The Equal Credit Opportunity Act makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction … on the basis of … marital status." 15 U.S.C. § 1691(a). The ECOA defines "applicant" to include "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." Id. § 1691a(b). Today, the Supreme Court granted *certiorari* in Hawkins v. Community Bank of Raymore, No. 14-520, to answer two questions: (1) whether the term "applicant" unambiguously excludes guarantors to a loan; and (2) if it does not, whether the courts should defer to a Federal Reserve Board regulation, 21 C.F.R. § 202.2(e) ("Regulation B"), which interprets "applicant" to include guarantors. This case is of significant interest to the financial industry because the Supreme Court's ruling will help clarify the scope of the ECOA's antidiscrimination protections and could affect lenders' ability to require spousal guaranties on loans to closely held corporations or partnerships.

The petitioners are guarantors for several loans and loan modifications that the respondent, Community Bank of Raymore, extended to a limited-liability company. The sole members of the company are the petitioners' spouses. When the company failed to meet its loan obligations, the bank declared a default and demanded payment from the company and the petitioners. The petitioners sued, claiming that their guaranties were void and unenforceable under the ECOA as interpreted by Regulation B. The petitioners alleged that the bank violated § 1691(a) when it required them to guarantee the loans simply because they were married to the members of the company.

The district court granted summary judgment for the bank, holding that a guarantor unambiguously is not an "applicant" as defined by the ECOA, and thus is not entitled to invoke § 1691(a). Because the district court considered § 1691(a)'s language to be clear, it concluded that Regulation B was "not entitled to deference."

The Eighth Circuit affirmed, holding that "the text of the ECOA clearly provides that" a guarantor is not an "applicant." According to the court of appeals, "a person is an applicant only if she requests credit," but the execution of a guaranty is not a request for credit; it is simply "'a promise to answer for another person's debt, default, or failure to perform,'" and is thus "collateral and secondary to the underlying loan transaction." Having concluded that the ECOA is unambiguous, the court declined to defer to Regulation B. The Eighth Circuit acknowledged, however, that its decision conflicts with a recent Sixth Circuit decision holding that the term "applicant" is ambiguous and therefore deferring to Regulation B; the court also characterized decisions on the issue by the First and Third Circuits as assuming simply that Regulation B warrants deference.

Absent extensions, which are likely, amicus briefs in support of the petitioners will be due on April 23, 2015, and amicus briefs in support of the respondent will be due on May 26, 2015. Any questions about this case should be directed to Donald M. Falk (+1 650 331 2030) in our Palo Alto office.