

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

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Date: April 7, 2021  
To: Board of Governors  
From: Staff<sup>1</sup>  
Subject: Draft interagency proposed rule regarding income tax allocation agreements

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**ACTIONS REQUESTED:** Approval of the attached draft proposed rule (proposal) that would establish safety and soundness requirements for depository institutions that file consolidated tax returns with their holding companies. The proposal would be issued jointly by the Board of Governors (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) after each agency has completed its review process. In addition, staff requests authority to make technical or minor changes to prepare the proposal for publication in the Federal Register.

**EXECUTIVE SUMMARY:**

- The Board, FDIC, and OCC adopted an Interagency Policy Statement on Income Tax Allocation in 1998 and updated it in 2014 (policy statement).
  - The policy statement provides guidance to depository institutions and their holding companies and other affiliates regarding the allocation and payment of taxes when they file income tax returns on a consolidated basis.
  - A principal goal of the policy statement is to clarify depository institutions' ownership rights in tax refunds, when the consolidated group elects to file a consolidated tax return.
- The proposal would codify the principles in the policy statement.<sup>2</sup>
  - The policy statement is not enforceable, and this has caused losses for the FDIC in some receiverships.

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<sup>2</sup> See *Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure* (SR Letter 98-38) and its addendum (SR Letter 14-6), 63 FR 64757 (November 23, 1998).

- Adopting a rule on tax allocation agreements should help to avoid the situation where significant amounts of tax refunds become trapped at depository institution holding companies in connection with a bank failure, potentially reducing resolution-related costs to the Deposit Insurance Fund.
- Under the proposal, a depository institution would be required to enter into a written, comprehensive tax allocation agreement with its holding company.
  - This approach would protect the depository institution's ownership rights in tax refunds that are attributable to the depository institution.
  - It also would promote safety and soundness by requiring that a depository institution be compensated for the use of its tax assets by its affiliates.

## **DISCUSSION:**

### **A. Background**

The policy statement provides that tax settlements between a depository institution and its holding company should be conducted in a manner that ensures that when a holding company receives a tax refund from any taxing authority, and the refund is attributable to its subsidiary depository institution, the holding company acts as an agent for the depository institution.

Since adoption of the 1998 policy statement, there have been many disputes between holding companies in bankruptcy and the FDIC as receiver for failed depository institutions regarding the ownership of tax refunds generated by the depository institutions. In these disputes, some courts have found that tax refunds generated by a depository institution were the property of its holding company based on language contained in their tax allocation agreement. Accordingly, in 2014, the agencies issued an addendum to the policy statement in part to encourage depository institutions in a consolidated group to maintain an appropriate relationship regarding the payment of taxes and treatment of tax refunds.<sup>3</sup> However, because the policy statement is guidance, and therefore not enforceable, and because the FDIC has continued to experience litigation losses as receiver for failed depository institutions, staff has developed the proposal to make the principles in the policy statement enforceable.

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<sup>3</sup> See 79 FR 35228 (June 19, 2014).

## **B. Proposal**

The proposal would apply to all depository institutions that file tax returns as part of a consolidated group and would make the contents of the policy statement enforceable with some additional clarifications, as described below.<sup>4</sup>

In general, the proposal would ensure that tax settlements between a depository institution and its holding company are conducted in a manner that is no less favorable to the depository institution than if the depository institution were a separate taxpayer. Specifically, the proposal would require a depository institution that files tax returns as part of a consolidated group to have a written tax allocation agreement regarding the allocation and payment of taxes and the treatment of deferred tax assets and liabilities between the depository institution and members of the consolidated group. The proposal would not apply directly to holding companies.

The proposal would include several additions to the policy statement. First, the proposal would require a depository institution that files tax returns as part of a consolidated group to reflect net operating losses or tax credit carryforwards on its stand-alone regulatory reporting balance sheet if those assets have not yet been absorbed by the consolidated group. Second, in alignment with U.S. Generally Accepted Accounting Principles, the proposal would reaffirm that a depository institution cannot report its individual deferred tax assets for temporary differences separately from the asset or liability that gave rise to such assets. Third, consistent with the view that a depository institution should receive tax refunds that are attributable to its tax attributes, the proposal would require that a depository institution must be compensated when its tax assets are used to reduce the tax liability of the consolidated group. Fourth and finally, the proposal would require that a depository institution, or the FDIC as receiver for the depository institution, have access to consolidated tax returns for a consolidated group of which the depository institution is a member. Conforming regulatory reporting instructions related to the proposal would be prepared at a later time.

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<sup>4</sup> See 12 U.S.C. § 1831p-1.

### **C. Impact Assessment**

Overall, staff expects most depository institutions already have policies and tax allocation agreements in place that are consistent with the proposal. Accordingly, the expected burden of the proposal is likely to be small. The proposal would increase the safety and soundness of the limited number of depository institutions that may not be following the policy statement and reduce potential litigation costs to the Deposit Insurance Fund.

**RECOMMENDATIONS:** For the reasons discussed above, staff recommends that the Board approve the attached proposal. Staff also recommends that the Board authorize staff to make technical or minor changes to the proposal prior to publication in the Federal Register.

Attachment