

Financial Institutions Law Update

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US Supreme Court Fails to Resolve Guarantors' Status Under ECOA

On March 22, in an Equal Credit Opportunity Act (ECOA) case that was closely followed and highly anticipated, the U.S. Supreme Court (in a four-to-four vote) failed to issue a definitive ruling regarding whether Regulation B provides protections to spouses when they sign or are asked to sign guarantees. *Hawkins v. Cmty. Bank of Raymore*, 577 U. S. ____ (2016). In *Hawkins*, a bank entered into a series of loans and modifications with a two-member LLC and required personal guarantees not only from the two named LLC members, but also their spouses. When the LLC eventually defaulted on the loans, the bank attempted to collect under the spouses' guarantees. In response, the spouses filed an action against the bank alleging that requiring their guarantees constituted discrimination on the basis of marital status, an ECOA violation. The legal issue stems from whether a non-applying spouse is an "applicant" under ECOA. ECOA defines an applicant as someone who "applies to a creditor for an extension of credit," while Regulation B, purporting to interpret the statute, adds that the term "includes any person who is or may become contractually liable regarding an extension of credit." As a result, under the regulatory interpretation of the statute, a guarantor is also an "applicant" and therefore protected by the anti-discrimination provisions of ECOA.

Circuit Courts of Appeals are split as to whether a spouse-guarantor is correctly to be treated as an "applicant" who is provided all of Regulation B's protections: the Seventh and Eighth Circuits have concluded that guarantors cannot allege ECOA violations, relying on the plain language of ECOA, whereas the First, Third, and Sixth Circuits have allowed guarantors to allege ECOA violations, relying instead on Regulation B's more expansive interpretation of ECOA. Although the Supreme Court affirmed the Eighth Circuit's position in *Hawkins*, it did so with only eight justices on the bench, with the result that the four-four decision (i) leaves the Eighth Circuit's decision in place for the states the Eighth Circuit covers (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota), and (ii) does not decide the issue throughout the country.

With this basic issue of whether a guarantor has Regulation B rights remaining in doubt, creditors are best advised to continue to follow the Consumer Financial Protection Bureau's official interpretation that if, under the creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, the creditor may request a cosigner or guarantor, and the applicant's spouse may serve that purpose, but the creditor is not permitted to require that the spouse be the additional party. Of course, when a spousal signature is legally required under state law, spousal signatures can be required on those specific documents only.

**For more information, please contact the Financial Institutions Industry Team at
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