American Bankers Association
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VIA Electronic Submissions

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Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E-218
Washington, DC 20219

James P. Sheesley
Assistant Executive Secretary
Attention: Comments – RIN 3064-AF62 / Legal ESS
Federal Deposit Insurance Corp.
550 17th Street NW
Washington, DC 20429

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

RE: Proposed Rulemaking: Tax Allocation Agreements (Docket ID OCC-2020-0043; FDIC RIN 3064–AF62; FRB Docket No. R–1746; RIN 7100–AG 14)

Dear Sir or Madam:

On behalf of its members, the American Bankers Association (ABA)[1] is pleased to submit the following comments in response to a Notice of Proposed Rulemaking that would establish requirements for tax allocation agreements between institutions and their holding companies in a consolidated tax filing group (the Proposal). With an ultimate objective of promoting safety and soundness by preserving depository institutions' ownership rights in tax refunds and ensuring equitable allocation of tax liabilities among entities in a holding company structure, the Proposal appears to codify the principles that are contained in interagency policy statements issued in 1998 and 2014, with certain additions and modifications.

Summary

ABA members support the objective underlying the Proposal, which is to ensure separate and equitable entity treatment for insured depository institutions. However, certain new, more prescriptive requirements detailed in the Proposal are not well-suited for the complex issues that consolidated groups often face and, we believe, would lead to unintended consequences. Consistent with many principles of financial accounting and tax administration, professional judgment, applied in accordance with the underlying policy goals, should be preserved. In addition, current reporting standards for call reports and other regulatory reporting specifically

[1]The American Bankers Association is the voice of the nation's $22.5 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $18 trillion in deposits and extend nearly $11 trillion in loans.

designate generally accepted accounting principles (GAAP) as a cornerstone and those principles should not be changed. Therefore, new reporting requirements that may require deviation from GAAP should be reconsidered. These and additional comments are incorporated below in our responses to the specific questions presented in the Proposal.

Responses to Specific Questions in the Proposal

Question [1]: Is the scope of application of the proposal appropriate, and what are the advantages and disadvantages of this scope?

The Proposal applies to all institutions that file federal and state income taxes in a consolidated group in which one or more of the institutions in the consolidated group is supervised by any of the agencies. ABA believes that the scope of application of the Proposal is appropriate. We support policies and procedures that promote consistent reporting and comparability between insured and uninsured institutions. At the same time, it is also important to recognize the unique characteristics of bank groups that have elected S corporation status and as a result, and as a general matter, do not pay income taxes at the corporate level.

Question [2]: While the agencies expect refunds would be transmitted to the institution as soon as possible, what are the advantages and disadvantages of the agencies requiring that an institution receive any tax refund based on its tax attributes within a specific timeframe from the date received? What would be an appropriate timeframe, and why?

Under the existing policy statements, our members have sometimes struggled in determining an appropriate timeframe that would conform to a generally accepted understanding of "prompt" remittance of settlements in a consolidated group. As a result, there could be some benefit in setting a specific timeframe for settlements for the benefit of both banks and agency examiners.

That said, while we can appreciate the agencies' desire for a prescribed settlement period, our members generally believe flexibility is necessary in order to recognize the complexity that is associated with the technical and operational aspects of certain types of settlements. Settlements related to payments accompanying federal estimated, extension, and final returns can be straightforward and executed in a relatively short time frame. Even in these simple situations, however, there are a variety of "true-up" adjustments that routinely occur after payments are made and tax returns are filed (i.e. amended returns, audit settlements) that can require an extensive amount of detailed calculations and processes to confirm accuracy.

Settlement of state tax matters can be significantly more challenging for several reasons. First, there is a myriad of state filing deadlines for tax payments of all types. Second, as acknowledged in the Proposal, there are different filing schemes in various states, with separate company, unitary, and combined filing each being examples. Performing calculations for separate company settlements can be time-consuming and complex. The mere allocation of tax liabilities in a unitary filing state is an example of both the procedural and calculation challenges associated with these processes.

As a result, our members generally prefer that if the final rule includes particular prescribed settlement time periods, it would allow for more efficient settlement processes that can occur periodically several times a year rather than a complex and inefficient process based only on the myriad of filing dates.

For these reasons, we would propose that the term "promptly" in Section II C 1 be softened or otherwise expanded to recognize the complexities above and to offer institutions the opportunity to establish reasonable timing protocols with appropriate documentation and support.

Question [3]: What are the advantages and disadvantages of requiring that a parent or other members of a consolidated group compensate an institution for the use of its tax assets if and when the relevant tax asset is absorbed or used? How do these advantages and disadvantages compare to the advantages and disadvantages of other approaches including, for example, requiring that a parent or other members of the consolidated group compensate an institution for use of its tax assets if and when the institution would have been able to use the tax asset on a stand-alone basis?

Our members generally follow GAAP in the preparation of financial statements for members of a consolidated tax filing group. Accordingly, a "separate return" basis for settlements of tax liabilities is already generally used. We believe this approach generates fairly presented income statement and balance sheet results. Preparing separate return basis financial statements may at times require professional judgement and a reasoned approach to particular fact patterns that arise. Our members work to follow underlying policy objectives in applying practical solutions to unique circumstances and reasonable flexibility should be maintained in the final rule.

That said, our members have expressed strong concerns about requiring "hypothetical" separate return calculations that, in substance, could suggest tax settlement amounts that are devoid of the realities of the cash flows that might be due to the consolidated group. Rather, we agree with the proposition in the question above that members should receive cash settlement payments when tax benefits are used and cash is received by the consolidated group.

To better understand our concern, assume a simple example in which a holding company and a single banking subsidiary together filed a consolidated tax return for many years. Generally, each year the bank reported taxable income and the holding company reported a taxable loss and the bank would remit its tax liability to the holding company. The holding company would then remit taxes due from the consolidated group, net of the tax benefit attributable to the holding company loss.

In the current year, the bank now incurs a substantial loss and the consolidated group reports a taxable loss. Assume that a loss carryback period is available. However, the amount of the consolidated loss for the year exceeds the capacity for the consolidated group to carry back the

loss to the carryback year(s), even though on a separate return basis the bank's loss could have been absorbed by the bank's prior taxable income if it was not part of the consolidated return.

After filing the appropriate carryback claim, any cash received would be settled with (i.e. remitted to) the bank because of its history of taxable income. That said, our members believe it is impractical and inappropriate for the holding company to remit to the bank any hypothetical future refunds to the consolidated group based on hypothetical separate return calculations. Further, this does not seem to be in line with the holding company acting simply as agent of the consolidated group. They believe it is appropriate for the bank to instead record a deferred tax asset (DTA) for the unutilized tax benefit, subject to a "more likely than not" determination to be able to use or realize the tax benefits in the future, and to remit the refund to the bank upon its realization. This methodology is in line with GAAP, recognizes appropriate separate company balance sheet and income statement reporting, and appears consistent with regulatory capital treatment of DTAs.

Further, we believe in this case that the Proposal would result in regulatory reporting that deviates from GAAP. We believe maintaining multiple reporting regimes would be very challenging both for our member banks, and for examiners. Finally, our members also have commented that requiring this type of hypothetical settlement may also be in conflict with Treasury Regulations pursuant to Section 1502 of the Internal Revenue Code.

In line with the above, we respectfully suggest that Section II C 3 of the Proposal be eliminated from the final rule.

Similarly, our members expressed concern regarding Section II D of the Proposal. They believe that the fact pattern and related principles set forth in this section are covered by existing application of GAAP. Accordingly, this section appears unnecessary and we respectfully suggest that it also be eliminated from the final rule.

We understand that a member holding company may choose to settle tax attributes (i.e. net operating losses, general business credits) that are recorded on a bank's balance sheet prior to the utilization by the consolidated group. These settlements generally occur for administrative convenience and in situations when there are not concerns about the realization of the tax asset (albeit in a future different year) by the consolidated group. We believe that this type of flexibility for non-refundable settlements is appropriate (since it increases liquidity for the bank) and should be maintained in the final rule, but not required.

Question [4]: What are the advantages and disadvantages of the proposed requirements for a tax allocation agreement between an institution and its affiliates? Are there other requirements that the agencies should consider prescribing?

Our members understand and appreciate the need for clarity with respect to the holding company role as agent in the settlement of taxes in a consolidated tax group. Although this issue appears to

have been generally resolved through litigation and the adoption of the prior regulatory notices, we believe this proposal provides additional support for a proper review of procedures and documentation.

We have also received questions regarding the requirement that Boards of Directors of holding companies and affiliates approve these tax allocation agreements. While we appreciate it is important that senior management and directors be aware of the agreements and the policy implications, we respectfully suggest that authorized officers of the parties to the agreements be allowed to execute the agreements and to limit Board of Director approval to the holding company and the principal insured institutions within the consolidated group. Alternatively, perhaps an annual notice to the Board regarding tax allocation agreements with approval required only in circumstances where there are changes required to key affiliates as noted above. Many of our members have literally hundreds of members in their consolidated tax groups and we believe this would provide meaningful administrative relief without diminishing the policy objectives of the rule.

Question [5]: To what extent is the proposal consistent with current industry practices? To the extent that the proposal differs from current practice, what are the advantages and disadvantages of the proposal, relative to current industry practices?

With the issuance of the 1998 and 2014 interagency policy statements, we believe that our members have generally updated their intercompany tax settlement agreements in line with the intent and language suggested in the Proposal. Accordingly, with the important exceptions noted above, we believe these changes will have relatively limited impact.

That said, the Proposal is silent on implementation timing. Any change to documentation or process requires an appropriate amount of time for our members to implement. Any final rule should provide for a significant implementation period. As a rule of thumb, our members typically indicate a change in process or technology requires 18-24 months to implement effectively.

We thank you in advance for your consideration of these comments. If you have questions or would like additional background information, please do not hesitate to contact me.

Sincerely,

John P. Kinsella