

[Banking and Finance Law Daily Wrap Up, EQUAL CREDIT OPPORTUNITY —CFPB argues against dismissal of complaint alleging race discrimination by mortgage lender, \(Mar. 16, 2021\)](#)

Banking and Finance Law Daily Wrap Up

[Click to open document in a browser](#)

By Nicole D. Prysby, J.D.

The Bureau argued that Regulation B's discouragement prohibition is reasonably related to ECOA and applies to prospective applicants, and that neither Regulation B nor the Bureau's action against Townstone violates the First Amendment.

The Consumer Financial Protection Bureau filed a [response](#) to Townstone Financial, Inc.'s motion to dismiss the Bureau's claims for violations of the Equal Credit Opportunity Act (ECOA) and Regulation B. The Bureau's complaint alleged that Townstone engaged in practices that would discourage prospective applicants, on the basis of race, from applying for credit in the Chicago area. Townstone argued that the Bureau improperly sought to expand ECOA's reach to include "prospective applicants" and that the Bureau unconstitutionally sought to regulate the content and viewpoint of protected speech (see [Banking and Finance Law Daily](#), Feb. 9, 2021). The Bureau responded that courts have recognized Regulation B's discouragement provision and have stated that its coverage of prospective applicants is independent of the statute's definition of "applicants," which governs who can bring private causes of action. Whether a private plaintiff may satisfy the definition of "applicant" has no bearing on the Bureau's authority to enforce ECOA and Regulation B's prohibitions. The Bureau also argued that neither Regulation B nor its action against Townstone violates the First Amendment, because the speech at issue is commercial speech falling outside the protections of the First Amendment. The repeated promotion of Townstone's services and the promise of the benefits that prospective applicants might expect from applying for mortgage loans from Townstone highlight the commercial nature of the Townstone radio broadcasts, and because the Bureau's regulation of Townstone's commercial speech directly advances the Bureau's interest in prohibiting discriminatory lending, it is a valid restriction on Townstone's commercial speech.

Complaint and motion to dismiss. The Bureau alleged that Townstone violated ECOA and Regulation B by engaging in unlawful discrimination, including redlining and practices that would discourage prospective applicants, on the basis of race, from applying for credit in the Chicago area. The Bureau alleged that Townstone markets through a radio infomercial that regularly includes statements that would discourage African-Americans prospective applicants from applying for mortgage loans. For example, the show hosts discussed a grocery store in downtown Chicago as the "Jungle Jewel" and disparaged majority-African-American areas as "hoodlum weekend" and approaching "a real war zone." Townstone and its owner filed a motion to dismiss the Bureau's complaint, arguing that the Bureau improperly sought to expand the reach of ECOA, and that Regulation B is unconstitutional. Specifically, Townstone argued that the Bureau improperly sought to expand ECOA's reach to include "prospective applicants." Townstone also argued that contrary to the First Amendment, the Bureau unconstitutionally seeks to regulate the content and viewpoint of protected speech and does so in a way that is unconstitutionally overbroad and vague.

Bureau's response. The Bureau argued that the complaint states claims under ECOA and Regulation B. Regulation B's discouragement prohibition is not manifestly contrary to ECOA, but helps to fulfill ECOA's goals, and therefore is "reasonably related" to ECOA and should be upheld by the court. Regulation B carries out ECOA's purpose by making clear that creditors cannot evade the statute's prohibition on discrimination in lending by discouraging applications—in effect, telling prospective applicants that, because of some protected characteristic, they need not apply. As a lawful rulemaking, Regulation B is not "in excess of statutory jurisdiction" and ECOA would not be effective without the discouragement provision. Courts have recognized

Regulation B's discouragement provision, and have been direct in stating that its coverage of prospective applicants is independent of the statute's definition of "applicants," which governs who can bring private causes of action. A private plaintiff's ability to satisfy the definition of "applicant" has no bearing on the Bureau's authority to enforce ECOA and Regulation B's prohibitions. The complaint, argued the Bureau, alleges facts sufficient to state a claim under ECOA and Regulation B, when the evidence (including the statistical evidence) is considered as a whole.

The Bureau also argued that neither Regulation B nor its action against Townstone violates the First Amendment. The speech at issue is commercial speech falling outside the protections of the First Amendment, or at the least, is only subject to intermediate scrutiny. Protecting equal access to credit is a permissible objective, and any incidental impact on expression occasioned by enforcement of ECOA, via Regulation B, is no more protected than a "White Applicants Only" sign that can be permissibly prohibited under a lawful ban on race-based hiring. Even if Townstone's discouraging statements and other commercial speech contained discussions of public issues, they would remain commercial speech properly subject to Regulation B. The repeated promotion of Townstone's services and the promise of the benefits that prospective applicants might expect from applying for mortgage loans from Townstone highlight the commercial nature of the Townstone Financial Show radio broadcasts and podcasts. Because the Bureau's regulation of Townstone's commercial speech directly advances the Bureau's interest in prohibiting discriminatory lending, it is a valid restriction on Townstone's commercial speech. And Regulation B is not overbroad as applied to Townstone. For each of the discouraging statements described in the complaint, a reasonable African American prospective applicant seeking to finance the purchase of properties in African-American neighborhoods in Chicago could well conclude that the statement conveys the Townstone Financial Show's hosts' intent to discourage, and be discouraged, on the basis of race or the racial composition of particular neighborhoods, from submitting a mortgage-loan application.

Finally, the Bureau argued that ECOA and Regulation B provide fair notice of the prohibited conduct and thus comport with the Fifth Amendment.

Companies: Townstone Financial, Inc.

LitigationEnforcement: CFPB CommunityDevelopment EqualCreditOpportunity IllinoisNews Loans Mortgages