



The Department of the Treasury's Authority to Regulate GSE Debt: A Legal Analysis

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Summary

The Department of the Treasury is developing a more formalized approach for approving Fannie Mae's and Freddie Mac's debt issuances. Although the Department of the Treasury has traditionally used its approval authority merely to coordinate the timing of debt issuances, the department may seek to regulate the amount of debt that Fannie Mae and Freddie Mac may issue. This report analyzes the Department of the Treasury's legal authority over Fannie Mae and Freddie Mac and concludes that a court would likely hold that the department possesses the power to regulate the amount of debt issued by these two organizations.

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Introduction

In the wake of accounting scandals involving the Federal Home Loan Mortgage Corporation (Freddie Mac) and its sister organization the Federal National Mortgage Association (Fannie Mae) and, more recently, with various housing problems beginning with the subprime mortgage crisis, Congress has launched efforts concerning the oversight of Freddie Mac and Fannie Mae.¹ Legislative efforts to increase the oversight of these two entities are still pending. The Department of the Treasury may assert that it has the power to regulate Fannie and Freddie's debt issuances more strongly than it has in the past.² According to these reports, the Treasury Department would trace this authority to language in Fannie's and Freddie's charters. The Fannie Mae charter provides Fannie Mae the authority to issue obligations "upon the approval of the Secretary of the Treasury, and have outstanding at any one time obligations having such maturities and bearing such rate or rates of interest as may be determined by [Fannie Mae] with the approval of the Secretary of the Treasury."³ The Treasury Secretary has the same authority over Freddie Mac's securities issuances.⁴

The Treasury Secretary has traditionally, although not exclusively,⁵ exercised the approval authority with regard to Fannie's and Freddie's debt issuances—not to prevent them from issuing such debt but, rather, to time such issuances so that they do not conflict with the Department of the Treasury's own debt issuances. In other words, the Department of the Treasury has traditionally acted as a "traffic cop" with regard to Fannie and Freddie debt issuances as part of an overall effort to coordinate the federal government's debt issuances. As mentioned above, however, reports have circulated that the Treasury Department may seek to exercise its approval authority to regulate the amount of debt that Fannie and Freddie can issue.⁶

Analysis

The Supreme Court held in *Chevron, Inc. v. Natural Resources Defense Council*⁷ that courts should defer to a reasonable agency interpretation of an ambiguous statute that the agency is charged with administering. Later cases have clarified the scope of *Chevron*. For example, the *Chevron* deference is available only to interpretations of an agency to which Congress has delegated the authority to make "rules carrying the force of law."⁸ Generally, then, *Chevron* deference is warranted for agency interpretations after formal adjudication or notice-and-

¹ For information on proposals in the 110th Congress, see CRS Report RL34236, *Fannie Mae and Freddie Mac: Changes to the Regulation of Their Mortgage Portfolios*, by (name redacted).

² There are reports indicating that Treasury is considering new debt approval procedures for Fannie Mae and Freddie Mac. See, e.g., BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008: ANALYTICAL PERSPECTIVES, p. 75 (2007); Brian Collins, *Treasury Wants GSE Review*, NATIONAL MORTGAGE NEWS, November 27, 2006, at 1; and David S. Hilzenrath, *New Tack in Mortgage Firm Oversight*, WASHINGTON POST, April 30, 2004, at E4.

³ 12 U.S.C. § 1719(b).

⁴ 12 U.S.C. § 1455(j).

⁵ It appears that, in the past, the Treasury Secretary used his authority to prohibit a debt issuance by Fannie Mae. See, e.g., *Fannie Mae Request for Debt Sale Abroad is Denied by Regan*, WALL STREET JOURNAL, April 26, 1983, at 45.

⁶ See, fn. 3.

⁷ 467 U.S. 837 (1984).

⁸ *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

comment rulemaking.⁹ Actions pursuant to less formal interpretations are “entitled to respect” under an earlier case, *Skidmore v. Swift Co.*¹⁰ Because it is not clear how, or even if, the Treasury Department will issue an interpretation, this report analyzes the strength of the Treasury Department’s reported proposed interpretation under both *Chevron* and *Skidmore*.

***Chevron* Deference**

Chevron analysis requires a two-step inquiry. First, the court must ask if the statute is ambiguous. If not, then the court simply rules according to the clear meaning of the statute. However, if the statute is ambiguous, the court must determine whether the agency’s interpretation is reasonable. If the interpretation is reasonable, the court must then defer to that interpretation. Here, it would seem that the analysis would end after the first prong. The statute is not ambiguous; it vests approval authority in the Secretary of the Treasury. The language in both statutes clearly gives the Treasury Secretary approval authority over Fannie’s and Freddie’s debt issuances. There appears to be nothing in the statutory language to suggest that this approval authority is limited to the “traffic cop” role through which the Secretary has traditionally exercised this power. The statutory language in both Fannie Mae’s and Freddie Mac’s charters conditions the issuance of debt obligations upon the approval of the Secretary of the Treasury. The power to approve seems clearly to imply the concomitant power to *disapprove*.¹¹ Indeed, the power to approve would be no power at all if an agency did not have the ability to withhold that approval.

There is one notable Supreme Court case where the Court, faced with clear statutory language, used superceding congressional and agency action to find ambiguity under the first *Chevron* prong. In *FDA v. Brown & Williamson Tobacco Corp.*,¹² the FDA had interpreted its statutory mandate to regulate “drugs” and “devices” to give the agency the power to regulate tobacco. The Supreme Court, however, looked at the FDA’s long history of disclaiming authority over tobacco and the fact that Congress had legislatively addressed tobacco regulation separately six times to find a congressional intent contrary to the agency’s proposed interpretation.¹³ There appears to be no such history here which would force a reviewing court to look beyond the language of the statute. Congress has passed no legislation evincing a different congressional intent from what the language indicates. Further, Congress has not created a separate regulatory scheme for the regulation of Fannie’s and Freddie’s debt issuances.

Moreover, unlike the FDA in *Brown & Williamson*, the Treasury Department has never disclaimed or receded from its authority to regulate in this area. Although the department has not generally exercised this authority to stop Fannie and Freddie from issuing debt, the statutory authority to do so remains. Given that the Treasury Department has this authority, there appears to be nothing to prevent the department from exercising it in a different way. As the Supreme

⁹ See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

¹⁰ 323 U.S. 134, 140 (1944). For a discussion of the different levels of deference due to agency interpretations, see Thomas W. Merrill and Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001).

¹¹ See, e.g., *State v. Duckett*, 130 S.E. 340 (S.C. 1925) (“Approval implies knowledge and exercise of discretion after knowledge”); *McCarten v. Sanderson*, 109 P.2d 1108 (Mont. 1941).

¹² 529 U.S. 120 (2000).

¹³ *Id.* at 137-138.

Court has held, agencies must be allowed to “adapt their rules and policies to the demands of changing circumstances.”¹⁴

Although it seems doubtful that a court using the *Chevron* analysis would even get to the second prong of that analysis, the Treasury Department’s reported proposed exercise of authority would very likely be legal under *Chevron*’s second prong. Under this highly deferential prong, a court must accept an agency’s interpretation so long as that interpretation is reasonable, whether or not the court agrees with it. For the same reasons discussed above, it appears difficult to imagine bases upon which a court would find the Treasury Department’s reported proposed interpretation here to be unreasonable. If Congress had wanted to limit the Treasury Department’s approval authority, Congress could have done so. Because Congress chose instead to use broad language in describing Treasury’s authority, it follows that a broad interpretation of that authority would likely be judged to be reasonable.

***Skidmore* Deference**

Although *Chevron* requires a court to defer to an agency interpretation of an ambiguous statute, so long as the interpretation is reasonable, an agency interpretation under *Skidmore* is merely guidance. The weight of the agency’s interpretation depends upon a variety of contextual factors, including the thoroughness evident in the agency’s consideration of the interpretation, the validity of its reasoning, its consistency with earlier and later pronouncements, “and all those factors which give it power to persuade, if lacking power to control.”¹⁵ In essence, under the *Skidmore* analysis, the court will determine the statute’s meaning, merely taking into account the agency’s interpretation as one tool among the many statutory interpretation tools used by courts—unless the agency can convince the court that the agency has some special body of knowledge warranting greater deference.¹⁶

One of the most basic premises of statutory construction is that the statutory language itself should be the initial touchstone for analysis. The Supreme Court has consistently stated that “the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms.”¹⁷ As mentioned above, the statutory language at issue here unambiguously grants approval power to the Secretary of the Treasury without any qualifying language limiting the exercise of this power in any way. Further, as the Supreme Court has stated, “legislative history is irrelevant to the interpretation of an unambiguous statute.”¹⁸

Although the general rule is that extrinsic aids such as legislative history are only to be used when a statute is unclear and ambiguous, there appears to be no rule that forbids a court from examining legislative history of clear language.¹⁹ Courts have on occasion allowed the admission

¹⁴ *Motor Vehicles Mfrs. Assoc. of the United States, Inc., v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 42 (1983).

¹⁵ 323 U.S. at 140.

¹⁶ See Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1131 (April 2001).

¹⁷ *Caminetti v. United States*, 242 U.S. 470, 485 (1917); see also *United Air Lines, Inc., v. McMann*, 434 U.S. 192, (1997).

¹⁸ *United Air Lines, Inc., v. McMann*, 434 U.S. 192, 199 (1997).

¹⁹ 2A SUTHERLAND’S STATUTORY CONSTRUCTION § 48.01 (1992).

of legislative history to interpret unambiguous statutes if that history clearly expresses a legislative intent contrary to the language.²⁰ It is important, then, to examine the legislative history and see if it points strongly against the interpretation that the language appears to command.

Fannie Mae has been authorized to issue obligations since 1934.²¹ However, it was not until 1954, when Congress re-chartered Fannie Mae as a mixed government and private sector entity, that Congress inserted into Fannie Mae's charter the aforementioned language conditioning the issuance of debt obligations on the Secretary of the Treasury's approval.²² Although the legislative history is silent as to why the Secretary of the Treasury was given this authority or how Congress expected him to use it, the clear language suggests that the power is a broad one.²³

The statutory language indicates a broad authority vested in the Secretary of the Treasury to regulate Fannie Mae's debt issuances. However, the Secretary has generally used this power not to disapprove of proposed issuances but, rather, to coordinate these issuances so as not to conflict with the Treasury Department's debt issuances.²⁴ One House committee had this in mind in 1989 when Congress gave Freddie Mac powers similar to those held by Fannie Mae to issue debt.²⁵ Although the House report that accompanied that legislation stated that one of the overarching purposes of the statute was to give Freddie Mac powers and authority parallel to those enjoyed by Fannie Mae,²⁶ Part III of the House Report, submitted by the Committee on Banking, Housing, and Urban Affairs, also offered a very different picture of how the committee expected the Secretary of the Treasury to exercise the approval authority:

The title also grants the Secretary of the Treasury certain approval authorities over [Freddie Mac's] issuance of unsecured debt obligations and mortgage-related securities. Treasury already possesses such powers over [Fannie Mae] ... The Committee intends that the Treasury shall use these powers solely to ensure that [Freddie Mac's] financing activities are conducted in a way that promotes [Freddie Mac's] statutory purpose. *In fulfilling this responsibility, and as is the case with [Fannie Mae], the Committee expects that Treasury will function largely as a "traffic cop" to assure that securities issued or guaranteed by [Freddie Mac] are marketed in an orderly way in appropriate coordination with the financing activities of the Treasury and other government-sponsored enterprises (GSEs)*²⁷ [Emphasis added].

At first glance, it appears possible that Congress had a different intent in mind when it granted this approval authority to the Secretary of the Treasury. Put simply, although the statutory language concerning the Treasury Secretary's authority here is clear, one could argue that Congress's understanding of that authority may have changed between the time that it was

²⁰ See, e.g., *Escobar Ruiz v. Immigration and Naturalization Service*, 838 F.2d 1020 (9th Cir. 1988).

²¹ Act of June 27, 1934 ch. 847, title III, § 304.

²² P.L. 83-560, § 201.

²³ A broad interpretation of this authority would also be consistent with the significant role assigned by Congress in the 1954 legislation to the Secretary of the Treasury in ensuring the success of Fannie Mae's transition to a mixed entity. See, e.g., Conf. Rep. No. 2271, 83rd Cong., 2d Sess. (1954), reprinted in 1954 U.S.C.C.A.N. 2824, 2842.

²⁴ See David S. Hilzenrath, *New Tack in Mortgage Firm Oversight*, WASHINGTON POST, April 30, 2004, at E4.

²⁵ P.L. 101-73, § 731(i).

²⁶ H.Rept. 101-54(III) (1989), reprinted in 1989 U.S.C.C.A.N. 86, 385.

²⁷ H.Rept. 101-54(III) (1989), reprinted in 1989 U.S.C.C.A.N. 86, 386.

granted over Fannie Mae and when it was granted to Freddie Mac, because of the way that the Department of the Treasury had traditionally chosen to exercise this authority.

For a variety of reasons, however, the above-quoted report language from 1989 would not likely be enough to convince a court that the Secretary of the Treasury's power is limited here. First and foremost, the language represents the opinion of one committee, not the entire Congress. The Supreme Court has made it clear that a committee's direction cannot be equated with a statute passed by Congress.²⁸ Under the Constitution, federal statutes must pass both Houses of Congress and be signed by the President to have legal effect. As the Supreme Court has stated, "unenacted approvals, beliefs, and desires are not laws."²⁹ This is not to suggest that committee reports are not important interpretive tools. On the contrary, these reports are among courts' favorite sources of interpretation. Such sources, however, cannot be divorced from the statutory language. "Courts have no authority to enforce [a] principle gleaned solely from legislative history that has no statutory reference point."³⁰ In this case, Congress could have chosen to enact language explicitly limiting the Treasury Secretary's authority to the "traffic cop" function described above. Congress chose not to do so, however.

Even if the report language were to be given greater weight, however, the language itself does not evince an intent completely to constrain the Treasury Secretary's authority. The language describes an expectation that, concerning securities and debt issuances, the department would function "*largely* as a 'traffic cop.'" This use of the word "*largely*," as opposed to "*only*," suggests that there are other, unenumerated ways in which Treasury could exercise that authority.

Consequently, the legislative history does not provide a clear Congressional intent that courts should depart from the clear statutory language. In addition to the clear language, as mentioned above, a reviewing court using the *Skidmore* analysis would give weight to the Treasury Department's opinion that the Treasury Secretary possesses the power to regulate debt issuances by Fannie and Freddie. The likely final result under the *Skidmore* analysis, then, appears to be the same as that under *Chevron* deference.

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²⁸ See *TVA v. Hill*, 437 U.S. 153, 191 (1969).

²⁹ *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1998).

³⁰ *Shannon v. United States*, 512 U.S. 573, 581 (1994) (quoting *International Brotherhood of Elec. Workers v. National Labor Relations Board*, 814 F. 2d 697, 712 (D.C. Cir. 1987).

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