

**DECISION
OF THE
ASSESSMENT APPEALS COMMITTEE**

CASE NO. 2023-01

*** (“Bank”) filed an appeal with the Assessment Appeals Committee (“AAC” or “Committee”) of the Federal Deposit Insurance Corporation (“FDIC”) by letter dated March 16, 2023. The Bank is appealing a determination issued by the FDIC’s Division of Insurance and Research (“DIR”) dated February 14, 2023. In that determination, DIR denied the Bank’s request for an adjustment to its quarterly assessments for *** 2022, as described below.

The Committee met to consider the Bank’s appeal on August 9, 2023. After carefully considering the Bank’s submissions and facts of this case, the Committee has denied the appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

Factual Summary

The Bank, located in ***, is a *** bank that is a “small bank” for purposes of the FDIC’s assessment regulations. The Bank is a wholly-owned subsidiary of ***, which also owns *** other banks. In ***, as part of what was described by the Bank as a realignment, the Bank entered into a purchase and assumption agreement with ***, through which the Bank acquired certain assets and deposits ***.¹ This transaction led to an increase of the Bank’s one-year asset growth rate, which ultimately resulted in an increase in the Bank’s assessment rate *** basis points to *** basis points in the *** quarter of 2022, and *** basis points in the *** quarter of 2022. As a result, the Bank’s assessment for those quarters increased by approximately ***.

Procedural History

The Bank submitted a request for review of its risk assignment on ***, which was denied by DIR on February 14, 2023. The Bank requested review of and adjustment to those quarters to eliminate the effect of the Bank’s *** reorganization via a purchase and assumption agreement with ***, in which the Bank acquired certain assets and deposits of ***. Specifically, the Bank requested an adjustment to its one-year asset growth rate or, alternatively, that the FDIC treat the reorganization as a bank merger or acquisition. The Bank argued that the reorganization did not increase the risk posed to the DIF by the Bank, ***, or the *** depository subsidiaries in the aggregate; the bank further argued that including the effect of the reorganization in the Bank’s one-year asset growth rate was inconsistent with the purposes and policies supporting the inclusion of the one-year asset growth rate in the assessment rate formula.

¹ This transaction was subject to FDIC approval under the Bank Merger Act, 12 U.S.C. § 1828(c), and constituted a “merger transaction” and “corporate reorganization” for purposes of the FDIC’s application requirements and procedures for transactions subject to FDIC approval under the Bank Merger Act. See 12 C.F.R. § 303.61.

By letter dated February 14, 2023, DIR determined that with respect to the request for review and adjustment for *** 2022, the request was not timely filed. With respect to the request as to *** 2022, DIR determined that the assessment regulations were applied correctly. Additionally, DIR noted that, while the regulation provides an adjustment to the one-year asset growth rate to eliminate the effect of bank mergers and the acquisitions of failed banks, the regulations do not provide an adjustment for other types of transactions. DIR also noted that it has not provided an adjustment or similar relief to other small banks in comparable circumstances and the regulations applicable to small banks do not permit such an adjustment.

The Bank filed this appeal with the Committee on March 16, 2023 with respect to the denial of its request for review of the *** quarters of 2022.² In its appeal, the Bank reiterates the arguments set forth in its request for review, specifying that the obligation of *** to serve as a source of strength for both the Bank and *** undermines any argument that the Bank’s year-on-year asset increase in any way increased its risk of failure. In addition, the Bank argued that it is a minority depository institution (MDI) and that granting the request would not be inconsistent with the treatment of other banks due to the affiliated nature of the transactions.

On May 30, 2023, the Committee held a hearing at which the Bank and DIR both presented. After questions from Committee members, the Committee requested the Bank submit additional information. The Bank submitted the additional information on June 22, 2023. In that submission, the Bank noted that, as affiliates, the Bank and *** are subject to the cross-guarantee requirements of Section 5(e) of the Federal Deposit Insurance Act,³ thus, because *** would be liable for any losses to the DIF in the event of the Bank’s failure, the reorganization did not expose the DIF to the same risk as comparable transactions between and among non-affiliates.

II. PRIOR COMMITTEE DECISIONS

The FDIC has adopted regulations governing the calculation of assessment rates,⁴ and the authority to waive the regulations resides with the FDIC Board of Directors (Board).⁵ However, at times, when deciding whether to grant an appeal, the Committee has granted relief based on, among other things, the interests of justice and fundamental fairness, the substance of the transaction, whether unique circumstances—generally circumstances beyond a bank’s control—prevented a bank from complying with the relevant regulations, or whether application of the regulations in a particular case otherwise would be inequitable.⁶ Additionally, the Committee

² 12 C.F.R. § 327.4(c). The Bank timely filed and met other requirements set forth in the regulations, including timely payment, to obtain review of its assessment for the *** quarters of 2022.

³ 12 U.S.C. § 1815(e).

⁴ 12 C.F.R. pt. 327.

⁵ On August 4, 2003, the Board approved a final rule (12 C.F.R. § 303.12) granting authority to the Board of Directors to waive regulatory provisions for good cause to the extent permitted by statute. *See* [68 Fed. Reg. 50,457](#) (Aug. 21, 2003). *See also* [AAC Case No. 2009-01](#) (Committee finding that the decision in [AAC Case No. 2002-01](#) was no longer binding precedent because it was decided before the effective date of 12 C.F.R. § 303.12).

⁶ *See* [AAC Case No. 2001-03](#) (granting relief where the Committee determined bank should be treated as, in substance, a de novo institution after the bank performed certain actions); [AAC Case No. 2002-01](#) (granting relief based on the “substance” of transaction where bank had an agreement with the FDIC regarding its capital group); [AAC Case No. 2002-02](#) (granting relief where the terrorist attacks on September 11, 2001, prevented the bank from consummating a previously arranged transaction that would have made the bank well capitalized on the cut-off

has referred appeals to the Board for review.⁷ For the reasons set forth below, the Committee concludes that the circumstances of this case do not warrant the relief requested.

III. ANALYSIS

Small Bank Pricing Methodology

Under the small bank pricing methodology, a small bank's assessment rate is calculated using seven financial measures and the bank's weighted average CAMELS ratings.⁸ The FDIC uses data reported on a bank's quarterly Consolidated Reports of Condition and Income ("Call Report") to calculate all of the financial risk measures.⁹ These financial risk measures and the weighted average CAMELS components are multiplied by a corresponding pricing multiplier.¹⁰ The sum is the initial base assessment rate.¹¹

The one-year asset growth rate at issue in this appeal is one of the financial risk measures used to determine the initial base assessment rate and is calculated using data reported by a bank on its quarterly Call Report. The assessment regulation defines the one-year asset growth rate as "growth in assets (adjusted for mergers [and acquisitions of failed banks]) over the previous year in excess of 10 percent."¹² The regulation does not provide an exception or adjustment to the one-year asset growth rate for transactions other than mergers or acquisitions of failed banks, such as branch acquisitions or purchase and assumption transactions outside the context of acquiring failed banks.¹³ For this purpose, a transaction is considered a merger if it results in the elimination of one or more bank certificate numbers.¹⁴

date); [AAC Case No. 2004-02](#) (granting relief where the primary federal regulator's delay in granting a needed approval prevented the bank from consummating a previously arranged transaction that would have made the bank well capitalized on the cut-off date); [AAC Case No. 2007-01](#) (granting relief to avoid a "disproportionate" outcome and based on a determination that the bank "in substance" acquired substantially all assets for purposes of the *de facto* rule); [AAC Case No. 2007-02](#) (granting relief when the bank met its evidentiary burden and satisfied the requirements of the *de facto* rule for one-time assessment credits); and [AAC Case No. 2007-03](#) (granting relief when the regulation did not expressly address the facts of the case and in consideration of "fundamental fairness and the interests of justice"). The Committee has also denied appeals after considering similar equitable considerations. *See* [AAC Case No. 2004-06](#) (denying appeal based on "the Committee find[ing] that the circumstances presented are not unique nor is application of [the regulation] in this instance inequitable"); [AAC Case No. 2018-02](#) (acknowledging that the Committee has granted appeals when there are "unique circumstances—generally circumstances beyond a bank's control—prevented a bank from complying with the relevant regulations" or when "application of the regulations in a particular case would be inequitable"); and [AAC Case No. 2021-01](#) (denying appeal but noting that the Committee in prior decisions has considered "whether application of the regulations in a particular case would be inequitable").

⁷ *See* [AAC Case No. 2001-01](#).

⁸ *See* 12 C.F.R. § 327.16(a).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* The initial base assessment rate is also adjusted for unsecured debt and depository institution debt. *See also* 12 C.F.R. § 327.16(e)(1) and (2).

¹² 12 C.F.R. § 327.16(a)(1)(ii).

¹³ *Id.*

¹⁴ This is consistent with how the term merger and consolidation is used generally in other aspects of the assessment regulations (i.e., a merger or consolidation is considered a transaction in which one insured depository institution merges into, or consolidates with, another insured depository institution and there is a one surviving or resulting

The small bank pricing methodology is based on a statistical model estimating the likelihood that a bank could fail within three years. The pricing multiplier for the one-year asset growth rate was derived from regression coefficients that excluded increases in assets due to mergers (defined as transactions that resulted in the elimination of one or more bank certificate numbers) and failed bank acquisitions. No other asset transactions, including the purchase of assets or bank branches outside the context of acquiring failed banks, were excluded from the statistical model used to develop the small bank pricing methodology.

Due to the purchase and assumption agreement with ***, the Bank's one-year asset growth rate of *** for the *** quarter of 2022 added approximately *** basis points to the Bank's assessment rate of *** basis points for the quarter.¹⁵ Similarly, the one-year asset growth rate of *** for the *** quarter of 2022 added approximately *** basis points to the Bank's assessment rate of *** basis points for the quarter.¹⁶ If the FDIC were to eliminate the increase in the one-year asset growth rate in the calculation of the Bank's assessment rate but made no other changes to reported data, the Bank's *** and *** quarter assessment rates would be *** basis points. This adjustment would reduce the Bank's assessment for the *** quarter of 2022 by approximately *** and approximately *** for the *** quarter of 2022.

Bank's Transaction and One-Year Asset Growth Rate

Bank's Position

The Bank argues that the reorganization did not increase the risk to the DIF or the risk of the Bank's failure. Additionally, the Bank believes the unique facts and circumstances in this case undermine any concern that granting an exception would lead to inconsistent and inequitable treatment or create a precedent. Lastly, the Bank points out that its status as a MDI deserves special consideration.

Committee's Findings

The FDIC is required by law to establish and maintain a risk-based assessment system. As part of that system, the FDIC established a specific risk-based system to evaluate and price for the probability of failure of a small bank within three years.¹⁷ The statistical model reflects analysis of decades of bank failure data, financial data and CAMELS rating history, and loan charge-off data.¹⁸ The small bank assessment regulations are applicable to approximately 4,500 small banks. The small bank assessment system is not able to account specifically for

insured depository institution). *See, e.g.*, 12 C.F.R. §§ 327.6 and 327.8(k). *But see, e.g.*, 12 C.F.R. § 327.11(b)(6)(ii).

¹⁵ The Bank's reorganization increased its one-year asset growth rate for four quarters ending the *** quarter of 2022. To the extent the Bank's reorganization increased its one-year asset growth rate in ***, those quarters are not at issue in this appeal and the reorganization had no effect on subsequent quarters.

¹⁶ Changes to other financial measures impacted the Bank's assessment rate for the *** quarters of 2022 but at a lesser magnitude compared to changes in the one-year asset growth rate.

¹⁷ *See* [81 Fed. Reg. 32,183](#) (May 20, 2016).

¹⁸ *Id.*

individualized risk represented by each particular bank, but the system does promote consistent application of the regulations across all subject banks.

In this appeal, the parties agree that the FDIC's assessment regulations were applied correctly and that the Bank's one-year asset growth rate was calculated accurately based on the Call Report information reported by the Bank.

The Committee has previously considered adjustments to the one-year asset growth rate pursuant to an appeal involving similar circumstances to those presented in the current matter. In [AAC Case No. 2018-02](#), the appealing bank sought relief from the one-year asset growth rate after a branch acquisition resulted in an increase in the bank's assessment. Similar to this case, the bank in the 2018 appeal argued that the transaction did not increase risk to the DIF and that the transaction should be treated as a merger. As here, the parties also agreed that the regulations were applied correctly and the Call Report data was accurate.

The Bank argues its transaction is unique from the facts of AAC Case No. 2018 because *** and therefore, according to the Bank, the transaction did not increase risk to the DIF. In particular, *** the Bank argues the transaction did not increase risk to the DIF because *** serves as a source of strength for both the Bank and ***,¹⁹ and because the Bank and *** are subject to the cross-guarantee requirements of Section 5(e) of the Federal Deposit Insurance Act.²⁰

While the Committee recognizes these distinctions, the small bank assessment system is modeled on indices of risk measured at the insured-depository-institution level and not the banking-organization or holding-company level. Each affiliated institution within an organization may be comprised of different management, business models, and other factors that influence the amount of risk the institution poses to the DIF. Consistent with Section 7 of the Federal Deposit Insurance Act, the assessment system prices for risk presented at an insured-depository-institution level.

In this case, the Committee finds it is not inequitable to apply the one-year asset growth rate under the assessment regulations to the Bank to maintain consistent application of the regulations. The FDIC has consistently applied the one-year asset growth rate to all small banks, and removing that effect from the Bank's assessment rate, or treating the transaction as a merger for assessment purposes, would provide an adjustment that is not provided to other banks in the same or similar circumstances, and would result in inequitable treatment across small banks. The small bank pricing methodology, of which the one-year asset growth rate is a component, went through notice-and-comment rulemaking,²¹ and applies to approximately 4,500 small banks. While the small bank pricing methodology is designed to differentiate risk among small banks, it is impossible for any risk-based methodology to be tailored to every conceivable dimension or gradation of risk.²² Even if one were to assume—for the sake of argument—that

¹⁹ See 12 U.S.C. § 1831o-1; 12 C.F.R. § 225.4(a)(1).

²⁰ See 12 U.S.C. § 1815(e).

²¹ See Assessments, [81 Fed. Reg. 32,180](#) (May 20, 2016) (codified at 12 C.F.R. pt. 327).

²² If, at some point, the FDIC were to consider potential changes to the small bank pricing methodology through notice-and-comment rulemaking, it is possible that the one-year growth rate could be revisited.

the transaction did not increase risk to the DIF, the Committee finds that applying correctly the assessment regulations would not be sufficiently inequitable as to outweigh the administrative-efficiency benefits of applying consistently a notice-and-comment rulemaking especially, as is the case here, where there are no unique factors beyond the bank's control.

While the Committee understands the Bank's perspective, it is the Committee's view that consistent application of the assessment regulations is required for transparency, predictability, and fairness.

IV. CONCLUSION

After considering the facts and arguments the Bank presented in its appeal, the Committee finds that the circumstances in this case do not warrant the removal of the effect of the one-year asset growth rate on the Bank's assessment rate, or to treat the Bank's transaction as a merger for assessment purposes. The Bank's assessment rate was correctly calculated under the FDIC assessment regulations using data reported in its Call Report. Accordingly, for the reasons set forth in this decision, the Bank's appeal is denied.

By direction of the Assessment Appeals Committee, dated November 16, 2023.

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