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SMALL BUSINESS ADMINSTRATION (SBA)

Submitter Information

Address: United States,
Email: jennifer.smith@sba.gov
Submitter's Representative: Major L. Clark, III and Jennifer A. Smith
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General Comment

See attached file(s)

Attachments

SMALL BUSINESS ADMINSTRATION (SBA)

U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

April 15, 2024

VIA ELECTRONIC SUBMISSION

Michael J. Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Re: Business Combinations Under the Bank Merger Act; Docket ID OCC-2023-0017; RIN 1557-AF24

Dear Acting Comptroller Hsu:

On February 13, 2024, the Office of the Comptroller of the Currency (OCC) published a notice of proposed rulemaking (NPRM) on Business Combinations Under the Bank Merger Act in the Federal Register.[1] The proposed rule would amend the procedures and would add an appendix outlining a policy statement that summarizes the principles the OCC uses when it reviews proposed bank merger transactions under the Bank Merger Act. It would also remove provisions for expedited review and the use of streamlined applications. The Office of Advocacy (Advocacy) is concerned about the factual basis in the OCC's Regulatory Flexibility Act (RFA) certification and recommends that the OCC allow small entities to have expedited review and the streamlined application process.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

[1] 89 Fed. Reg. 10010 (Feb. 13, 2024).

The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.[4] Additionally, Section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.[5] The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.[6] If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.[7] The agency must provide a statement of factual basis that adequately supports its certification.[8]

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[9] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.[10]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[11]

The Office of Advocacy performs outreach through roundtables, conference calls, and other means to develop its position on important issues such as this one. The Office of Advocacy held a conference call with stakeholders on March 5, 2024, to discuss the impact of this NPRM on small entities and less burdensome alternatives to the rule as proposed. Advocacy's comments reflect the feedback that it received from stakeholders about the potential impact of the proposal on small businesses.

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[2] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[3] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[4] 5 U.S.C. § 603.
[5] *Id.* § 609.
[6] *Id.*
[7] *Id.* § 605(b).
[8] *Id.*
[9] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[10] *Id.*
[11] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

B. The Proposed Rule

On February 13, 2024, the OCC published a proposed rulemaking on Business Combinations Under the Bank Merger Act in the Federal Register.[12] The proposed rule would amend the procedures and add an appendix outlining a policy statement that summarizes the principles the OCC uses when it reviews proposed transactions under the Bank Merger Act (BMA).[13]

The BMA governs the OCC's review of business combinations of national banks and federal savings associations with other insured depository institutions that result in a national bank or federal savings association. Under the BMA, the OCC must consider competition, the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, the risk to the stability of the United States banking or financial system, and the effectiveness of any insured depository institution involved in combatting money laundering activities, including in overseas branches. The BMA generally requires public notice of the transaction to be published for 30 days. OCC regulations require the public notice include essential details about the transaction and instructions for public comment. The regulations incorporate the statutory 30-day public notice period and provide a 30-day public comment period, which the OCC may extend. The OCC may also hold a public hearing, public meeting, or private meeting on an application.[14]

The OCC is proposing two substantive changes to its business combination regulation. First, the OCC proposes to remove the expedited review procedures in 12 C.F.R. § 5.33(i). Paragraph (i) currently provides that a filing that qualifies as a business reorganization as defined in paragraph (d)(3) or that qualifies as a streamlined application under paragraph (j) is deemed approved as of the 15th day after the close of the comment period, unless the OCC notifies the applicant that the filing is not eligible for expedited review, or the expedited review process is extended, under 12 C.F.R. § 5.13(a)(2).[15]

Second, the OCC proposes to remove the OCC's streamlined business combination application rather than the full Interagency Bank Merger Act Application. The streamlined application requests similar information to the Interagency Bank Merger Act Application. However, it only requires an applicant to provide detailed information if the applicant answers yes to one of a series of yes or no questions. A transaction eligible for a streamlined application also currently qualifies for expedited review. As noted above, the proposed rule would remove expedited review.[16]

The OCC certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.[17]

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[12] 89 Fed. Reg. 10010.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 10,011.
[16] *Id.*
[17] *Id.* at 10,015.

II. The Certification under the Regulatory Flexibility Act Lacks an Adequate Factual Basis

As noted above, the OCC prepared a certification in lieu of an initial regulatory flexibility analysis (IRFA). Section 603 of the Regulatory Flexibility Act (RFA) requires agencies to perform an IRFA to explain the economic impact of the action on small entities and consider less costly alternatives. However, Section 605 of the RFA allows the agency to prepare a certification in lieu of an IRFA, if the action is not expected to have a significant economic impact on a substantial number of small entities. The certification must be supported by a factual basis.

The OCC's certification lacks sufficient information about the number of small entities that may be impacted in its factual basis. In the certification, the OCC states that it currently supervises 1,057 financial institutions, of which approximately 661 are small.[18] The OCC estimates that on average, 38 OCC-supervised institutions could be impacted by the rulemaking a year. The OCC's estimate is based on a five-year average of the number of business combination applications submitted to the OCC from 2019 through 2023.[19]

The certification lacks clarity on whether or not the estimate pertains to small financial institutions. Does the estimate of 38 OCC-supervised institutions refer to all financial institutions regardless of size, or does the estimate only reflect small financial institutions? The OCC needs to clarify the size of the institutions it is referring to in its estimate. If the estimate is not limited to small financial institutions, Advocacy recommends that the OCC calculate the number of small financial institutions that may be impacted. Additionally, the OCC should estimate the total number of small entities that are likely to be affected by the rule and not just the number of small entities affected in a given year.

Likewise, the OCC's assertion of no significant economic impact is also questionable. In the certification, the OCC states:

> In terms of the potential impact of the proposed changes on affected institutions, the OCC does not expect that the changes would: (1) result in a different decision outcome for the merger application by the OCC or (2) result in a burden on affected institutions. First, proposed appendix A would seek to provide transparency with respect to the OCC's BMA review process including the OCC's consideration of certain statutory factors under the BMA, which should provide regulated institutions with additional clarity and transparency about the OCC's decision-making process. Second, the removal of the expedited review process would potentially affect OCC staff, but not affect banks, as the scope of information to be submitted by

[18] *Id.*
[19] *Id.*

> banks would not change. And third, the OCC expects that the removal of the streamlined application process would not result in a substantive impact on affected institutions or on the information collected, as the streamlined application and the interagency BMA application requests substantively the same information. (33) Therefore, the OCC expects the impact to affected OCC-supervised institutions would likely be de minimis. For these reasons, the OCC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.[20]

Simply stating that the impact is de minimis is not sufficient. The OCC has no true information on the impact of this proposal on small entities. There should be substantive information to support the conclusion that the impact is de minimis.

Advocacy is concerned that the OCC has underplayed the economic impact and that impact on small entities could be significant. For example, in terms of the streamlined application, the OCC states that the two applications request substantively the same information. Advocacy is confused by this assertion because it is not supported by any data. In fact, in a footnote, OCC states that the streamlined application has yes or no questions. If the answer is yes, then the applicant needs to provide additional information.[21] It seems that a streamlined application would not be as time consuming and burdensome as a regular merger application if the applicant does not answer yes and need to provide additional information as result of responding yes. Does the OCC have data that shows the amount of time it takes to fill out the streamlined application is the same as the amount of time it takes to fill out the regular merger application form? Do the applications require the same level of expertise? This is the type of information that the OCC should provide in the factual basis to its certification.

Since the streamlined application and the regular merger applications are OCC forms, the OCC should be able to determine the amount of additional work that the proposal requires. The OCC should also be able to determine how often small entities use the streamlined application. This data could be used to approximate the burden on small financial institutions. If the streamlined application requires less time and expertise than the regular merger application, removing the streamlined application would effectively increase costs, including expert labor time to complete the application, for financial institutions for which the streamlined application was established. If a substantial number of small financial institutions use the streamlined applications, these increased costs would burden them more than they would large financial institutions, as small financial institutions have lower assets and revenues than do large financial institutions. As such, Advocacy recommends that the OCC perform additional research and provide a realistic estimate of the costs of eliminating the streamlined application.

The OCC also failed to consider the impact of eliminating the expedited process. In the certification, the OCC states that the removal of the expedited process would affect OCC

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[20] *Id.*
[21] *Id.*

staff but not banks as the scope of the information to be submitted by banks would not change.[22] This statement fails to acknowledge that small financial institutions could be negatively impacted by a delay in the merger. As noted above, Advocacy discussed the proposal with stakeholders. According to stakeholders, not having the expedited process may be costly and interfere with a small financial institution's ability to obtain capital in a timely manner. This delay in obtaining capital represents an opportunity cost of lost revenue. These costs are referred to in the comment letter submitted by America's Mutual Banks, which states "too often application processing times take longer than they should, causing applicants to incur additional expense and deterioration in the operations of the disappearing institution as it loses customers and key employee focus."[23] Advocacy encourages the OCC to consider the economic impact that removing the expedited process may have on small financial institutions.

III. Small Entities Should Be Allowed to Continue to Use the Streamlined Form and Request Expedited Review

The OCC states in the preamble that the BMA requires it to consider the following factors: competition, the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, the risk to the stability of the United States banking or financial system, and the effectiveness of any insured depository institution involved in combatting money laundering activities, including in overseas branches.[24] However, the proposed rule creates obstacles that may interfere with a small financial institution's ability to merge with another institution in an expeditious manner. Requiring a daunting application process and prolonging the process for a small community bank to merge with another financial institution could interfere with a small financial institution's ability to serve its customers and possibly the survival of the institution. This appears to be contrary to the goals of the BMA.

Furthermore, there is no information in the proposal to indicate that small financial institutions are causing the problem. The RFA was promulgated because regulations designed to address problems created by large institutions were being applied to small institutions, even though the problems were not created by small entities. Advocacy understands that a large institution merger could require a regular application and more time to process the information. However, there is no indication that the OCC needs additional time, beyond what is allowed for expedited review, to review documents submitted by small institutions or that the streamlined process does not work for small financial institutions. If small entities are not the problem, Advocacy submits that small entities should not be subjected to a daunting, prolonged process. Advocacy encourages

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[22] *Id.*
[23] America's Mutual Banks on Proposed Rule on Business Combinations Under the Bank Merger Act (Apr. 3, 2024), https://www.regulations.gov/comment/OCC-2023-0017-0010.
[24] 89 Fed. Reg. at 10,010.

the OCC to maintain the status quo for small entities. If small entities are creating a problem, information supporting that allegation should be provided in the rulemaking.

IV. Conclusion

Thank you for the opportunity to comment on this important proposal. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Jennifer A. Smith at (202) 205-6943 or by email at Jennifer.Smith@sba.gov.

Sincerely,

/s/
Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Jennifer A. Smith
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: The Honorable Richard L. Revesz, Administrator Office of Information and Regulatory Affairs Office of Management and Budget