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AN ABRIDGED SUMMARY OF THE EQUAL CREDIT OPPORTUNITY ACT (ECOA) FOLLOWING THE SUPREME COURT'S DIVIDED RULING ON SPOUSAL GUARANTORS

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On March 22, 2016, an evenly divided U.S. Supreme Court affirmed the Eighth Circuit Court of Appeals' decision in ***Hawkins v. Community Bank of Raymore***, in which the Circuit Court held that spousal guarantors could not bring discrimination claims under Regulation B of the ECOA against creditors when they are required by a creditor or lender to execute guaranties in favor of such creditor or lender.

To understand the decision, one must first understand the ECOA and Regulation B adopted by the Federal Reserve Board to implement the ECOA.

1. **The General Rule**. A creditor may not require the signature of an Applicant's spouse (or any other person) other than a joint applicant on any credit instrument if the Applicant qualifies for the credit requested under the creditor's standards of creditworthiness. This rule applies to all types of open-end, term, secured and unsecured consumer and business credit.

If the Applicant does not meet the creditor's standards, the creditor is then permitted to condition approval upon the Applicant either (a) furnishing the signature of another person (co-signor or guarantor) but cannot require that such person be the Applicant's spouse or (b) securing credit with sufficient collateral (or additional collateral) to satisfy the creditor's standards.

Therefore, if a creditor or lender routinely requires spousal guarantees without first ascertaining whether an applicant is creditworthy, then the conditioning of the credit on a spousal guarantee (or an guaranty by any other party) violates Regulation B of the ECOA.

2. **Some Exceptions to the Rule.**

If an Applicant requests secured credit, a creditor/lender may under Regulation B require the signature of the Applicant's spouse on any instrument necessary under applicable state law (such as California) to make the property being offered as security available to satisfy the debt in the event of a default.

If an Applicant requests unsecured credit and resides in a Community Property state (such as California), the creditor/lender may under Regulation B require the signature of the Applicant's spouse on any instrument necessary under state law to make the community property available to satisfy the debt in the event of default if: (a) applicable state law denies the Applicant the sole power to manage or control sufficient community property to qualify for the amount of the credit requested; and (b) the Applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to the community property.

3. **Business Lending and ECOA.**

Ambiguities relating to business lending rules in Regulation B were clarified in 2003 by amendments making clear that applications for credit, business plans, and financial statements that cover jointly held assets or which are signed by both spouses cannot be presumed by the

lender to be the joint application by both spouses. A person's intent to be a joint applicant must be manifest and evidenced at the time of the application. Where there is no written application, as is often the case with business credit, an Applicant's intent to be a joint Applicant must be demonstrated by a written statement that expresses such intent and in the file of the lender at the time the credit is granted.

Even if a business is creditworthy, a creditor may require the personal guarantees of the partners, directors, officers and shareholders of a closely held business. Regulation B, however, prohibits a creditor from requiring the signature of a spouse of any of the foregoing in the same way that it does in consumer loans. Therefore, if a creditor first determines that a guarantor is not creditworthy based upon their individual assets, then the creditor may require an additional signature and that signature may be required to be that person's spouse in appropriate circumstances. So, while a creditor may require officers and directors of a business to personally guarantee the business loan and may require the guarantee of another person in appropriate circumstances, the creditor may not automatically require that spouses of married officers, directors and shareholders also personally guarantee the loan.

4. Who is the Applicant.

In an amendment to Regulation B, the Board of Governors of the Federal Reserve System interpreted the term "Applicant" to include guarantors (this interpretation was also adopted by the Consumer Financial Protection Bureau that was recently established). In ***Hawkins,*** however, the court refused to follow Regulation B and instead concluded that "a person is an Applicant only if she requests credit…" The court concluded that the spousal guarantors in ***Hawkins,*** were not Applicants under the ECOA and the bank did not violate ECOA by requiring them to execute the guaranties.

The Supreme Court affirmed the Eighth Circuit's holding by a 4-4 decision leaving the ruling in ***Hawkins*** to remain the law in the Eighth Circuit. The Case however is not a nationwide precedent and creditors must continue to follow the varying decisions of the courts where they operate.

5. Conclusion.

Although the Eighth Circuit held that a guarantor is not an "Applicant" under the ECOA, this does not mean that creditors should require the signature of a spousal guarantor. Under Regulation B a creditor cannot require the signature of an Applicant's spouse or other person on any credit instrument if the Applicant qualifies under the creditor's standards of creditworthiness for the credit requested. Additionally, Regulation B explains that when an Applicant requests individual credit but does not meet the creditor's standards, the creditor may require a cosigner, guarantor, endorser or other party--but cannot require that it be the spouse. The decision in Hawkins does not appear to affect these rules. However, based upon the decision, if a creditor illegally requires a spouse to sign a guaranty as a condition to the credit, only the Applicant will have standing to sue the creditor under the ECOA-- at least in the Eighth Circuit.

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