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# REGULATION B UPDATE: Can a Spousal Guarantor Invoke its Protections?

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In October 2015, the U.S. Supreme Court heard arguments in *Hawkins v. Community Bank of Raymore*, a case concerning whether guarantors of defaulted loans, who are the spouses of a borrower's principals, are entitled to pursue the protections of the Equal Credit Opportunity Act (ECOA). Read our alert on this hearing for more background and information.

On March 22, 2016, an equally divided Supreme Court affirmed the lower court decisions that spousal guarantors do *not* have a cause of action to invalidate their guaranties based on a claim of discrimination based on marital status.

The *Hawkins* decision is the Court's first since the death of Justice Antonin Scalia in February. Because the judgment was affirmed by an equally divided Court, although it affirms the lower court ruling, it sets no nationwide precedent.

## The Facts

In the *Hawkins* Case, Valerie Hawkins and Janice Patterson (Spousal Guarantors) sought to invalidate guaranties that they had executed in favor of the Community Bank of Raymore (Bank) guaranteeing loans totaling approximately $2,000,000 made by the Bank to entities owned and controlled by their respective husbands. The Spousal Guarantors claimed that they were discriminated against based on their marital status in violation of the ECOA.

The ECOA prohibits a creditor from discriminating against an ***applicant*** for credit based on his or her marital status or from requiring a spousal guaranty or co-signor if an applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested (except in certain defined circumstances). Under the ECOA, only an "applicant" has a cause of action against a creditor. While the text of the ECOA defines an "applicant" as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit," the Federal Reserve Board's Regulation B expands the ECOA's definition of an "applicant" to specifically include guarantors, sureties, endorsers and similar parties.

## The Ruling

The Supreme Court's decision affirmed the lower court rulings that the Spousal Guarantors, as guarantors, are not "applicants" for purposes of gaining the protections of the ECOA (despite the Federal Reserve Board's expansion of the definition of "applicant" to include guarantors), and do not have a cause of action to invalidate their guaranties based on a claim of discrimination based on marital status. However, because of the Court's even split, the law remains unsettled and the Court may be asked to hear the case again.

## Analysis

*Hawkins* and the Supreme Court's decision do *not* affect the prohibitions against a creditor discriminating against an applicant based on his or her marital status or requiring a spousal guaranty or co-signor if the applicant qualifies under the creditor's standards of

creditworthiness for the amount and terms of the credit requested (except in specific circumstances). Lenders still need to comply with Regulation B and exercise caution when requiring a spousal guarantee. There are situations in which a creditor may require or accept a spousal guaranty, but lenders will still need to make sure that they are doing so in strict compliance with the ECOA and properly document the circumstances under which a spousal guaranty of a loan is obtained.

We will continue to monitor this issue and provide updates of further developments. Please contact Meredith A. Bieber (215.864.6292; bieberm@whiteandwilliams.com) or any other member of our Finance Group for further assistance.

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