

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: May 12, 2014

SUBJECT: Final Issuance of “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 for the final issuance of the Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure (“Addendum”). Previously, the Addendum was published in the *Federal Register* on December 19, 2013, with a 30-day public comment period. The agencies received one comment on the guidance from an individual who viewed the Addendum favorably and did not suggest any modifications. The agencies also received a comment from a financial institution trade association which did not comment on the substance of the Addendum but requested the agencies provide a date certain for institutions to comply. As a result, the agencies have stated in the preamble to the Addendum that institutions should, by October 31, 2014, review and revise their tax allocation agreements to ensure that the agreements expressly acknowledge that the holding company receives a tax refund from a taxing authority as agent for the IDI and are consistent with certain of the requirements of sections 23A and 23B of the Federal Reserve Act.

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

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.

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. The 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 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. Staff believes that the Addendum reflects current practices for open institutions that are not controversial. A copy of the Addendum accompanies this memorandum (see Attachment A).

SUMMARY OF RECOMMENDED CHANGES

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 that 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.

SUMMARY OF COMMENTS AND SUBSEQUENT REVISIONS

The agencies received one comment on the guidance from an individual. This comment viewed the Addendum favorably and did not suggest any modifications. In addition, the agencies received a comment from a financial institution trade association, which did not provide any substantive comments on the Addendum. Rather, the trade association requested that the agencies provide institutions until the end of calendar year 2014 to amend their tax allocation agreements, as necessary, to ensure consistency with the Addendum. The trade association suggested that this time period is appropriate because the Addendum will require reviews of

existing tax allocation agreements and may require institutions and holding companies to receive board of directors' approvals to amend both their agreements and internal tax processes. In response to this comment, the agencies revised the Addendum to require compliance as soon as reasonably possible, but in no event later than October 31, 2014. This revision reflects the agencies' willingness to be flexible in allowing institutions and holding companies to revise their tax allocation agreements, and the agencies' view that a lengthy period of time for implementation is not necessary because a consolidated group's tax processes should be unaffected by the Addendum.

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