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The Right to Deregulate: The CFPB's Authority to Remove the Ability-to-Pay Requirement as it Pertains to Payday Lenders

By Ben Davisson*

The Consumer Financial Protection Bureau (CFPB) is facing heat from twenty-five states' attorneys general for a proposal which could place many financially distressed consumers in an even more precarious position.¹ The proposal is to rescind the Bureau's rule requiring payday lenders to make a reasonable determination that the consumer will have the ability to repay the loan.² Because payday loans typically carry a very high interest rate and are often used by low-income consumers to make ends meet until their next payday, regulation of these loans is particularly appropriate in order to protect this class of consumers.³ That being the case, the attorneys general contended in a comment letter to the CFPB that the proposal is inconsistent with the Dodd-Frank Act and is deeply flawed as a matter of law and policy.⁴

The Dodd-Frank Act was signed into law in 2010 in response to the Great Recession.⁵ The Act established the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."⁶ The Act further authorized the CFPB to implement and enforce laws to ensure that the consumer financial products markets are fair, transparent, and competitive.⁷ While the act explicitly required residential mortgage lenders to make a reasonable and good faith determination that the consumer could repay the loan,⁸ it is silent on whether short-term lenders such as payday loan companies are

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¹ Neil Haggerty, *25 Attorneys General Oppose CFPB's Payday Rule Revamp*, American Banker (May 17, 2019), <http://www.americanbanker.com/news/25-attorneys-general-oppose-cfpbs-payday-rule-revamp>.

² *Id.*; 12 C.F.R. § 1041.5(b) (2019).

³ See *What is a Payday Loan?*, Consumer Financial Protection Bureau (June 02, 2017), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567/>.

⁴ Haggerty, *supra* note 1.

⁵ *Dodd-Frank Act*, History (Aug. 21, 2018), <https://history.com/topics/21st-century/dodd-frank-act>.

⁶ 12 U.S.C. § 5491(a) (2012).

⁷ 12 U.S.C. § 5511 (2012).

⁸ 15 U.S.C. § 1639c (2012).

required to make these determinations. In 2018, the CFPB answered that question in the affirmative when it enacted the regulation at issue.⁹

Now the question remains as to whether the CFPB can rescind its own rule, even if it might have a detrimental impact on consumers. This would hardly be the first time that the courts have been called upon to determine the authority of an administrative agency in relation to the powers delegated to it by Congress. In the seminal case on the issue, *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court instructed that “considerable weight” should be given to an administrative agency’s construction of a statutory scheme that it is entrusted to administer.¹⁰ It further cautioned that a court may not substitute its own construction of a statutory provision for that of an administrative agency so long as the agency’s interpretation is a reasonable one.¹¹

Not surprisingly, in *Chevron*, the Court deferred to the policy determinations of the Environmental Protection Agency (EPA) and held that its interpretation and implementation of a statutory scheme was reasonable and therefore immune from judicial scrutiny.¹² In that case, Congress had amended the Clean Air Act to require states with air quality problems to establish a permit system to regulate “new or modified major stationary sources” of air pollution.¹³ However, Congress never specifically defined the term “stationary source.”¹⁴ Thus, in its regulation to implement the permit system, the EPA adopted its own plantwide definition of the term “stationary source,” meaning that so long as a plant as a whole does not increase total emissions, then the plant is free to install or modify individual pieces of equipment.¹⁵ The Court noted that, while the term “stationary source” had been defined in one portion of the Act as “any building, structure, facility, or installation,” that definition was expressly limited to another program under the Clean Air Act and not to

⁹ 12 C.F.R. § 1041.5.

¹⁰ 467 U.S. 837, 844 (1984).

¹¹ *Id.*

¹² *Id.* at 866.

¹³ *Id.* at 840.

¹⁴ *Id.* at 851.

¹⁵ *Chevron*, 467 U.S. at 840.

the permit program at issue.¹⁶ Ultimately, the Court determined that Congressional intent could not be determined from the reading of the statutory language alone.¹⁷ Turning to the legislative history and the purposes of the Act, the Court noted that forbidding the plantwide definition of “stationary source” may very well have been consistent with the Act’s purpose of improving air quality.¹⁸ However, the Court also pointed out that the plantwide definition was also consistent with the Act’s concern for economic growth.¹⁹ In the absence of clear statutory language suggesting the meaning of the term “stationary source” and finding that the EPA’s adoption of the plantwide definition was not inconsistent with the purposes of the Clean Air Act, the Court then rejected the respondent’s policy argument by stating that such arguments carry no weight when an administrative agency is interpreting and constructing a statutory provision so long as that construction is a reasonable one.²⁰ Thus, even though the Court itself might have chosen a different construction of the term “stationary source,” it nonetheless deferred to the EPA’s construction of the term after concluding that its construction was reasonable.²¹

Chevron provides insight into the likely fate of the current challenge to the CFPB. Like in *Chevron*, where the EPA adopted the plantwide definition of “stationary source” in spite of Congress expressly forbidding that definition in another portion of the Act,²² here, the CFPB is proposing to rescind the ability-to-pay requirement for payday loans despite the Dodd-Frank Act requiring that assessment for mortgage lenders.²³ Although here, the language of § 1639c does not explicitly limit this requirement to mortgage lenders at the exclusion of other types of lenders, a court would likely conclude that Congress was particularly concerned about the dangers posed by subprime mortgage loans but recognized that the ability-to-pay requirement’s reach as applied to other types of lenders should be for the CFPB to decide. Also like in *Chevron*, where forbidding

¹⁶ *Id.* at 859-60.

¹⁷ *Id.* at 862.

¹⁸ *Id.* at 842, 864.

¹⁹ *Id.* at 863.

²⁰ *Chevron*, 467 U.S. at 866.

²¹ *Id.*

²² *Id.* at 859-60.

²³ Haggerty, *supra* note 1; 15 U.S.C. § 1639c.

the plantwide definition of “stationary source” may have been more in line with the Clean Air Act’s purpose of improving air quality,²⁴ here, prohibiting the CFPB from rescinding its ability-to-pay requirement may very well be in furtherance of the Bureau’s purpose of ensuring fair, transparent, and competitive consumer financial products markets.²⁵ However, many desperate consumers depend on payday loans and might otherwise be compelled to seek other more predatory and potentially illegal forms of lending.²⁶ Therefore, the Bureau’s decision to loosen the regulation is a reasonable policy choice by a Bureau responsible for ensuring fair, transparent, and competitive consumer financial products markets.²⁷ Once a court decides that the decision to rescind the ability-to-pay requirement is a reasonable one, it would likely refuse to entertain any policy arguments that might be raised.²⁸ Therefore, if this challenge finds its way to the courtroom, a court would likely defer to the CFPB’s decision and allow it to rescind the ability-to-pay requirement.

The challengers to the proposal certainly have their work cut out for them. If the CFPB ultimately decides to go through with its proposal, consumers will have to be extra diligent in dealing with payday lenders in the absence of a government safety net.

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²⁴ *Chevron*, 467 U.S. at 842, 864.

²⁵ 12 U.S.C. § 5511.

²⁶ Daniel Press, *How the Consumer Financial Protection Bureau’s Payday Loan Rule Hurts the Working Poor*, Competitive Enterprise Institute (January 17, 2018), <https://cei.org/content/how-consumer-financial-protection-bureaus-payday-loan-rule-hurts-working-poor>.

²⁷ See *Chevron*, 467 U.S. at 863.

²⁸ See *id.* at 866.