.S.C § 1691b(a) (emphasis added).[9]

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[9] *See also* 12 U.S.C. § 5512(b)(1) ("The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out

The Bureau could point to this expansive language—note the phrases "may contain but are not limited to" and "or other provision"—in support of a rule prohibiting lender-paid compensation based on the terms of a loan.[10] Congress authorized the Bureau to prescribe any reasonable regulation "necessary or proper" to prevent practices which "circumvent[] or eva[de]" the Act. The indirect lender practice of allowing auto dealers to markup buy rates after some consultation with or reliance on the lender is a practice that is seemingly engineered to circumvent and evade ECOA (or, at the very least, avoid liability under the law). Consequently, a regulation prohibiting indirect automobile lenders from compensating anyone based on the terms of a loan would be a necessary and proper regulation to prevent this particular manifestation of an evasion of ECOA.

Second, the delegation of rulemaking authority to the Bureau specifically authorizes regulations to "carry out the purposes of" ECOA. 15 U.S.C § 1691b(a); *see also Dorsey*, 678 F.2d at 139 ("When the Board's regulations are consonant with a rational interpretation of the congressional language *and purpose*, courts are obliged to respect those regulations.") (emphasis added); *Diaz*, 117 F. Supp. 2d at 507. Congress' purpose in enacting ECOA was clear,[11] and markups have a disparate impact on protected classes—precisely the outcome[12] that Congress, as

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the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.").

10 The level of deference accorded to an agency to which Congress has delegated rulemaking authority does not "turn on whether Congress' delegation of authority was general or specific." *Mayo*, 131 S. Ct. at 714.

11 *See* § 502 ("It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers . . . .").

12 Viz., credit is available, but not equally.

stated in ECOA's purpose, sought to avoid. Because the Bureau may draw from the congressionally-stated purpose in justifying its regulations, *see* 15 U.S.C. § 1691b(a), a regulation prohibiting indirect lenders from paying compensation based on the terms of a loan would carry out the purposes of ECOA and be a valid exercise of the Bureau's rulemaking authority under ECOA.

Finally, ECOA's definition of the word "creditor," section 702(e), is another potential source of ambiguity justifying the proposed regulation. The definition includes an assignee "of an original creditor who *participates* in the decision to extend, renew, or continue credit." *Id.* (emphasis added). The verb "participates" is ambiguous[13] and the Bureau has discretion under *Chevron* to interpret this word to encompass the activities of indirect automobile finance companies that occur during the back-and-forth that takes place with the automobile dealer.

For example, the Bureau could clarify through a rulemaking that indirect automobile dealers "participate" in the credit transaction by providing buy rates (often by supplying rate sheets) and purchasing retail installment contracts that include apparent markups from these buy rates.[14] *Cf. Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 847 F.2d 890, 899 (D.C. Cir. 1988) ("The statute permits banks to affiliate with firms that are not 'principally' engaged in [securities issuance]; the Board reasonably concluded that 'principally' does not include a firm whose commercial paper transactions are subject to the limits included in its order."). Many indirect auto lenders already control the amount of compensation they pay to

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[13] *See Mutual Benefit Health & Accident Ass'n v. Bowman*, 99 F.2d 856, 859 (8th Cir. 1938) ("The verb 'participate' . . . . denotes either active or passive sharetaking, and having a double meaning, *is patently ambiguous*.") (emphasis added). The fact that agencies define "participation" in their regulations supports the idea that the word "participate" is inherently ambiguous and in need of clarification. *See, e.g.*, 42 C.F.R § 405.1010 (2010) (defining "participation").

[14] Alternatively, the Bureau could define "participate" from a market share perspective.

dealers by capping the amount of the markup at 2.5%. Promulgating a regulation that further restricts an indirect lender's ability to compensate dealers above a buy rate is in the same vein. As assignees who participate in the credit transaction, then, the lenders would be "creditors" and therefore subject to ECOA under the proposed rule. Thus, to the extent that the indirect auto lenders are participating in credit transactions where discrimination occurs, those lenders would be liable under ECOA and Regulation B.

1. *Risk—*

Courts, however, in analyzing the first prong of *Chevron*, sometimes employ other tools of statutory construction besides simply analyzing the text of a particular law.[15] Thus, it is prudent to do the same when assessing whether ECOA addresses the issue of compensation. Doing so reveals at least two arguments suggesting that Congress did in fact address this issue—meaning the only role for the Bureau in this space would be to carry out the intention of Congress, precluding the Bureau from promulgating the proposed rule.

a. *Negative Implications of Congressional Activity*

When Congress amended ECOA by transferring rulemaking authority under that Act to the Bureau, Congress also amended the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, to prohibit "mortgage originator . . . compensation that varies based on the terms of the loan." *See* Pub. L. No. 111-203, Sec. 1403, § 129b(c), 124 Stat. 1376, 2139 (2010). Because Congress amended both statutes simultaneously—but included an explicit prohibition against

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[15] "In order to determine whether a statute clearly shows the intent of Congress in a *Chevron* step-one analysis, we employ traditional tools of statutory construction and examine the statute's text, structure, and legislative history, and apply the relevant canons of interpretation." *Heino v. Shinseki*, --- F.3d ----, 2012 WL 2433521, at *4 (Fed. Cir. June 28, 2012). Perhaps it is worth noting that the need to resort to anything other than the statute's text could be seen as an indication that the statute does not clearly explicate Congress' intent. *See supra* note 8 and accompanying text.

compensation that varies based on the terms of the loan in only one statute—a court might interpret this as an indication of Congress' intent *not* to include such a prohibition under ECOA. *See Gross v. FBL Fin. Svcs., Inc.*, 557 U.S. 167, 175 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

On the other hand, this amendment was actually a statutory codification of an administrative regulation to the same effect. The Federal Reserve had previously promulgated a regulation pursuant to its UDAAP authority under HOEPA. Congress in effect ratified the Fed's approach. Thus, it could be significant that Congress, in amending TILA, was responding to previous administrative agency activity; the Fed did not, on the other hand, ever promulgate a rule addressing compensation in the indirect auto context. Therefore, to the extent that any inferences might be drawn from the fact that Congress amended TILA and ECOA at the same time—but only addressed compensation under the former—these inferences could be countered by pointing to the particular, unique regulatory history that preceded Congress' action.

b. Negative Supreme Court Precedent

Moreover, in *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Supreme Court—while tacitly recognizing that under the FDA's organic statute, regulations governing food and drug products would ordinarily be entitled to *Chevron* deference—found a "reason to hesitate" before accepting the proposition that Congress intended to give the FDA "jurisdiction to regulate an industry constituting a significant portion of the American economy"—cigarettes and smokeless tobacco. *Id.* at 132, 159. Drawing primarily from other tobacco-related statutes passed by Congress *subsequent* to the enactment of the FDA's organic statute, the Court inferred that Congress did not intend to "give[] the FDA the

authority that it" claimed. *Id.* at 161; *see also Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986).

As the agency charged with overseeing ECOA, the Bureau should receive deference under *Chevron*; however, it is possible that a court, following *Brown & Williamson*, might look to "other Acts," 529 U.S. at 132, or another consideration, in judging whether a regulation prohibiting compensation that varies based on the terms of a loan is consonant with Congress' intention. Indeed, Dodd-Frank specifically exempted automobile dealerships from its coverage, and the proposed rule under consideration is—while not targeting the dealers directly—arguably designed to affect actions taking place, in part, at dealerships. *See* Pub. L. No. 111-203, § 1029, 124 Stat. 1376, 2004 (2010) (codified at 12 U.S.C. § 5519 (Supp. 2011). A reviewing court might find that, implicitly, "Congress has directly spoken to the issue here and precluded" the Bureau's "jurisdiction to regulate" indirect lender-paid compensation. *Brown & Williamson*, 529 U.S. at 133.

Ultimately, the text of ECOA suggests that the issue of lender-paid compensation is not addressed whereas other statutory construction tools, and precedent, could suggest otherwise. It is possible that a regulation prohibiting compensation based on the terms of a loan—promulgated pursuant to ECOA—could be held as exceeding the scope of the Bureau's rulemaking authority under that Act if a court were to rule that Congress already addressed the matter (implicitly, at least). It is difficult to predict how a court might rule.

The text of any statute, however, is always the "starting point" for statutory construction, *Smith v. City of Jackson*, 544 U.S. 228, 248 (2005), and it is the "authoritative statement" of congressional intent—"not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Svcs., Inc.*, 545 U.S. 546, 568 (2005). ECOA does not address compensation

directly, the grant of rulemaking authority is broad, and the requisite level of assignee participation needed to establish liability under the law is not sufficiently clear.[16] Thus, while there is some foreseeable risk, it is likely that the proposed regulation would survive at least the first step in a *Chevron* analysis because the key indicator of congressional intent—the text of the statute—does not speak directly to the precise issue and ECOA is otherwise ambiguous.

b. Step 2 of the Analysis—Is the Regulation Permissible, Reasonable?

Assuming, then, that ECOA does not address the issue, the next step would be to consider "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 834 (2001) ("*Chevron*'s famous 'two-step' procedure . . . asks second[ly] whether the agency's interpretation is reasonable."). A regulation may be impermissible or unreasonable if it is inconsistent with the statute's plain language or meaning, *Nat'l R.R. Passenger Corp. v. Boston and Me. Corp.*, 503 U.S. 407, 417 (1992), with congressional intent or purpose, *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91–92 (2002), or with the legislative history, *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251. Additionally, rules of long-standing are viewed with a credential of reasonableness. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). Finally, when an agency is charged with promulgating rules in technical and complex fields, this bears positively on the permissibility/reasonableness analysis. *Nat'l Cable and Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002); *Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 468 U.S. 137 (1984).

Again, the text of ECOA does not address compensation and the delegation of rulemaking authority to the Bureau is quite broad. Thus, it is unlikely that a rule prohibiting

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16 Regulation B currently defines this; regulations, of course, can be changed.

compensation based on the terms of a loan is inconsistent with ECOA's plain language or its meaning. Additionally, determining whether such a rule is consistent with congressional intent or purpose should not be problematic, especially in light of the expansively-worded congressional purpose set out in ECOA.[17]

i. Risk—

1. Contrary to Legislative History?—

Determining whether such a rule is consistent with the legislative history, however, is slightly more difficult. Comments submitted during the hearings phase of ECOA's enactment did address the assignee language. The Federal Deposit Insurance Corporation, for instance, recommended that the definition be expanded, in order to "avoid circumvention" of the law by "financial institutions" who "purchase[d] existing consumer paper generated by less well-regulated originating creditors which practice discrimination." *Hearing on H.R. 14856 and H.R. 14908 Before the H. Subcomm. On Consumer Affairs of the H. Comm. on Banking and Currency*, 93rd Cong. 74 (1974). At the same time, the National Consumer Finance Association asked the Congress to clarify the "confusing" language in the definition of the word "creditor" so as to "limit[] the liability of an assignee to knowing participation in the discriminatory practice," lest a "financing agency [] be liable for the merchant's acts of discrimination." *Hearing on H.R. 14856 Before the Subcomm. On Consumer Affairs of the H. Comm. on Banking and Currency*, 93 Cong. 104 (1974). Obviously, regulators and industry disagreed as to the effect of this language as well as the desired outcome; it is not clear from the record whether Congress ever took action based

17 Indeed, if it were, this should have presented itself during the first prong of the *Chevron* analysis.

on these recommendations.[18] The language, though, was never changed. In any event, the contradictory interpretations taken by testifying stakeholders underscores the inherent ambiguity of the issue, supporting the need for an expert agency to put forward its own reasonable interpretation.

2. Long-standing Rule or Not?—

Additionally, *Smiley* could weigh negatively in the permissibility/reasonableness analysis. A recently-promulgated rule (and a change from what the current regulation requires) would receive slightly less credence from a court in the final analysis; this would be the first time that the Bureau would attempt to regulate the area of indirect auto lender compensation schemes. At the same time, as the Bureau is charged with rulemaking in a highly technical and complex field (regulation of financial products, services, and institutions) this would weigh positively in the analysis—perhaps cancelling out any potentially-negative *Smiley* effect. *See Chevron*, 467 U.S. at 844; *Nat'l Federation of Fed. Employees, Local 1309 v. Department of Interior*, 526 U.S. 86, 99 (1999).

In sum, there are likely only two grounds on which a challenge could be mounted attacking the permissibility or reasonableness of the proposed regulation under ECOA; first, a challenger could invoke the legislative history, and argue that a rule prohibiting compensation based on the terms of a loan is inconsistent with that history; second, the fact that the rule would be new and a change from the existing regulatory structure would weigh negatively in the final analysis. The merits of both arguments are not clear; in any event, a *Chevron* Step Two permissibility/reasonableness challenge to the proposed rule is certainly foreseeable.

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[18] I did not have time to do exhaustive research into this particular area; may warrant further work.

Conclusion—

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (alteration in original) (internal quotations omitted). The Bureau has significant discretion to promulgate rules under ECOA. These rules are accorded substantial deference. To the extent that ECOA does not address the issue of compensation, the Bureau can "fill the gap" by promulgating rules governing this area. Additionally, ECOA's delegation of rulemaking authority, as well as ambiguities in the statute, present space for the Bureau to clarify—through rulemaking—the kinds of practices that are prohibited. One potential obstacle to the proposed rulemaking is the possibility that a court might rule that Congress has already spoken to the issue—and foreclosed the Bureau's action. Additionally, challenges to the reasonableness and permissibility of such a rule can be anticipated.