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Advocacy: the voice of small business in government

July 9, 2009

The Honorable John C. Dugan
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Office of the Comptroller of the Currency
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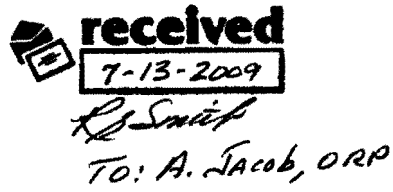

The Honorable Jennifer J. Johnson
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Re: Joint Notice of Proposed Rulemaking on Registration of Mortgage Loan Originators: Docket No. OCC-2009-0005 (OCC), Docket No. R-1357 (Federal Reserve), RIN 3064-AD43 (FDIC), RIN 1550-AC33/Docket No. 2009-0004 (OTS), RIN 3052-AC52 (FCA), RIN 3133-AD59 (NCUA)

Dear Sir/Madame:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the proposed rulemaking on Registration of Mortgage Loan Originators. The Office of Advocacy believes that the Office of Comptroller of the Currency (OCC), the Federal Reserve System ("the Board"), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), Farm Credit Administration (FCA) and National Credit Union Administration (NCUA), hereinafter collectively "the agencies", have not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA).[1] Advocacy recommends that the agencies revise the rulemaking to increase transparency and address the issues below.

Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the RFA requires Advocacy to monitor agency compliance with the Act, as amended by the Small Business Regulatory Enforcement Fairness Act.[2]

In addition, Executive Order 13272 enhances Advocacy's RFA mandate by directing Federal agencies to implement policies protecting small entities when writing new rules and regulations. Executive Order 13272 also requires Agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

The Joint Proposed Rule

On June 9, 2009, the Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), the Farm Credit Administration (FCA) and the National Credit Union Administration (NCUA) issued a joint proposed rule on the Registration of Mortgage Loan Originators to implement the Secure and Fair Enforcement for Mortgage Licensing Act (the S.A.F.E. Act). The S.A.F.E. Act requires an employee of a bank, savings

[1] 5 U.S.C. §§ 601-612.

[2] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

association, credit union or other depository institution and their subsidiaries who acts as a residential mortgage loan originator to register with the Nationwide Mortgage Licensing System and Registry. It also requires financial institutions to require their employees who act as residential mortgage loan originators to comply with the SAF.E. Act's requirements to register and obtain a unique identifier. Agency regulated institutions must also adopt and follow written policies and procedures designed to assure compliance with the requirements in the proposal.

Requirements of the RFA

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the federal agency is required to prepare an initial regulatory flexibility analysis (IRFA) to assess the economic impact of a proposed action on small entities. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.[3] In preparing the IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.[4] The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.[5]

Pursuant to section 605(a), in lieu of an IRFA, the head of the agency may certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. A certification must be supported by a factual basis.

Compliance with the RFA

The agencies certified that the proposal would not have a significant economic impact on a substantial number of small entities. Preliminarily, Advocacy would like to commend the agencies for preparing individual certifications as opposed to a joint certification. Individual certifications assist small entities in determining what the economic impact will be for the agency that regulates their institutions. However, Advocacy is concerned that the factual basis provided in the proposal may be insufficient. The agencies' discussions of economic impact in their respective RFA sections should contain more information to clarify the factual basis and increase transparency.

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[3] 5 USC § 603.
[4] 5 USC § 607.
[5] 5 USC § 603.

In the OCC's certification, the agency states that the compliance cost per bank is $18,800.[6] It states that the basis of this number is "the impact of the proposed rule on compliance costs as a percent of labor costs as well as compliance costs as a percent of noninterest expenses."[7] However, there is no indication about what assumptions were made in terms of labor costs or noninterest expenses. Without this information, it is difficult to ascertain whether the OCC's assumption that compliance cost per bank of $18800 is correct. Moreover, the OCC states that the proposal will impact 653 small national banks.[8] Are those all of the small national banks that the OCC regulates? If so, the proposal would impact all of the banks. This would be a "substantial number" of small banks within the meaning of that term in the RFA. If not, the OCC should provide information about the total number of small banks that it regulates. Advocacy recommends that the OCC provide additional information to clarify its factual basis.

Similarly, the Board states that compliance costs are estimated to be four percent of profits for state member banks and other banks will be exempt because they will fall under the *de minimus* exception.[9] Advocacy asserts that revenue may be a more transparent indicator of economic impact than profits. The manner that revenue is calculated is uniform, while profit is often determined by the particular accounting system of an institution. Advocacy, therefore, recommends that the Board use revenues rather than profits in determining economic impact.

The FDIC's certification states that approximately 26 percent of FDIC-supervised small entities would be subject to the requirements of the proposed rule.[10] Advocacy asserts that 26 percent would constitute a substantial number of small entities. However, according to the FDIC, the economic impact is not significant. The basis of this determination is that the initial costs for complying with the proposed rule would represent, on average, approximately 0.7 percent of total non-interest expenses, and the annual compliance costs would represent, on average, approximately 0.3 percent of total non-interest expenses.[11] Advocacy asserts that those are conclusory statements. Advocacy encourages the FDIC to provide more information about the assumptions that it used to reach those conclusions. Without specific information about these assumptions, the FDIC's certification under the RFA lacks a factual basis.

The OTS' certification states that the average compliance per savings association is $13,311.[12] However, there is no indication of how OTS reached that conclusion. Moreover, like the Board, OTS states that it will impact 385 small entities but does not indicate the universe of small entities OTS regulates.

The NCUA's certification states that the proposal will only affect 41 small federally insured credit unions or 1.3 percent of small entities. The FCA certifies that the banks in the Farm Credit System are not small entities. Neither agency provides any information about the potential economic impact of the rule.

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[6] 74 Federal Register 27398.
[7] Id.
[8] Id.
[9] Id.
[10] Id.
[11] Id.
[12] 74 Federal Register 27399.

The Economic Impact May Be Underestimated

In addition, Advocacy is concerned that the agencies may have underestimated the costs associated with the proposed rule. According to the Independent Community Bankers Association (ICBA), this proposal will be very burdensome to small community banks. The registration requires employees to provide information about financial services-related employment and financial history for the past 10 years as well as information about criminal history, financial related civil matters, license suspensions, disciplinary actions, etc.[13] Small entities are required to develop policies and procedures to assure compliance with this rulemaking. The policies and procedures must include instructing employees on the registration procedures, confirming the accuracy of an employee's registration, and monitoring compliance with registration requirements and procedures.[14] The proposal also requires institutions to be able to demonstrate compliance by maintaining appropriate records and to establish a process for reviewing criminal background checks.[15] If there is a problem the institution must take appropriate action based on applicable law.[16] Institutions must maintain records or reports and documents of action taken consistent with applicable recordkeeping requirements.[17]

Advocacy asserts that the cost of these requirements could exceed the agencies' estimates. Will small banks have to obtain legal expertise to assure that their policies and procedures comply with the requirements of the proposal? Will they have to expend resources to train employees and develop a database to track employee compliance? If so, how much will it cost? These are only a few of the questions that Agencies need to address to determine the economic impact of this proposal. Advocacy recommends that the agencies work with the industry to determine an accurate estimate of the economic impact of this rule on small entities and develop ways to minimize that burden.

Definition of *De Minimus* Exception

One of the reasons why the agencies have stated that the proposal will not have a significant economic impact is that the proposal provides for a *de minimus* exception, which was a part of the statute. The Agencies have defined *de minimus* as being the financial institution processing less than 25 mortgages per year in the aggregate of all of its employees. An individual employee cannot exceed 5 mortgages in the year.[18] The agencies have solicited comment on whether the 25 mortgages per year is the proper definition. The agencies have also asked for comment on whether an asset based definition may be more appropriate. Advocacy commends the agencies for this solicitation.

While Advocacy is pleased that the statute allowed for a *de minimus* exception, Advocacy is concerned that the agencies' definition of *de minimus* is extremely restrictive. As such, this rule may be unduly burdensome on small community banks. Moreover, according to ICBA, an

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[13] 74 Federal Register 27394.
[14] 74 Federal Register 27396.
[15] 74 Federal Register 27397.
[16] Id.
[17] Id.
[18] See, footnote 14, 74 Federal Register 27390.

asset-based definition may be a more appropriate way of determining *de minimus*. Advocacy encourages the agencies to work with representatives from small financial institution industry to develop a better definition of *de minimus*. Advocacy is also available to work with the agencies on this issue.

Compliance

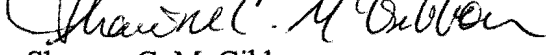
The proposal provides a grace period for initial registrations of 180 days from the date that the agencies provide public notice that the Registry is accepting initial registrations.[19] The agencies requested comment on whether the 180 days was an adequate amount of time for implementation. Advocacy recommends that the agencies expand the time period for compliance to at least one year. The additional time will provide small financial institutions with the additional time that is needed to register and train employees, develop compliance policies, and make any other necessary changes.

Conclusion

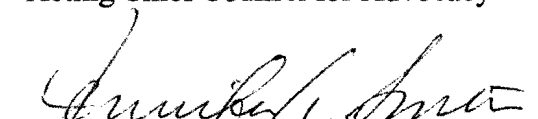
Advocacy appreciates the opportunity to comment on this joint proposed rule. Advocacy encourages the agencies to analyze fully the economic burden of this rulemaking on small entities. In addition, Advocacy encourages the agencies to work with representatives from the small banking industry to develop a definition of *de minimus* that will reduce the burden on small financial institutions. Advocacy further encourages the agencies to extend the implementation period to one year to provide small entities with the additional time that they will need to comply.

Advocacy recognizes the importance of this undertaking and is available to assist the agencies in any way possible. Please feel free to contact me or Jennifer A. Smith at (202) 205-6943 or jennifer.smith@sba.gov if you have any questions or require additional information. We look forward to working with you.

Sincerely,



Shawne C. McGibbon
Acting Chief Counsel for Advocacy



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[19] 74 Federal Register 27393.