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Federal Trade Commission Files Friend of the Court Brief in Equal Credit Opportunity Act Case

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The Federal Trade Commission ("FTC") filed an amicus brief in a case before the Seventh Circuit that was brought on appeal by the Consumer Financial Protection Bureau ("CFPB") against a Chicago-area lender, Townstone Financial, for violations of the Equal Credit Opportunity Act (ECOA). In its original complaint against the lender, filed in the Northern District of Illinois, the CFPB alleged that the lender, through a podcast and radio show, "made statements about African Americans and predominantly African-American neighborhoods that would discourage African-American prospective applicants from applying" for mortgage loans. Judge Franklin U. Valderrama of the Northern District of Illinois issued an order that dismissed the ECOA count from the action, in response to a motion to dismiss filed by the lender. In the opinion accompanying the order, the court found that because the rule promulgating ECOA, Regulation B, contained an express prohibition of discouraging consumers, while the statute itself only prohibits the discouragement of applicants, the CFPB's basis for alleging an ECOA violation failed the Chevron test.

The FTC, which is also authorized to enforce ECOA and Regulation B, filed the amicus brief observing that the FTC "has decades of experience in monitoring credit markets for violations of ECOA and Regulation B and . . . has a strong interest in their proper application." In support of the CFPB, the FTC observed that the anti-discouragement provisions of Regulation B at question in the case have been settled for almost 50 years and that the language dates back to 1975, when Regulation B was initially written and promulgated. In addition, the FTC points to concerns that Congress initially had regarding the possibility of evasion of ECOA's requirements and its express directive in ECOA that necessary rules be promulgated "to prevent circumvention or evasion" of those requirements. To this point the FTC observed, "[i]f, as the district court held, ECOA and Regulation B apply only after an individual formally submits an application, creditors could bypass the statute's fair lending requirements entirely by preventing protected classes from applying for credit (through flagrantly discriminatory adverting, for

example).” In conclusion, the FTC warns that if the district court decision is allowed to stand, then “consumers . . . after decades of protection – [would] be stripped of a pillar of Congress’s promise of discrimination-free credit markets.” The FTC’s amicus brief joins briefs filed by several others, including the National Fair Housing Alliance and the National Consumer Law Center.