

**DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency
Docket ID OCC-2013-0020**

**BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
Docket No. OP-1474
RIN 7100-AD 87**

FEDERAL DEPOSIT INSURANCE CORPORATION

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

AGENCIES: Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, Department of the Treasury (Agencies).

Action: Final Addendum to Interagency Policy Statement.

SUMMARY: The Agencies are issuing jointly an Addendum (Addendum) to the “Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” to ensure that insured depository institutions (IDIs) in a consolidated group maintain an appropriate relationship regarding the payment of taxes and treatment of tax refunds. The Addendum instructs IDIs and their holding companies to 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. The Addendum includes a sample paragraph that IDIs could include in their tax allocation agreements to facilitate the Agencies' instructions.

DATES: The Agencies expect institutions and holding companies to implement fully the Addendum to the Interagency Policy Statement as soon as reasonably possible, which the Agencies expect would not be later than October 31, 2014.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

In 1998, the Agencies and the Office of Thrift Supervision issued the “Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” (Interagency Policy Statement) to provide guidance to insured depository institutions (IDIs) and their holding companies and other affiliates (Consolidated Groups) regarding the payment of taxes on a consolidated basis.¹ One of the principal goals of the Interagency Policy Statement is to protect IDIs' ownership rights in tax refunds, while permitting the Consolidated Group to file consolidated tax returns. The Interagency Policy Statement 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 Interagency Policy Statement, there have been many disputes between holding companies in bankruptcy and failed IDIs regarding the ownership of tax refunds generated by the IDIs. 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 contained in their tax allocation agreement that the courts interpreted as creating a debtor-creditor relationship. Accordingly, the Agencies are issuing an Addendum to the Interagency Policy Statement (Addendum) to ensure that

¹ 63 FR 64757 (November 23, 1998).

IDIs in a Consolidated Group maintain an appropriate relationship regarding the payment of taxes and treatment of tax refunds.

II. Description of Addendum

The Addendum is intended to clarify and supplement the Interagency Policy Statement to ensure that tax allocation agreements expressly acknowledge an agency relationship between a holding company and its subsidiary IDI to protect the IDI's ownership rights in tax refunds. 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.

The Addendum states that, to further the goals of the Interagency Policy Statement, IDIs and their holding companies should review and revise their tax allocation agreements to ensure their tax allocation 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 includes a sample paragraph for IDIs and their holding companies to use in their tax allocation agreements, which the Agencies generally would deem to adequately acknowledge that an agency relationship exists for purposes of the Interagency Policy Statement, 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 clarifies that section 23B of the FRA requires a holding company to promptly transmit tax refunds received from a taxing authority to its subsidiary IDI. The sample paragraph in the Addendum incorporates this expectation.

III. Summary of Comments

The Agencies issued the Addendum in proposed form with a request for comment (Proposed Addendum) on December 19, 2013.² The comment period closed on January 21, 2014. The Agencies received two comment letters on the Proposed Addendum -- one from an individual who viewed the Proposed Addendum favorably and did not suggest any modifications, and another from a financial institution trade association, which also did not suggest any modifications to the Proposed Addendum. However, this 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 Proposed Addendum. This commenter also suggested that this time period is appropriate because the Proposed 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. The Agencies understand that institutions and holding companies require time to revise their tax allocation agreements, that some institutions and holding companies may wish to consult with tax counsel, and that more complex banking organizations with multiple subsidiaries and affiliates may require additional time to obtain all required approvals of

² 78 FR 76889 (December 19, 2013).

the members of the Consolidated Group. Accordingly, the Agencies encourage institutions and holding companies to begin promptly the efforts to review and revise their tax allocation agreements. In this regard, the Agencies expect institutions and holding companies to implement fully the Addendum to the Interagency Policy Statement as soon as reasonably possible, which the Agencies expect would not be later than October 31, 2014.

The Agencies also received some informal inquiries regarding the applicability of the Addendum to holding companies that have elected S corporation status for federal income tax purposes.³ The Addendum and Interagency Policy Statement concern tax allocation agreements between an IDI, its parent company, and its affiliates. Accordingly, the Addendum and Interagency Policy Statement does not apply to an IDI, its holding company, or other affiliates if the holding company is not subject to corporate income taxes at the federal or state level.

IV. Administrative Law Matters

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320, Appendix A.1), the Agencies reviewed the Addendum guidance for any collection of information. The Agencies may not conduct or sponsor, and an organization is not required to respond to, an information collection unless the information collection

³ S corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes.

displays a currently valid Office of Management and Budget control number. There is no collection of information contained in the Addendum.

V. Text of the Addendum

The text of the Addendum follows:

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 (OTS) issued the “Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” (the “Interagency Policy Statement”).⁴ 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

⁴ 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.

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
- 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.⁵ 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.⁶ The

⁵ Case law on this issue is mixed. *Compare Zucker v. FDIC, as Receiver for BankUnited*, 727 F.3d 1100, 1108-09 (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 *F.D.I.C. v. Siegel (In re IndyMac Bancorp, Inc.)*, ___ F. App’x ___, 2014 WL 1568759, *2 (9th Cir. Apr. 21, 2014) (*per curiam*) (“The TSA does not create a trust relationship. The absence of language creating a trust relationship is explicitly an indication of a debtor-creditor relationship in California”).

⁶ *See e.g., F.D.I.C. v. Siegel (In re IndyMac Bancorp, Inc.)*, ___ F. App’x ___, 2014 WL 1568759 (9th Cir. Apr. 21, 2014) (*per curiam*).

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 language to suggest a contrary intent.⁷ 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

⁷ This Addendum clarifies and supplements but does not replace the Interagency Policy Statement.

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 may be subject to additional requirements under section 23A of the FRA.⁸ 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.⁹ 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

⁸ 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).

⁹ 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).

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.

**[THIS SIGNATURE PAGE RELATES TO THE “Addendum to the Interagency
Policy Statement on Income Tax Allocation in a Holding Company Structure”]**

Dated: May 15, 2014

Thomas J. Curry (signed)

Thomas J. Curry, *Comptroller of the Currency*

**[THIS SIGNATURE PAGE RELATES TO THE “Addendum to the Interagency
Policy Statement on Income Tax Allocation in a Holding Company Structure”]**

By order of the Board of Governors of the Federal Reserve System, June 12, 2014.

Robert deV. Frierson (signed)

Robert deV. Frierson,
Secretary of the Board.

**[THIS SIGNATURE PAGE RELATES TO THE “Addendum to the Interagency
Policy Statement on Income Tax Allocation in a Holding Company Structure”]**

By order of the Board of Directors.

Federal Deposit Insurance Corporation

Dated at Washington, DC this 23rd day of May, 2014.

Robert E. Feldman (signed)

Robert E. Feldman,
Executive Secretary