

MEMORANDUM TO: Board of Directors
Federal Deposit Insurance Corporation

FROM: Doreen R. Eberley, Director 
Division of Risk Management Supervision

Richard J. Osterman, Jr. 
Acting General Counsel

DATE: October 25, 2013

SUBJECT: Addendum to the Interagency Policy Statement on Income Tax
Allocation in a Holding Company Structure

RECOMMENDATION

The Division of Risk Management Supervision, with the concurrence of the Legal Division, recommends that the Board of Directors approve for publication the accompanying draft *Federal Register Notice* that provides an Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure (“Addendum”). If approved, the Addendum would be published in the *Federal Register* with a 30-day public comment period.

SUMMARY

In 1998, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision issued the “Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” (the “IPS”)¹ to provide guidance to insured depository institutions (“IDIs”) and their holding company and affiliates (the “Consolidated Group”) regarding the payment of taxes on a consolidated basis. One of the principal goals of the IPS is to protect the tax attributes of IDIs, while permitting the Consolidated Group to file consolidated tax returns. The IPS states that (1) tax settlements between an IDI and its holding company should be conducted in a manner that is no less favorable to the IDI than if it were a separate taxpayer, and (2) a holding company receives a tax refund from a taxing authority as agent for the IDI.

Since adoption of the IPS, there have been many disputes between holding companies in bankruptcy and failed IDIs regarding the ownership of tax refunds generated by the IDIs. The amount in dispute exceeds \$3 billion. In these disputes, some courts have found that tax refunds generated by an IDI were the property of its holding company based on certain language in their tax sharing agreements which the courts interpreted as creating a debtor-creditor relationship.

¹ 63 Fed. Reg. 64757 (Nov. 23, 1998). Responsibilities of the OTS were transferred to the Board, FDIC, and OCC pursuant to Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The proposed Addendum seeks to remedy this problem by requiring IDIs to clarify that their tax sharing agreements acknowledge that an agency relationship exists between the holding company and its subsidiary IDI with respect to tax refunds, and provides a sample paragraph to accomplish this goal. The proposed Addendum would also clarify how certain of the requirements of sections 23A and 23B of the Federal Reserve Act (“FRA”) apply to tax allocation agreements between IDIs and their affiliates. Staff believes that the Addendum reflects current practices for open institutions that are neither controversial nor likely to draw significant comment from the public.

SUMMARY OF RECOMMENDED CHANGES

The Addendum responds to certain court decisions finding that holding companies in bankruptcy own tax refunds created by failed IDIs based on language in their tax sharing agreements that the courts interpret as creating a debtor-creditor relationship (as opposed to acknowledging an agency relationship). During this crisis, the amount of tax refunds in dispute exceeds \$3 billion. The Addendum is intended to clarify and supplement the IPS to ensure that tax sharing agreements expressly acknowledge an agency relationship between a holding company and its subsidiary IDI to protect the IDI’s ownership rights in tax refunds. A copy of the Addendum accompanies this memorandum (see Attachment A).

The Addendum includes a discussion of the purpose and intent of the IPS, which recognizes that intercorporate tax settlements between an IDI and its parent company should be conducted in a manner that is no less favorable to the IDI than if it were a separate taxpayer. In addition, the Addendum states that a holding company receives a tax refund from a taxing authority as agent for its subsidiary IDI. The Addendum reiterates that to accomplish the goals of the IPS, IDIs should ensure that their tax sharing agreements explicitly acknowledge that an agency relationship exists between the holding company and its subsidiary IDIs with respect to tax refunds, and do not contain other language to suggest a contrary intent. The Addendum also provides a sample paragraph for IDIs to use in their tax sharing agreements which the agencies would deem in compliance with the IPS, the Addendum, and sections 23A and 23B of the FRA.

The Addendum also clarifies that all tax allocation agreements are subject to the requirements of section 23B of the FRA, and tax allocation agreements that do not clearly acknowledge that an agency relationship exists may be subject to additional requirements under section 23A of the FRA. Moreover, the Addendum describes the requirements of section 23B, which requires a holding company to promptly transmit tax refunds received from a taxing authority to its subsidiary IDI.

Contacts: Robert Storch, Chief Accountant, Division of Risk Management Supervision, (202) 898-8906; Mark Flanigan, Counsel, Legal Division, (202) 898-7426; Jeffrey E. Schmitt, Counsel, Legal Division, (703) 562-2429.

**ADDENDUM TO INTERAGENCY POLICY STATEMENT ON INCOME TAX
ALLOCATION IN A HOLDING COMPANY STRUCTURE**

In 1998, the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC) (collectively, the Agencies), and the Office of Thrift Supervision issued the “Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” (the “Interagency Policy Statement”).¹ Under the Interagency Policy Statement, members of a consolidated group, comprised of one or more insured depository institutions (IDIs) and their holding company and affiliates (the Consolidated Group), may prepare and file their federal and state income tax returns as a group so long as the act of filing as a group does not prejudice the interests of any one of the IDIs. That is, the Interagency Policy Statement affirms that intercorporate tax settlements between an IDI and its parent company should be conducted in a manner that is no less favorable to the IDI than if it were a separate taxpayer and that any practice that is not consistent with the policy statement may be viewed as an unsafe and unsound practice prompting either informal or formal corrective action.

The Interagency Policy Statement also addresses the nature of the relationship between an IDI and its parent company. It states in relevant part that:

- “[A] parent company that receives a tax refund from a taxing authority obtains these funds as agent for the consolidated group on behalf of the group members,”
and

¹ 63 FR 64757 (Nov. 23, 1998). Responsibilities of the OTS were transferred to the Board, FDIC, and OCC pursuant to Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

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- A Consolidated Group’s tax allocation agreement should not “characterize refunds attributable to a subsidiary depository institution that the parent receives from a taxing authority as the property of the parent.”

Since the issuance of the Interagency Policy Statement, courts have reached varying conclusions regarding whether tax allocation agreements create a debtor-creditor relationship between a holding company and its IDI.² Some courts have found that the tax refunds in question were the property of the holding company in bankruptcy (rather than property of the subsidiary IDI) and held by the holding company as the IDI’s debtor.³ The agencies are issuing this addendum to the Interagency Policy Statement (Addendum) to explain that Consolidated Groups should review their tax allocation agreements to ensure the agreements achieve the objectives of the Interagency Policy Statement. This Addendum also clarifies how certain of the requirements of sections 23A and 23B of the Federal Reserve Act (FRA) apply to tax allocation agreements between IDIs and their affiliates.

In reviewing their tax allocation agreements, Consolidated Groups should ensure the agreements (1) clearly acknowledge that an agency relationship exists between the holding company and its subsidiary IDIs with respect to tax refunds, and (2) do not contain other

² Case law on this issue is mixed. Compare Zucker v. FDIC, as Receiver for BankUnited, 2013 WL 4106387, *6 (11th Cir. Aug. 15, 2013) (“The relationship between the Holding Company and the Bank is not a debtor-creditor relationship. When the Holding Company received the tax refunds it held the funds intact—as if in escrow—for the benefit of the Bank and thus the remaining members of the Consolidated Group.”) with In re IndyMac Bancorp, Inc., 2012 WL 1951474, *2 (C.D. Ca. May 30, 2012) (“According to both bankruptcy law and California contract law, the [tax allocation agreement in question] creates a debtor/creditor relationship.”).

³ See e.g., In re IndyMac Bancorp, Inc., 2012 WL 1951474 (C.D. Ca. May 30, 2012).

language to suggest a contrary intent.⁴ In addition, all Consolidated Groups should amend their tax allocation agreements to include the following paragraph or substantially similar language:

The [holding company] is an agent for the [IDI and its subsidiaries (the “Institution”)] with respect to all matters related to consolidated tax returns and refund claims, and nothing in this agreement shall be construed to alter or modify this agency relationship. If the [holding company] receives a tax refund from a taxing authority, these funds are obtained as agent for the Institution. Any tax refund attributable to income earned, taxes paid, and losses incurred by the Institution is the property of and owned by the Institution, and shall be held in trust by the [holding company] for the benefit of the Institution. The [holding company] shall forward promptly the amounts held in trust to the Institution. Nothing in this agreement is intended to be or should be construed to provide the [holding company] with an ownership interest in a tax refund that is attributable to income earned, taxes paid, and losses incurred by the Institution. The holding company hereby agrees that this tax sharing agreement does not give it an ownership interest in a tax refund generated by the tax attributes of the Institution.

Going forward, the agencies generally will deem tax allocation agreements that contain this or similar language to acknowledge that an agency relationship exists for purposes of the Interagency Policy Statement, this Addendum, and sections 23A and 23B of the FRA.

All tax allocation agreements are subject to the requirements of section 23B of the FRA, and tax allocation agreements that do not clearly acknowledge that an agency relationship exists

⁴ This Addendum clarifies and supplements but does not replace the Interagency Policy Statement.

may be subject to additional requirements under section 23A of the FRA.⁵ In general, section 23B requires affiliate transactions to be made on terms and under circumstances that are substantially the same, or at least as favorable to the IDI, as comparable transactions involving nonaffiliated companies or, in the absence of comparable transactions, on terms and circumstances that would in good faith be offered to non-affiliated companies.⁶ Tax allocation agreements should require the holding company to forward promptly any payment due the IDI under the tax allocation agreement and specify the timing of such payment. Agreements that allow a holding company to hold and not promptly transmit tax refunds received from the taxing authority and owed to an IDI are inconsistent with the requirements of section 23B and subject to supervisory action. However, an Agency's determination of whether such provision, or the tax allocation agreement in total, is consistent with section 23B will be based on the facts and circumstances of the particular tax allocation agreement and any associated refund.

⁵ Section 23A requires, among other things, that loans and extensions of credit from a bank to its affiliates be properly collateralized. 12 U.S.C. § 371c(c).

⁶ 12 U.S.C. § 371c-1(a). Transactions subject to section 23B include the payment of money by a bank to an affiliate under contract, lease, or otherwise and transactions in which the affiliate acts as agent of the bank. *Id.* at § 371c-1(a)(2) & (a)(4).