person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

DOE considers public participation to be a very important part of the process for developing test procedures and energy conservation standards. DOE actively encourages the participation and interaction of the public during the comment period in each stage of this process. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in the process. Anyone who wishes to be added to the DOE mailing list to receive future notices and information about this process should contact Appliance and Equipment Standards Program staff at (202) 287–1445 or via email at *ApplianceStandardsQuestions@ee.doe.gov.*

Signing Authority

This document of the Department of Energy was signed on April 25, 2021 by Kelly Speakes-Backman, Principal Deputy Assistant Secretary and Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on May 4, 2021.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2021–09723 Filed 5–7–21; 8:45 am]

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DEPARTMENT OF TREASURY

Office of the Comptroller of the Currency

12 CFR Part 30

[Docket ID OCC–2020–0043]

RIN 1557–AF03

FEDERAL RESERVE SYSTEM

12 CFR Part 208

[Docket No. R–1746]

RIN 7100–AG 14

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 364

RIN 3064–AF62

Tax Allocation Agreements

AGENCY: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; and Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking and comment request.

SUMMARY: The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (collectively, the agencies) are inviting comment on a proposed rule (proposal) under section 39 of the Federal Deposit Insurance Act that would establish requirements for tax allocation agreements between institutions and their holding companies in a consolidated tax filing group. The proposal would promote 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. Under the proposal, national banks, state banks, and savings associations that file tax returns as part of a consolidated tax filing group would be required to enter into tax allocation agreements with their holding companies and other members of the consolidated group that join in the filing of a consolidated group tax return. The proposal also would describe specific mandatory provisions in these tax allocation agreements, including provisions addressing the ownership of tax refunds received. If the agencies were to adopt the proposal as a final rule, the agencies would rescind the interagency policy statement on tax allocation agreements that was issued in 1998 and supplemented in 2014.

DATES: Comments must be received by July 9, 2021.

ADDRESSES: Comments should be directed to:

OCC: Commenters are encouraged to submit comments through the Federal eRulemaking Portal. Please use the title ''Tax Allocation Agreements'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov:* Go to *https://regulations.gov/.* Enter ''Docket ID OCC–2020–0043'' in the Search Box and click ''Search.'' Public comments can be submitted via the ''Comment'' box below the displayed document information or by clicking on the document title and then clicking the ''Comment'' box on the top-left side of the screen. For help with submitting effective comments please click on ''Commenter's Checklist.'' For assistance with the *Regulations.gov* site, please call (877) 378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email *regulations@erulemakinghelpdesk.com.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2020–0043'' in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this action by the following method:

• *Viewing Comments Electronically—Regulations.gov:* Go to *https://regulations.gov/.* Enter ''Docket ID OCC–2020–0043'' in the Search Box and click ''Search.'' Click on the ''Documents'' tab and then the document's title. After clicking the document's title, click the ''Browse Comments'' tab. Comments can be viewed and filtered by clicking on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Results'' options on the left side of the screen. Supporting materials can be viewed by clicking on the ''Documents'' tab and filtered by clicking on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Documents Results'' options on the left side of the screen.'' For assistance with the *Regulations.gov* site, please call (877) 378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email *regulations@erulemakinghelpdesk.com.*

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Board: When submitting comments, please consider submitting your comments by email or fax because paper mail in the Washington, DC, area and at the Board may be subject to delay.

You may submit comments, identified by Docket No. R–1746; RIN 7100–AG 14, by any of the following method:

• *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

• *Email: regs.comments@federalreserve.gov.* Include docket and RIN numbers in the subject line of the message.

• *Fax:* (202) 452–3819 or (202) 452–3102.

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

All public comments will be made available on the Board's website at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information unless specifically requested by the commenter. Public comments may also be viewed in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684.

FDIC: You may submit comments, identified by FDIC RIN 3064–AF62, by any of the following methods:

• *Agency Website: https://www.fdic.gov/regulations/laws/federal/.* Follow instructions for submitting comments on the Agency website.

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

• *Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

• *Email: comments@FDIC.gov.* Comments submitted must include ''FDIC RIN 3064–AF62'' on the subject line of the message.

• *Public Inspection:* All comments received must include ''FDIC RIN 3064–AF62'' for this rulemaking. All comments received will be posted without change to *https://www.fdic.gov/regulations/laws/federal/,* including any personal information provided. Paper copies of public comments may be requested from the FDIC Public Information Center, or by telephone at (877) 275–3342 or (703) 562–2200.

FOR FURTHER INFORMATION CONTACT:

OCC: Carol Raskin, Senior Policy Accountant, or Mary Katherine Kearney, Professional Accounting Fellow, Office of the Chief Accountant, 202–649–6280; Kevin Korzeniewski, Counsel, or Joanne Phillips, Counsel, Chief Counsel's Office, (202) 649–5490.

Board: Lara Lylozian, Chief Accountant, (202) 475–6656; Juan Climent, Assistant Director, (202) 872–7526; Kathryn Ballintine, Manager, (202) 452–2555; Michael Ofori-Kuragu, Senior Financial Institution Policy Analyst II, (202) 475–6623, Sasha Pechenik, Senior Accounting Policy Analyst, (202) 452–3608, Division of Supervision and Regulation; Benjamin W. McDonough, Associate General Counsel, (202) 452–2036; Asad Kudiya, Senior Counsel, (202) 475–6358; Lucy Chang, Senior Counsel, (202) 475–6331; Joshua Strazanac, Senior Attorney, (202) 452–2457; David Imhoff, Attorney, (202) 452–2249, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263–4869.

FDIC: John Rieger, Chief Accountant, (202) 898–3602, *jrieger@fdic.gov*; Andrew Overton, Senior Examination Specialist, (202) 898–8922, *aoverton@fdic.gov,* Accounting and Securities Disclosure Section, Division of Risk Management Supervision; Jeffrey Schmitt, Counsel, (703) 562–2429, *jschmitt@fdic.gov*; Joyce M. Raidle, Counsel, (202) 898–6763, *jraidle@fdic.gov*; Francis Kuo, Counsel, (202) 898–6654, *fkuo@fdic.gov,* Legal Division.

SUPPLEMENTARY INFORMATION:

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I. Introduction

A. Summary of Proposal

The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the agencies) are inviting comment on a proposed rule (proposal) that would prescribe requirements for tax allocation agreements that involve insured depository institutions and OCC chartered uninsured institutions supervised by the agencies (collectively, institutions).[1] Under the proposal, institutions in a consolidated tax filing group (consolidated group [2]) would be required to enter into tax allocation agreements with their holding companies and other members of the consolidated group that join in the filing of a consolidated group tax return. The proposal would establish a methodology for tax payment obligations between an institution and its parent holding company within a consolidated group

[1] National banks and Federal savings associations, (OCC); state member banks (Board); and state nonmember banks and state savings associations (FDIC).

[2] A consolidated group refers to an institution, its parent, and any affiliates of the institution that join in the filing of a tax return as a single consolidated, combined, or unitary group.

and would address how the institution should be compensated for the use of its tax assets (such as net operating losses and tax credits). The proposal would be adopted primarily under Section 39 of the Federal Deposit Insurance Act (FDI Act) [3] and codified within the agencies' safety and soundness regulations.[4]

The proposal would require institutions to include certain provisions in all tax allocation agreements, such as: The timing and amounts of any payments for taxes due to taxing authorities; the acknowledgment of an agency relationship between institutions and their holding companies in a consolidated group with respect to tax refunds received; and a provision stating that documents, including returns, relating to consolidated or combined federal, state, or local income tax filings must be made available to an institution or any successor during regular business hours. The proposal further addresses the regulatory reporting treatment of an institution's deferred tax assets (DTAs).

B. Background

In 1998, the agencies and the Office of Thrift Supervision [5] adopted the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure [6] (Interagency Policy Statement) to provide guidance to insured depository institutions, their holding companies, and other affiliates regarding the allocation and payment of taxes when these entities file income tax returns on a consolidated basis. One of the principal goals of the Interagency Policy Statement is to clarify insured depository institutions' ownership rights in tax refunds when the consolidated group elects to file a consolidated tax return. The Interagency Policy Statement states that tax settlements between an insured depository institution and its holding company should be conducted in a manner that is no less favorable to the insured depository institution than if it were a separate taxpayer, and that whenever a holding company receives a tax refund from any taxing authority, and the refund is one that is attributable to its subsidiary insured depository institution, the holding company is acting purely as an agent for the insured depository institution.

In 2014, the agencies issued an addendum to the Interagency Policy Statement to emphasize that tax allocation agreements should expressly acknowledge an agency relationship between a holding company and its subsidiary insured depository institution to protect the insured depository institution's ownership rights in tax refunds (2014 Addendum).[7] The 2014 Addendum also clarifies that all tax allocation agreements are subject to section 23B of the Federal Reserve Act (section 23B).[8] In addition, the 2014 Addendum provides that tax allocation agreements that do not clearly acknowledge the presence of an agency relationship between the holding company and the subsidiary insured depository institution may be subject to requirements under section 23A of the Federal Reserve Act (section 23A).[9] Moreover, the 2014 Addendum clarifies that section 23B requires a holding company to transmit promptly to its subsidiary insured depository institution any tax refunds received from a taxing authority that are attributable to the insured depository institution. Sections 23A and 23B apply to institutions supervised by the agencies.[10]

In their supervision of institutions, the agencies have observed that some institutions in consolidated groups either lack tax allocation agreements with their holding companies or have agreements that do not have language conforming with section 23A or 23B. In particular, the agencies have reviewed tax allocation agreements that do not require a holding company in a consolidated group to transmit promptly the appropriate portion of a consolidated group's tax refund to its subsidiary institution, resulting in the holding company failing to do so in some instances. Such inaction could adversely affect the safety and soundness of the subsidiary institutions because delayed access to funds could weaken an institution's liquidity profile. Further, in its capacity as receiver for failed insured depository institutions, the FDIC has engaged in legal disputes regarding the ownership of tax refunds claimed by holding companies based on losses incurred by insured depository institutions in a consolidated group because the tax allocation agreements did not clearly acknowledge an agency relationship between an insured depository institution and its holding company. These disputes can reduce or prevent recoveries by the FDIC on behalf of failed insured depository institutions, consequently increase costs to the Deposit Insurance Fund, and thus could lead to higher FDIC deposit insurance premiums charged to solvent insured depository institutions.

II. Description of the Proposal

A. Scope of Application

The proposal would apply 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. A consolidated group refers to an institution, its parent, and any affiliates of the institution that join in the filing of a tax return as a single consolidated, combined, or unitary group. While the Interagency Policy Statement and 2014 Addendum only apply to insured depository institutions, the OCC has observed similar problematic tax practices at uninsured institutions it supervises. Therefore, the OCC proposes to apply relevant provisions of the proposal to uninsured institutions as well.

In contrast, institutions that do not file federal and state income taxes as members of a consolidated group file separately and account for taxes on a separate entity basis. Therefore, an institution that files on a separate entity basis or in a group consisting solely of the institution and its subsidiaries would not be subject to the proposal.

[3] 12 U.S.C. 1831p–1.

[4] 12 CFR part 30 (OCC); 12 CFR part 208 (Board); 12 CFR part 364 (FDIC).

[5] The functions of the Office of Thrift Supervision were transferred to the OCC and FDIC in accordance with Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, enacted July 21, 2010.

[6] 63 FR 64757 (Nov. 23, 1998).

[7] 79 FR 35228 (June 19, 2014).

[8] 12 U.S.C. 371c–1.

[9] 12 U.S.C. 371c. Section 23A requires, among other things, that loans and other extensions of credit from an insured depository institution to its affiliate be collateralized properly by a specified amount and subject to certain quantitative limits. Issues concerning compliance with section 23A could arise from instances whereby a tax allocation agreement does not (i) acknowledge that a holding company in a consolidated group serves as agent for its subsidiary insured depository institution with respect to tax refunds generated by the subsidiary insured depository institution, or (ii) require a holding company in a consolidated group to transmit promptly the appropriate portion of a consolidated group's tax refund to the subsidiary insured depository institution. In such circumstances, the failure of a holding company to acknowledge an agency relationship with respect to tax refunds or to pay promptly the subsidiary insured depository institution its appropriate portion of tax refunds could result in an extension of credit from the insured depository institution to its affiliated holding company in the consolidated group that would be subject to the requirements of section 23A.

[10] Sections 23A and 23B and 12 CFR part 223 apply by their terms to "member banks", that is, any national bank, State bank, trust company, or other institution that is a member of the Federal Reserve System. In addition, the Federal Deposit Insurance Act (12 U.S.C. 1828(j)) applies sections 23A and 23B to insured State nonmember banks in the same manner and to the same extent as if they were member banks. The Home Owners' Loan Act (12 U.S.C. 1468(a)) also applies sections 23A and 23B to insured savings associations in the same manner and to the same extent as if they were member banks.

The proposal also would not apply to an institution if the institution or its holding company is not subject to corporate income taxes at either the federal or state level, such as those that have elected S-Corporation status and do not have an obligation to pay corporate income taxes.[11]

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

B. Tax Allocation in a Holding Company Structure

As noted, a holding company and its bank subsidiaries have the ability to file a consolidated group income tax return. However, each depository institution is viewed as, and reports as, a separate legal and accounting entity for certain regulatory purposes, including for regulatory capital requirements. When a depository institution has subsidiaries of its own, the institution's applicable income taxes on a separate entity basis include the taxes of the subsidiaries of the institution itself that are included with the institution in the consolidated group return. Accordingly, each depository institution's applicable income taxes, reflecting either an expense or benefit, should be recorded in its books and records and reflected in the institution's regulatory reports as if the institution had filed on a separate entity basis. Throughout this notice, the terms ''separate entity'' and ''separate taxpayer'' are used synonymously. Furthermore, the amount and timing of payments or refunds should not be in any case less favorable to the institution than if the institution were a separate taxpayer. Any practice that is not consistent with this principle may be viewed as an unsafe or unsound practice.

C. Tax Allocation Agreements and Key Terms

The proposal would require that all institutions that are subject to Federal or State tax and file tax returns as part of a consolidated group execute a tax allocation agreement that applies to and binds each member of the consolidated group. The proposal also would require that the tax allocation agreement be approved by the boards of directors of an institution subject to that tax allocation agreement and its holding company to ensure the agreement's enforceability by and among the institutions in the consolidated group.

Section 23A and 23B generally govern extensions of credit and certain other transactions between institutions and their affiliates, which include their holding companies. Section 23A places quantitative limits on covered transactions between an institution and its affiliates and imposes collateral requirements on certain covered transactions. Section 23B requires that transactions between an institution and its affiliates be made on terms and under circumstances that are substantially the same, or at least as favorable to the institution, as comparable transactions involving nonaffiliated companies or, in the absence of the comparable transactions, on terms and circumstances that would in good faith be offered to nonaffiliated companies. The tax allocation agreement requirements in the proposal are intended to be consistent with sections 23A and 23B.

As mentioned above, one of the principles of the Interagency Policy Statement is that a tax allocation agreement cannot result in terms less favorable to an institution than if the institution filed its income tax return on a separate entity basis (that is, not as part of a consolidated group). To achieve this result, tax allocation agreements subject to the proposal would be required to establish certain rights and obligations among institutions in the consolidated group. Adjustments for statutory tax considerations that may arise on a consolidated tax return are permitted as long as the adjustments are made on a basis that is equitable and consistently applied among the holding company and other affiliates. Certain proposed key terms that would be required under the proposal for tax allocation agreements are explained below.

The proposal clarifies that, in terms of timing, an institution must be compensated for the use of its tax assets by the parent or other members of the consolidated group at the time the relevant tax asset is absorbed by the consolidated group. The proposal also clarifies that an institution must be promptly remitted any tax refund received (by the holding company) from a taxing authority that is based on the institution's tax attributes.[12] This is a common approach taken in tax sharing agreements, would promote safety and soundness by ensuring that an institution receives the benefit of its tax attributes, and is the approach least likely to create an extension of credit under section 23A.

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?

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?

Agency Relationship

As discussed in the preamble to the 2014 Addendum, there have been many legal disputes between holding companies and the FDIC, as receiver for failed insured depository institutions, regarding the ownership of tax refunds generated by the insured depository institutions. In reported decisions, some courts have found that tax refunds generated by an insured depository institution were the property of its holding company based on certain language contained in their tax allocation agreements that the courts have interpreted as creating a debtor-creditor relationship.[13] As a result, the FDIC's Deposit Insurance Fund has a material stake in the outcome of these legal disputes because they may lead to significant losses to creditors of the receiverships and, ultimately, the Deposit Insurance Fund.[14] Therefore, the agencies are proposing that holding companies receive refunds due to institutions (if attributable to the tax attributes of an institution) in trust and promptly remit them to the institutions for two reasons. First, an institution's prompt receipt of refunds that are based on the tax attributes created by that institution would allow management to

[11] S-corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes under Subchapter S of the Internal Revenue Code. *See* 26 U.S.C. 1361 *et seq.*

[12] If an overpayment of tax is applied as a credit toward estimated tax or other payments due, the tax refund would be considered received by the holding company when it files the return electing to apply the refund as a credit.

[13] *See, e.g., In re IndyMac Bancorp, Inc.,* 2012 WL 1037481 (Bankr. C.D. Cal. Mar. 29, 2012); *In re Downey Financial Corp.,* 593 F. App'x 123 (3d Cir. 2015).

[14] The Deposit Insurance Fund is funded primarily from deposit insurance assessments collected by the FDIC from insured depository institutions.

direct those funds for the immediate benefit of the institution that owns them, rather than allowing them to be retained for the benefit of the holding company. Second, receipt of the refund by the institution strengthens the institution's liquidity profile as compared to a receivable from the holding company, and reduces the risk that a refund paid by the taxing authority to the holding company based on use of the institution's tax attributes would be diverted to the holding company's creditors or other affiliates.

Under the proposal, a group's tax allocation agreement must specify that an agency relationship exists between the institution and its holding company, including an affiliate of the institution that submits tax returns for the consolidated group with respect to tax refunds. The proposal would clarify that the subsidiary institution must enter into a tax allocation agreement that specifies that the institution owns any tax refund that is created from or results from its tax attributes. A group tax allocation agreement must state that the holding company receives any portion of the tax refund related to the subsidiary institution's tax attributes in trust for the benefit of the subsidiary institution, including, for example, when a holding company receives a tax refund for a consolidated group, and some or all of the tax refund is due to tax attributes [15] of a subsidiary institution. Further, under the proposal, the tax allocation agreement must provide that the holding company will remit the refund promptly to the subsidiary institution. Finally, to avoid any transactions that would prevent institutions from receiving tax refunds attributable to their tax attributes, the tax allocation agreement must provide that, notwithstanding any other transactions or agreements to the contrary, the institution must receive any tax refund attributable to its tax attributes.[16]

Tax Payments to a Holding Company

The proposal also would address the timing and amount of tax payments [17] made to a holding company by an institution in a consolidated group. Specifically, the proposal would require an institution to be a party to a tax allocation agreement that prohibits tax payments by the institution to its affiliates in excess of the current period tax obligation of the institution calculated on a separate entity basis. This requirement would reduce the risk that the holding company would use the institution's funds to pay expenses or offset tax liabilities owed by the holding company or its other affiliates (other than the institution).

Remitting a current period tax expense payment to a holding company significantly in advance of when the payment would be due to the taxing authority if the institution filed on a stand-alone basis may treat the institution less favorably than if it were a separate taxpayer and, further, may be subject to section 23B. As a result, under the proposal, an institution must not remit its current period tax expense (or reasonably calculated estimated tax payment) earlier than when the institution would have been obligated to pay the taxing authority had it filed as a separate entity, based on the timeframes established by the taxing authority. Furthermore, the tax allocation agreement may permit the holding company to collect less than what the institution's current period income tax obligation would have been, calculated on a separate entity basis. Provided the parent will not later require the institution to pay the remainder of the current tax liability, the amount of this unremitted liability should be accounted for as having been paid with a simultaneous capital contribution by the parent to the subsidiary. With respect to deferred tax liabilities (DTLs), however, a parent cannot forgive some or all of the institution's DTL because the parent cannot legally relieve the subsidiary of a potential future obligation to the taxing authorities, especially if the subsidiary were to become a stand-alone entity. Furthermore, taxing authorities can collect some or all of a group's liability from any of the group members if tax payments are not made when due.

Payments and Hypothetical Tax Refunds From a Holding Company to an Institution

The proposal would address the timing and amount of tax payments and hypothetical refunds to be received by an institution in a consolidated group from its holding company. For example, in a situation whereby the institution, as a separate entity, has a net operating loss (NOL) and other members of the group have taxable income, the consolidated group must utilize the institution's tax loss to reduce the consolidated group's current tax liability because consolidated tax return rules require the holding company to utilize the NOLs of members of the group to reduce the group's taxable income and thus its current tax liability.[18] As a result, in this situation, the holding company must reimburse the institution for the current use of its tax losses at the time the NOL is used. The institution must reflect the tax benefit of the loss in the current portion of its applicable income taxes in the period the loss is incurred.

Separately, the proposal would require that an institution must receive from its holding company no less than the tax refund amount it would have received had it filed tax returns on a separate entity basis. For example, this would apply if the institution has a tax loss and would have been able to carry back that loss to a previous year and obtain a tax refund from a taxing authority had it filed income tax returns on a separate entity basis, but there is no ability to obtain an actual refund because other members in the consolidated group had losses that offset the institution's separate tax liability for the previous year(s). Similarly, if the institution makes quarterly tax payments, on an aggregate basis, in excess of its annual tax liability at year end and would obtain a tax refund had it filed on a separate entity basis, the proposal would require that the institution receive from the holding company no less than the tax refund amount the institution would have received as a separate entity from the taxing authority. Consistent with the principle that the amount and timing of tax payments within the consolidated group should be no less favorable to the institution than if it were a separate taxpayer, this proposed requirement would ensure that an institution receives the full benefit of its tax assets, such as any tax losses or tax credits it generates as a separate entity, instead of allowing those benefits to subsidize the activities of other affiliates, even if other affiliates in the consolidated group generate offsetting tax liabilities that reduce or eliminate a refund to the consolidated group. In this situation, the holding company would be required to remit the amount due to the institution within a reasonable period following the date the institution would have filed its own return on a separate entity basis. The prompt transmittal of funds from the holding company to the institution would permit management to use those funds for the benefit of the institution rather than of the holding company.

[15] For example, if a refund is based on losses generated by or tax credits due to activities occurring at the subsidiary insured depository institution.

[16] For example, this would preclude an institution entering into any side agreements purporting to allocate a tax refund attributable to its tax attributes to an affiliate.

[17] Tax payments include both annual statutory tax payments and interim estimated payments required within an annual period.

[18] 26 CFR 1.1502–11 and 1.1502–12.

If a holding company were to fail to remit amounts or refunds owed to its subsidiary institution promptly, that inaction may be considered an extension of credit under section 23A. A holding company's failure to remit amounts or refunds owed to its subsidiary institution also could be viewed as a constructive dividend from the institution to the holding company, which would be subject to other requirements under applicable regulations of the agencies.[19]

Consolidated Tax Group Filings

Under the proposal, a tax allocation agreement must require that all materials including, but not limited to, returns, supporting schedules, workpapers, correspondence, and other documents relating to the consolidated federal income tax return and any consolidated, combined, or unitary group state or local return, which return includes the institution, be made available on demand to the institution or any successor during regular business hours and that this requirement must survive any termination of the tax allocation agreement. Access to this information would permit the institution, as well as agency examiners, to evaluate compliance with the proposal, including whether the institution and holding company are appropriately calculating the institution's share of any tax liability and the institution's refund for use of its tax attributes. This proposed approach also is consistent with how the Internal Revenue Service views the relationship of members in a consolidated group with respect to tax documentation.[20]

With respect to insured depository institutions that enter receivership, the FDIC as receiver would be successor to any rights or interests of the insured depository institution with respect to various agreements, including any tax allocation agreement and the ability to obtain tax return information for the consolidated group of which the insured depository institution is a member.[21] Requiring the holding company to provide access to tax returns to the consolidated group, including the insured depository institution, would benefit the FDIC as receiver by improving its ability to meet its tax obligations and obtain tax refunds that are due and owed to the failed insured depository institution in a timely manner.

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?

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?

D. Regulatory Reporting

Regardless of whether an institution files as part of a consolidated group or as a separate entity, the institution must prepare its regulatory reports[22] on a separate entity basis, as specified in the current instructions for those reports.[23] The current instructions for the Consolidated Reports of Condition and Income (Call Reports) issued by the Federal Financial Institutions Examination Council require an institution that is a subsidiary of a holding company to calculate and report its current and deferred taxes on a separate entity basis. This existing reporting requirement would be unaffected by the proposal, which would establish a similar principle. The proposal would address transactions involving the purported purchase or sale of, or advancement of funds with respect to, an institution's DTAs and DTLs (collectively, ''deferred tax items''). A DTA or DTL is an estimate of an expected future tax benefit more likely than not to be realized or an expected future tax obligation to be paid, respectively. Deferred tax items are generated by and are intrinsically, and often legally, tied to the activities, assets, and liabilities of the institution. DTAs and DTLs represent the future effects on income taxes that result from temporary differences and carryforwards that exist at the end of a period.[24] The agencies would propose to revise the Call Report instructions to incorporate the treatment for deferred tax items under the proposal, as described in the *Paperwork Reduction Act* section of the **SUPPLEMENTARY INFORMATION**.

Temporary Difference Deferred Tax Items

Consistent with the separate entity basis reporting requirement, separating DTAs and DTLs from the associated assets or liabilities that gave rise to the deferred tax items would depart from one of the primary objectives related to accounting for income taxes, which is to recognize deferred tax items for the future tax consequences of events that have been recognized in an entity's financial statements or tax returns.[25] The relevant accounting standards specifically state that a temporary difference refers to a difference between the tax basis of an asset or liability and its reported amount in the financial statements that will result in taxable or deductible amounts in future years when the reported amount of the asset or liability is recovered or settled, respectively.[26] More specifically, DTAs are the deferred tax consequences attributable to deductible temporary differences and carryforwards, while DTLs are the deferred tax consequences attributable to taxable temporary differences.[27]

Based on the description of deferred tax items in ASC paragraph 740–10–05–7 and the uncertainty over the actual amounts at which deferred tax items will be settled or realized in future periods, temporary difference deferred tax items should remain on the balance sheet as long as the associated assets or liabilities that give rise to those deferred tax items remain on the balance sheet. Accordingly, an institution's purchase, sale, or other transfer of deferred tax items arising from temporary differences is not acceptable under U.S. generally accepted accounting principles (GAAP) unless these items are transferred in connection with the transfer of the associated assets or liabilities. In the case of timing differences, it may be appropriate to transfer DTAs or DTLs resulting from a timing difference when the underlying asset or liability that created the future tax benefit or obligation is being purchased, sold, or transferred within the consolidated group.[28] In addition, when the DTA or DTL can be realized or is absorbed by the consolidated group in the current

[19] *See* 12 CFR part 5, subpart E, and 5.55 (OCC); 12 CFR 303.241 (FDIC).

[20] *See, e.g.,* Internal Revenue Manual 11.3.2.4.4 (09–17–2020).

[21] *See* 26 U.S.C. 6103(e).

[22] The Consolidated Reports of Condition and Income (Call Reports) (FFIEC 031, FFIEC 041, and FFIEC 051; OMB No. 1557–0081 (OCC), 7100–0036 (Board), and 3064–0052 (FDIC)).

[23] The separate entity method of accounting for income taxes of depository institution subsidiaries of holding companies is discussed in the glossary entry for ''Income Taxes'' in the Call Report instructions, available at: *www.ffiec.gov/ffiec_report_forms.htm*.

[24] *See* Acct. Standards Codification (ASC) Topic 740 ¶ 740–10–05–7 (Fin. Acct. Standards Bd. 2019).

[25] *Id.* ¶ 740–10–10–1.

[26] *Id.* ¶ 740–10–05–7.

[27] *Id.* ¶ 740–10–20.

[28] When an asset or liability is transferred outside the consolidated group, the institution would no longer recognize the associated DTA or DTL. The institution would include the tax consequences of the transaction in the calculation of its current period tax expense or benefit.

period tax return, it would be appropriate to settle or recover the DTA or DTL, respectively.[29] Therefore, as described in the *Paperwork Reduction Act* section of the **SUPPLEMENTARY INFORMATION**, the agencies plan to revise the Call Report instructions to clarify that transfers of temporary difference deferred tax items as described above are not consistent with GAAP.

Operating Loss and Tax Credit Carryforward DTAs

Carryforwards are deductions or credits that cannot be utilized on the tax return during a year that may be carried forward to reduce taxable income or taxes payable in a future year.[30] Thus, in contrast to temporary differences, carryforwards do not arise directly from book-tax basis differences associated with particular assets or liabilities.

GAAP does not require a single allocation method for income taxes when members of a consolidated group issue separate financial statements.[31] The commonly applied ''separate-return'' method, which would reflect DTAs for NOLs and tax credit carryforwards on a separate return basis, would meet the relevant criteria.[32] Other systematic and rational methods that are consistent with the broad principles established by ASC 740 are also acceptable.

The FDI Act provides that the accounting principles applicable to reports or statements required to be filed with the agencies by insured depository institutions should result in reports of condition that accurately reflect the capital of such institutions, facilitate effective supervision of the institutions, and facilitate prompt corrective action to resolve the institutions at the least cost to the Deposit Insurance Fund.[33] The FDI Act also provides that, in general, the accounting principles applicable to Call Reports must be uniform and consistent with GAAP.[34] However, this section permits the agencies to adopt alternate accounting principles for regulatory reporting that are no less stringent than GAAP, if the agencies find that application of GAAP fails to meet any of the objectives stated above.[35]

The agencies are aware of instances in which institutions have engaged in transactions with affiliates in a consolidated group to purchase, sell, or otherwise transfer deferred tax items, specifically DTAs, other than current period tax losses useable in the consolidated group's tax return for the current period, which would otherwise be NOL carryforward DTAs for the institution. The agencies' regulatory capital rule requires the deduction from common equity tier 1 capital of NOLs and tax credit carryforward DTAs, net of any related valuation allowances and net of DTLs.[36] Because of this treatment, an institution may attempt to derecognize its DTAs for NOLs or tax credit carryforwards on its separate-entity regulatory reports prior to the time when the carryforward benefits are absorbed by the consolidated group by selling or otherwise transferring these DTAs to affiliates, particularly affiliates not subject to the agencies' regulatory capital rule, potentially overstating capital. While an institution may receive cash from affiliates in exchange for these transfers, the transfer may be reversible and not provide the same quality of regulatory capital as cash in the form of a capital contribution from a holding company.

Second, there are significant valuation uncertainties associated with deferred tax items, particularly DTAs for NOLs or tax credit carryforwards, when the underlying tax attributes cannot be used or absorbed by the group in the current period. Even though deferred tax items are measured in accordance with the enacted tax rates expected to apply when these items are settled or realized, the actual amounts at which these items will be settled or realized will be determined using the tax rates in effect in the future periods when settlement or realization occurs. In cases where such transactions have been observed, the cash settlement for the deferred tax assets is based on tax rates at the time of the settlement between the entities. However, the actual tax benefit realized by the consolidated group may ultimately differ from that amount, depending upon tax rates at the time the relevant deferred tax asset is absorbed by the consolidated group. As a result, an institution that sells or purchases DTAs for NOLs or tax credit carryforwards may receive significantly less than, or overpay for, these DTAs in relation to the amounts at which these DTAs ultimately would have been realized had they not been transferred, which also raises concerns under section 23B to the extent that the insured depository institution is placed in a position less favorable than if it filed its income tax return on a separate entity basis.[37] For example, changes in federal tax laws, such as a change in the corporate income tax rate or provisions related to NOL carryback periods, can significantly affect the value of associated DTAs.[38]

For these reasons, the agencies have concluded that the derecognition by insured depository institutions of DTAs for NOL or tax credit carryforwards on their separate-entity regulatory reports before the period in which they are absorbed by the consolidated group raises significant concerns and would not meet the objectives described in 12 U.S.C. 1831n(a)(1).[39] Specifically, the agencies find that derecognizing DTAs for NOLs or tax credit carryforwards in the Call Report in such circumstances may not accurately reflect an institution's capital and may increase the cost to the Deposit Insurance Fund if insured depository institutions that have engaged in these transactions subsequently fail after the DTAs were sold for less than their value, and the FDIC as receiver is unable to fully recover the value of these DTAs under applicable tax laws.

Consistent with this finding, as described in the *Paperwork Reduction Act* section of the **SUPPLEMENTARY INFORMATION**, the agencies expect to propose to revise the Call Report instructions to clarify that an institution must not derecognize DTAs for NOLs or tax credit carryforwards on its separate-entity regulatory reports prior to the time when such carryforwards are absorbed by the consolidated group.

III. Incorporation of the Proposal as an Appendix to the Agencies' Safety and Soundness Rules

The agencies would adopt the proposal under the procedures described in section 39 of the FDI Act.[40]

[29] Under GAAP, a deferred tax item generally becomes a current tax item when it is expected to be used to calculate estimated taxes payable or receivable on tax returns for current and prior years. ASC Topic 740 ¶ 740–10–25–2(a) (Fin. Acct. Standards Bd. 2019).

[30] *Id.* ¶ 740–10–20.

[31] *See id.* ¶ 740–10–30–27 (referring to ASC subtopic 740–10).

[32] *Id.*

[33] 12 U.S.C. 1831n(a)(1).

[34] 12 U.S.C. 1831n(a)(2)(A).

[35] 12 U.S.C. 1831n(a)(2)(B).

[36] *See* 12 CFR 3.22(a)(3) (OCC); 12 CFR 217.22(a)(3) (Board); 12 CFR 324.22(a)(3) (FDIC).

[37] This circumstance also may raise concerns under section 23A, to the extent that monies owed to the insured depository institution from an affiliate as a result of these changed amounts are not paid promptly to the insured depository institution and may be viewed as extensions of credit subject to the requirements of section 23A.

[38] *See, e.g.,* NOL carryback provisions in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and the Worker, Homeownership, and Business Assistance Act of 2009, and NOL and corporate tax rate changes in the Tax Cuts and Jobs Act. Public Law 116–136, 134 Stat. 281 (2020); Public Law 111–92, 123 Stat. 2984 (2009); Public Law 115–97, 131 Stat. 2054 (2017).

[39] The establishment of valuation allowances for DTAs for NOL and tax credit carryforwards when required in accordance with U.S. GAAP is not a derecognition event.

[40] 12 U.S.C. 1831p–1.

The OCC would also adopt the proposal for uninsured institutions under its general rulemaking authority.[41] Guidelines or standards adopted under section 39 through a rulemaking are accorded special enforcement treatment under that statute. The agencies each have procedural rules that implement the enforcement remedies for guidelines prescribed by section 39. Under procedural provisions in these rules, each agency would be authorized to require an institution that intends to participate in a consolidated tax filing group and does not have an acceptable tax allocation agreement to develop a plan to implement an acceptable agreement consistent with the proposal or to be subject to enforcement actions.

Each agency proposes to incorporate the proposal as an appendix to its relevant safety and soundness rule (located in 12 CFR part 30 (OCC), 12 CFR part 208 (Board) and part 364 (FDIC)).

IV. Impact Analysis

Scope of Application

As of the most recent data, the agencies estimate that 2,604 supervised institutions (including 2,581 insured institutions and 23 uninsured OCC-chartered institutions) would be subject to the proposal.[42] Covered institutions must be part of a consolidated group and obligated to pay federal and state income taxes. These covered institutions represent 51 percent of all institutions supervised by the agencies, and they hold over 93 percent of total assets of all institutions supervised by the agencies.[43]

The agencies do not have, nor are they aware of, data that indicates whether any particular institution files taxes as part of a consolidated group, whether the institutions have tax allocation agreements with their holding companies, or whether the institutions have agreements that would conform with the proposal. Therefore, it is difficult to accurately estimate the number of institutions that would be potentially affected by the proposal. However, in their supervision of institutions, the agencies have observed that only a small number of institutions in consolidated groups lack tax allocation agreements with their holding companies, have agreements that do not have language conforming with section 23A or 23B, or engage in transfers of DTAs or DTLs that are inconsistent with the separate entity basis reporting requirement. Overall, due to the fact that the agencies expect most covered institutions to already be in compliance with the proposal, the expected costs of the proposal are likely to be small.

The potential benefits and costs discussed below generally apply to the supervised institutions, their affiliates, and holding companies that are not already implementing principles from the existing non-codified guidance.

Benefits

There are three key benefits of the proposal. First, in some situations, the proposal would strengthen the safety and soundness of covered insured and uninsured institutions by ensuring that consolidated tax filing arrangements and practices are not adverse to their interests. Second, in some circumstances, the proposal would reduce the FDIC's resolution-related costs for covered insured institutions. Third, under some circumstances, the proposal would result in institutions more accurately reflecting their common equity tier 1 capital. These issues are discussed in more detail below.

The proposal could strengthen the safety and soundness of covered institutions. In particular, to the extent that covered institutions, their affiliates, and holding companies are not already implementing principles from the existing non-codified guidance, it may be possible to transfer tax credits out of the institution to a parent or affiliate. In this situation, the transfer weakens the safety and soundness of the institution. The proposal would limit such transfers, increasing the safety and soundness of the covered institution.

The effect of the proposal on safety and soundness of all members of a consolidated group can be more nuanced. For example, when the parent or affiliate entity retains the transfers of tax credits out of the covered institution, the potential reduction of the safety and soundness of the covered institution may be accompanied by a corresponding increase in safety and soundness at the holding company or other affiliates.

To the extent there are covered institutions that currently engage in transactions involving NOL and tax credit carryforward DTAs within a consolidated group, the proposal could result in fewer transfers of such deferred tax items and the covered institutions may be more likely to receive equitable treatment. Furthermore, if the proposal were adopted, the covered institutions would retain access to the appropriate share of funds as they avoid being underpaid, or overpaying, in the course of the transactions related to deferred tax items.

By requiring a tax allocation agreement, and clear language in such agreements about an agency relationship, the proposal could reduce the cost of resolving failed insured depository institutions. In particular, to the extent that covered institutions, their affiliates, and holding companies are not already implementing principles from the existing non-codified guidance, it is possible to transfer tax credits out of the insured depository institution and into a parent or affiliate thereby reducing the value of the assets of the insured depository institution and raising the cost of resolving failed banks. Prompt receipt of tax refunds and appropriate timing and payment of tax obligations based on terms and provisions in a tax allocation agreement would, in some situations, result in the insured depository institution being better capitalized when entering receivership, and allow the FDIC to avoid litigation over the consolidated group's tax refunds and reduce uncertainties over any tax liabilities. By reducing the insured depository institution's failure resolution costs, including the related litigation and other procedural costs of resolution, the proposal would allow the FDIC to more efficiently resolve failed insured depository institutions, carry out its mission in a more cost-effective manner, and reduce future costs to the Deposit Insurance Fund.

As described in the *Operating Loss and Tax Credit Carryforward DTAs* section of the **SUPPLEMENTARY INFORMATION**, the agencies are aware of instances in which institutions have engaged in transactions with affiliates in a consolidated group to purchase, sell, or otherwise transfer deferred tax items, specifically DTAs, other than current period tax losses useable in the consolidated group's tax return for the current period, which would otherwise be NOL and tax credit carryforward DTAs for the covered institution. The proposal clarifies regulatory reporting requirements to help ensure that an institution recognizes all its individual deferred tax items, including those arising from temporary timing

[41] 12 U.S.C. 93a.

[42] Call Report data, September 30, 2020. The agencies estimate the covered institutions by subtracting the 1,537 insured institutions and 3 uninsured OCC-chartered institutions supervised by the agencies that are subsidiaries of bank or thrift holding companies supervised by the Board, are registered as Subchapter S corporations, and would not be affected by the adoption of the proposal; from the 4,118 insured institutions and 26 uninsured OCC-chartered institutions supervised by the agencies that are subsidiaries of bank or thrift holding companies supervised by the Board, respectively.

[43] Id.

differences, in its regulatory reports.[44] An institution cannot report such items on its Call Reports separately from the asset or liability that gave rise to it, except under certain circumstances that are appropriate under GAAP.[45] The proposal also addresses accounting principles for regulatory reporting for institutions' transactions involving the purported purchase or sale of, or advancement of funds with respect to its NOLs and tax credit carryforward DTAs[46] to other affiliates in the consolidated group or the holding company. The agencies' regulatory capital rule requires the deduction from common equity tier 1 capital of NOL and tax credit carryforward DTAs, net of any related valuation allowances and net of DTLs.[47] Thus, by clarifying the regulatory reporting requirements, the proposal would more accurately reflect institutions' common equity tier 1 capital.

Costs

To the extent the supervised institutions, their affiliates, and holding companies are not already implementing principles from the existing non-codified guidance, there are two primary costs of the proposal. First, parent companies and affiliates of covered institutions could lose some discretion over the timing, magnitude, and direction of cash flows between members of the group. Second, there would be regulatory costs associated with preparing agreements as well as ongoing compliance or reporting expenses. These issues are discussed in more detail below.

Under the proposal, holding companies would be required to remit tax refunds to their subsidiary institutions, if the relevant subsidiary's tax assets such as net operating losses or tax credits generate the refund. Similarly, if the institution's tax assets allow the group to make smaller payments to a tax authority, the institution must be compensated at such time as when the consolidated group has benefitted from the use of its assets. The proposal would also enable institutions to avoid scenarios whereby they are required to submit tax payments to their holding company either materially before the holding company must remit taxes to the tax authority or greater than their actual obligations. The proposal could also result in certain holding companies ceasing to retain tax refunds and transmitting refunds to their subsidiary institutions, or no longer receiving funds well in advance of the obligated payment date.

Mandatory tax allocation agreements with terms outlined in the proposal would reduce discretion over the timing, magnitude, or direction of certain cash flows between members of the group. This may reduce the flexibility of the holding company to allocate funds between members of the consolidated group, potentially resulting in reduced growth or profitability.

To the extent the supervised institutions, their affiliates, and holding companies are not already implementing principles from the existing non-codified guidance, they could incur regulatory costs in order to enter into tax allocation agreements that comply with the requirements in the proposal. While these costs are uncertain, they are likely to be relatively small given that in the agencies' experience only a small number of institutions do not have a tax allocation agreement or, have a tax allocation agreement that does not conform with the proposal. Further, the *Paperwork Reduction Act* section of the **SUPPLEMENTARY INFORMATION** describes relatively small recordkeeping, reporting and disclosure costs associated with the proposal for covered entities.

Overall, due to the fact that the agencies expect most covered institutions to already be in compliance with the proposal, the expected costs are likely to be small. The proposal would increase the safety and soundness of institutions not implementing the principles in the Interagency Policy Statement and the 2014 Addendum and reduce litigation costs to the Deposit Insurance Fund.

V. Administrative Law Matters

A. Paperwork Reduction Act

Certain provisions of the proposal contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA). In accordance with the requirements of the PRA, the agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The agencies will request new control numbers for this information collection. The information collection requirements contained in this proposal have been submitted to OMB for review and approval by the OCC and FDIC under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and § 1320.11 of the OMB's implementing regulations (5 CFR part 1320). The Board reviewed the proposal under the authority delegated to the Board by OMB.

Comments are invited on:

a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to the OMB desk officer for the agencies by mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; facsimile to (202) 395–6974; or email to *oira_submission@omb.eop.gov,* Attention, Federal Banking Agency Desk Officer.

(1) New Information Collection

OCC

OMB control number: 1557–NEW.

Title of Information Collection: Recordkeeping Provisions Associated with the Interagency Guidelines on Safety and Soundness Standards for Tax Allocation Agreements.

Frequency: Event generated, annually.

Affected Public: National banks and federal savings associations.

[44] For banks, savings associations, and non-deposit trust companies, the Consolidated Reports of Condition and Income (Call Reports) (FFIEC 031, FFIEC 041, and FFIEC 051; OMB No. 1557–0081 (OCC), 7100–0036 (Board), and 3064–0052 (FDIC)).

[45] GAAP does not prohibit the purchase, sale, or transfer of deferred tax items of the institutions within the consolidated group if the institution would not be entitled to a current refund on a separate entity basis, or if the purchase, sale, or transfer of deferred tax items occurs in conjunction with the purchase, sale, or transfer of the assets or the liabilities giving rise to those items.

[46] In contrast to temporary differences, carryforwards do not arise directly from book-tax basis differences associated with particular assets or liabilities.

[47] *See* 12 CFR 3.22(a)(3) (OCC); 12 CFR 217.22(a)(3) (Board); 12 CFR 324.22(a)(3) (FDIC).

Number of Respondents: 579.

Estimated average hours per response:

Recordkeeping Section 30 Appendix F Initial setup—20.

Recordkeeping Section 30 Appendix F Ongoing—1.

Estimated annual burden hours:

Recordkeeping Section 30 Appendix F Initial setup—11,580.

Recordkeeping Section 30 Appendix F Ongoing—579.

Total—12,159.

Board

OMB control number: 7100–NEW.

Title of Information Collection: Recordkeeping Provisions Associated with the Interagency Guidelines on Safety and Soundness Standards for Tax Allocation Agreements.

Frequency: Event generated, annual.

Affected Public: State member banks.

Number of Respondents: 435.

Estimated average hours per response:

Recordkeeping Section 208 Appendix D–3 Initial setup—20.

Recordkeeping Section 208 Appendix D–3 Ongoing—1.

Estimated annual burden hours:

Recordkeeping Section 208 Appendix D–3 Initial setup—8,700.

Recordkeeping Section 208 Appendix D–3 Ongoing—435.

FDIC

OMB control number: 3064–NEW.

Title of Information Collection: Recordkeeping Provisions Associated with the Interagency Guidelines on Safety and Soundness Standards for Tax Allocation Agreements.

Frequency: Event generated, annual.

Affected Public: State nonmember banks and state savings associations.

Estimated average hours per response:

Number of Respondents: 1,590.

Estimated average hours per response:

Recordkeeping Section 364 Appendix C Initial setup—20.

Recordkeeping Section 364 Appendix C Ongoing—1.

Estimated annual burden hours:

Recordkeeping Section 364 Appendix C Initial setup—31,800.

Recordkeeping Section 364 Appendix C Ongoing—1,590.

Current Actions: The proposal prescribes PRA recordkeeping requirements for tax allocation agreements that involve institutions supervised by the agencies. Each institution that is part of a consolidated group must enter into a written tax allocation agreement with its holding company. The respective boards of directors of each institution and its parent holding company must approve the tax allocation agreement.

(2) FFIEC 031, FFIEC 041, and FFIEC 051

Current Actions

In addition, the proposal would require changes to the instructions for the Call Reports (OMB No. 1557–0081 (OCC), 7100–0036 (Board), and 3064–0052 (FDIC)), which will be addressed in a separate **Federal Register** notice.

B. Regulatory Flexibility Act Analysis

OCC: In general, the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* requires an agency, in connection with a proposed rule, to prepare and make available for public comment an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of $600 million or less and trust companies with total assets of $41.5 million of less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. The OCC currently supervises approximately 745 small entities, of which 281 may be within the scope of the proposed rule. The OCC classifies the economic impact on an individual small entity as significant if the total estimated impact in one year is greater than 5 percent of the small entity's total annual salaries and benefits or greater than 2.5 percent of the small entity's total non-interest expense. The OCC estimates the cost of implementing or revising the tax allocation agreements under the proposal would be less than $1,000 per institution and not result in a significant economic impact to these entities. Therefore, the OCC certifies that the proposal, if adopted as final, would not have a significant economic impact on a substantial number of small entities.

Board: The Board is providing an initial regulatory flexibility analysis with respect to this proposal. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. In connection with a proposed rule, the RFA requires an agency to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. An initial regulatory flexibility analysis must contain (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap with, or conflict with the proposed rule; and (6) a description of any significant alternatives to the proposed rule which accomplish its stated objectives.

The Board has considered the potential impact of the proposal on small entities in accordance with the RFA. Based on its analysis and for the reasons stated below, the proposal is not expected to have a significant economic impact on a substantial number of small entities. Nevertheless, the Board is publishing and inviting comment on this initial regulatory flexibility analysis. The Board will consider whether to conduct a final regulatory flexibility analysis after any comments received during the public comment period have been considered.

Reasons Why Action Is Being Considered by the Board

In their supervision of institutions, the agencies have observed that certain institutions in consolidated groups either lack tax allocation agreements with their holding companies or have agreements that fail to ensure that the institutions receive the benefit of their tax attributes, which could negatively impact the safety and soundness of these institutions. Although there is existing interagency guidance relating to tax allocation agreements, this guidance is nonbinding.

The Objectives of, and Legal Basis for, the Proposal

The proposal would codify and make enforceable (with certain modifications) earlier guidance documents relating to tax allocation agreements. The proposal is intended to (1) ensure that state member banks that file taxes as part of a consolidated group have tax allocation agreements in place, and (2) specify certain mandatory terms for such agreements. The proposal would also clarify that an institution must not derecognize DTAs for NOLs or tax credit carryforwards on its separate-entity regulatory reports prior to the time when such carryforwards are absorbed by the consolidated group.

The Board proposes to adopt the proposal pursuant to sections 39 and 37 of the FDI Act.[48] Section 39 of the FDI Act authorizes the Board to prescribe standards for safety and soundness by regulation or guideline. Section 37 of the FDI Act permits the Board to prescribe an accounting principle applicable to insured depository institutions that is no less stringent than generally accepted accounting principles. The guidelines promulgated under the proposal would be incorporated as an appendix to the Interagency Guidelines Establishing Standards for Safety and Soundness contained in 12 CFR part 208.

Estimate of the Number of Small Entities

The proposal would apply to state member banks. According to Call Reports, there are approximately 455 state member banks that are small entities for purposes of the RFA.[49] 213 of these entities are registered as Subchapter S corporations, would pay no tax at the business level, and therefore would not be impacted by the proposal. Additionally, the majority of potentially impacted small entities are likely already party to a tax allocation agreement, as discussed in existing guidance, and thus the number of small entities impacted by the proposal's requirements is likely to be considerably smaller.

Description of the Compliance Requirements of the Proposal

The proposal would require state member banks to enter into tax allocation agreements containing certain specified terms. To the extent that institutions are not already party to compliant tax allocation agreements, they could incur administrative costs to enter into tax allocation agreements that comply with this proposal, or to modify existing tax allocation agreements to be compliant, which would require legal and accounting skills. It is likely that the majority of potentially impacted small entities are already party to a tax allocation agreement, as discussed in existing guidance. The majority of these agreements are likely either compliant with the proposal or could be made compliant with relatively minor modifications. Board staff estimates that impacted Board-supervised small entities will spend 20 hours establishing or modifying a tax allocation agreement, at an hourly cost of $115.00.[50] The estimated aggregate initial administrative costs of the proposal to Board-supervised small entities amount to $556,600.00,[51] and ongoing costs are expected to be small when measured by small banks' annual expenses. In addition, the proposal may also reduce existing flexibility around the timing of compensation from holding companies to state member banks for the use of their tax attributes. The Board does not anticipate any material impact on the overall tax liability of consolidated groups as a result of the proposal.

Consideration of Duplicative, Overlapping, or Conflicting Rules and Significant Alternatives to the Proposal

The Board has not identified any federal statutes or regulations that would duplicate, overlap, or conflict with the proposal. The Board has considered the alternative of maintaining or amending existing interagency guidance but considers the proposal to be a more appropriate alternative.

FDIC:

The RFA generally requires that, in connection with a proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities.[52] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBA has defined "small entities" to include banking organizations with total assets of less than or equal to $600 million that are independently owned and operated or owned by a holding company with less than or equal to $600 million in total assets.[53] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. The FDIC does not believe that the proposed rule, if adopted, will have a significant economic effect on a substantial number of small entities. However, some expected effects of the proposed rule are difficult to assess or accurately quantify given current information, therefore the FDIC has included an Initial Regulatory Flexibility Act Analysis in this section.

Reasons Why This Action Is Being Considered

As previously discussed, in its supervision of institutions, the FDIC has observed that some institutions and affiliated entities in consolidated groups lack tax allocation agreements with their holding companies, have agreements that do not have language conforming with section 23A or 23B, or engage in the sale or transfer of DTAs or DTLs with other entities in a consolidated tax filing group that is inconsistent with the separate entity basis reporting requirement. In particular, the FDIC has reviewed tax allocation agreements that do not require holding companies in a consolidated group to promptly transmit the appropriate portion of a consolidated group's tax refund to their subsidiary institutions, resulting in some holding companies failing to do so in some instances. The FDIC believes that such inaction could adversely affect the safety and soundness of the subsidiary institutions. Further, in its capacity as receiver for failed insured depository institutions, the FDIC has engaged in legal disputes regarding the ownership of tax refunds claimed by the holding company based on losses incurred by insured depository institutions in a consolidated group due

[48] 12 U.S.C. 1831p–1 and 12 U.S.C. 1831(a)(2).

[49] Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of $600 million or less. *See* 84 FR 34261 (July 18, 2019). Consistent with the General Principles of Affiliation in 13 CFR 121.103, the Board counts the assets of all domestic and foreign affiliates when determining if the Board should classify a Board-supervised institution as a small entity. The small entity information is based on Call Report data as of September 30, 2020.

[50] To estimate average hourly wages, we review data from September 2020 for wages (by industry and occupation) from the U.S. Bureau of Labor Statistics (BLS) for depository credit intermediation (NAICS 522100). To estimate compensation costs associated with the rule, we use $115 per hour, which is based on the weighted average of the 75th percentile for four occupations adjusted for inflation, plus an additional 33.9 percent to cover private sector benefits.

[51] This estimate is based on the assumption that all 242 Board-supervised small entities that are not Subchapter S corporations would need to spend 20 hours establishing or modifying a tax allocation agreement, at a cost of $115.00 per hour. As discussed above, because the proposal largely codifies existing guidance and likely reflects existing industry practice, the number of small entities impacted by the rule's requirements and the initial aggregate administrative cost of the proposal is likely to be considerably smaller.

[52] 5 U.S.C. 601 *et seq.*

[53] The SBA defines a small banking organization as having $600 million or less in assets, where "a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." *See* 13 CFR 121.201 (as amended, effective August 19, 2019). In its determination, the "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is "small" for the purposes of RFA.

to tax allocation agreements that did not clearly acknowledge an agency relationship between the insured depository institution and its holding company. These disputes can reduce or prevent recoveries by the FDIC on behalf of failed insured depository institutions, which increases the cost to the Deposit Insurance Fund and thus leads to higher FDIC deposit insurance premiums charged to solvent insured depository institutions.

Policy Objectives

The primary objective of the proposal is to further clarify the relationship between institutions supervised by the agencies (including insured depository institutions and uninsured institutions) and affiliates or parent holding companies who are in a consolidated tax filing group with respect to the treatment of tax obligations, tax refunds and related intra-group transactions. Tax allocation agreements between institutions and their holding companies and other affiliates are important safeguards to ensure compliance by institutions with sections 23A and 23B and certain other agency regulations that ensure that holding companies in a consolidated group promptly transmit the appropriate portion of a consolidated group's tax refund to their subsidiary institutions.

Legal Basis

The FDIC proposes to adopt the guidelines pursuant to sections 39 and 37 of the FDI Act.[54] Section 39 prescribes different consequences depending on whether the agency issues regulations or guidelines. Under these provisions, an agency may require an institution that intends to participate in a consolidated tax filing group and does not have an acceptable tax allocation agreement to develop a plan to implement an acceptable agreement consistent with the proposal or to be subject to enforcement actions. Section 37(a) of the FDI Act states that the accounting principles applicable to reports or statements required to be filed with the agencies by institutions should result in reports of condition that accurately reflect the capital of such institutions, facilitate effective supervision of the institutions, and facilitate prompt corrective action to resolve the institutions at the least cost to the Deposit Insurance Fund.[55] For a more detailed discussion of the proposal's legal basis please refer to Section III entitled ''Incorporation of the Guidelines as an Appendix to the Agencies' Safety and Soundness Rules''.

The Proposed Rule

The FDIC proposes to incorporate the guidelines as an appendix to its safety and soundness rule in part 364. The FDIC has procedural rules in part 364 that implement the enforcement remedies prescribed by section 39. Under these provisions, the FDIC may require an institution that does not have an acceptable tax allocation agreement to develop a plan to implement an acceptable agreement consistent with the proposal or be subject to enforcement actions.[56] For a more detailed discussion of the proposal please refer to Section II entitled ''Description of the Proposal'' and Section III entitled ''Incorporation of the Guidelines as an Appendix to the Agencies' Safety and Soundness Rules''.

Small Entities Affected

As of the most recent data, the FDIC supervises 3,245 depository institutions of which 2,434 are ''small'' entities according to the terms of the RFA. Covered institutions must be part of a consolidated group, and subject to and obligated to pay federal and state income tax. The FDIC estimates that 1,008 small, FDIC-supervised institutions will be subject to the proposal.[57] These covered institutions represent 41 percent of all small institutions supervised by the FDIC, and they hold over 47 percent of total assets of all small institutions supervised by the FDIC.[58]

As described in the *Impact Analysis* section of the **SUPPLEMENTARY INFORMATION**, it is difficult to accurately estimate the number of small FDIC-supervised institutions that would be potentially affected by the proposal. Specifically, the FDIC does not have data that indicates whether or not any particular small FDIC-supervised institution files taxes as a consolidated group, whether the small FDIC-supervised institutions have tax allocation agreements with their holding companies, or whether the institutions have agreements that do not have language conforming with section 23A or 23B. However, the FDIC believes that the number of small, FDIC-supervised depository institutions that will be directly affected by the proposal is likely to be small, given that in the agencies' supervisory experience only a small number of institutions do not currently have tax allocation agreements, have existing tax allocation agreements that do not have language conforming with section 23A or 23B, or engage in the sale or transfer of DTAs or DTLs with other entities in a consolidated tax filing group that is not consistent with the separate entity basis reporting requirement, notwithstanding the existing non-codified guidance.

Expected Effects

The potential benefits and costs summarized below generally apply to the small FDIC-supervised institutions, their affiliates, and holding companies that are not already implementing principles from the existing non-codified guidance.

Benefits

There are three key benefits of the proposal. First, in some situations, the proposal would strengthen the safety-and-soundness of covered small FDIC-supervised institutions by ensuring that consolidated tax filing arrangements and practices are not adverse to their interests. Second, in some circumstances, the proposal would reduce the FDIC's resolution-related costs. Third, under some circumstances, the proposal would result in small FDIC-supervised institutions more accurately reflecting their common equity tier 1 capital. These benefits are discussed in more detail in the *Impact Analysis* section of the **SUPPLEMENTARY INFORMATION**.

Costs

[54] 12 U.S.C. 1831p–1.

[55] *See* 12 U.S.C. 1831n(a)(1).

[56] *See* 12 U.S.C. 1831n(a)(1).

[57] Call Report data, September 30, 2020. The FDIC estimates small covered institutions by subtracting the 906 small insured institutions supervised by the FDIC that are subsidiaries of bank or thrift holding companies supervised by the Board, are registered as Subchapter S corporations, and would not be affected by the adoption of the proposed rule; from the 1,914 small insured institutions supervised by the FDIC that are subsidiaries of bank or thrift holding companies supervised by the Board, respectively.

[58] Id.

To the extent the small, FDIC-supervised institutions, their affiliates, and holding companies are not already implementing principles from the existing non-codified guidance, there are two primary costs of the proposal. First, covered small FDIC-supervised institutions, their parent companies, and affiliates could lose some discretion over the timing, magnitude, and direction of cash flows between members of the group. Second, there would be regulatory costs associated with preparing agreements as well as ongoing compliance or reporting expenses. These costs are discussed in more detail in the *Impact Analysis* section of the **SUPPLEMENTARY INFORMATION**.

Overall, due to the fact that the FDIC expects most small FDIC-supervised institutions to already be in compliance with the proposal, the expected effects are likely to be small.

Alternatives Considered

The FDIC considered the status quo alternative to maintain or amend the existing guidance and not include the guidance as a new codified appendix to the agencies' safety and soundness rules. However, for reasons previously stated in the *Background* section of the **SUPPLEMENTARY INFORMATION**, the FDIC considers the proposal to be a more appropriate alternative.

Other Statutes and Federal Rules

The FDIC has not identified any likely duplication, overlap, and/or potential conflict between this proposal and any other federal rule.

The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would the proposal have any significant effects on small entities that the FDIC has not identified?

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000.[59] The agencies have sought to present the proposal as a new appendix to certain codified safety and soundness rules in a simple and straightforward manner and invite comment on the use of plain language. For example:

• Have the agencies organized the material to suit your needs? If not, how could they present the proposal more clearly?

• Are the requirements in the proposal clearly stated? If not, how could the proposal be more clearly stated?

• Does the proposal contain technical language or jargon that is not clear? If so, which language requires clarification?

• Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposal easier to understand? If so, what changes would achieve that?

• Is the section format adequate? If not, which of the sections should be changed and how?

• What other changes can the agencies incorporate to make the proposal easier to understand?

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA),[60] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[61]

The agencies invite comments that will further inform their consideration of RCDRIA.

E. OCC Unfunded Mandates Reform Act of 1995

The OCC analyzed the proposal under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA).[62] Under this analysis, the OCC considered whether the proposal includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $157 million or more in any one year (as adjusted for inflation). The OCC has determined that the proposal, if implemented, could result in total costs of approximately $1 million for OCC institutions. Therefore, the OCC believes the proposal, if adopted as final, will not result in a Federal mandate imposing costs of $157 million or more.

Text of Common Proposed Guidelines on Tax Allocation Agreements (All Agencies)

Appendix [ ]

Interagency Guidelines on Safety and Soundness Standards for Tax Allocation Agreements

I. Introduction

The Guidelines establish standards under section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1) for intercorporate tax allocation agreements between a [BANK] and its parent holding company and other affiliates.

A. Scope

These Guidelines apply to a [BANK] that is part of a consolidated or combined group for federal or state income tax purposes. These Guidelines apply only if the [BANK] is subject to corporate income tax obligations at the federal or state level and files income taxes as part of a consolidated group.

B. Preservation of Existing Authority

Neither section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1) nor these Guidelines in any way limits the authority of the [AGENCY] to address unsafe or unsound practices or conditions or other violations of law or regulation. The [AGENCY] may take action under section 39 of the FDI Act and these Guidelines independently of or in addition to any other supervisory or enforcement authority available to the [AGENCY].

C. Definitions

Consolidated group means one or more [BANKS], any parent holding company, and any other affiliate that file federal or state income tax returns on a consolidated basis.

Deferred tax items mean deferred tax assets and deferred tax liabilities.

Separate entity basis refers to a situation where each [BANK] is viewed, and reports its applicable income taxes and its deferred tax items, as if it were a stand-alone legal and accounting entity for regulatory reporting purposes, notwithstanding its membership in a consolidated group. For purposes of this definition, when a [BANK] has subsidiaries that are included with the [BANK] in the consolidated group return, the [BANK's] applicable income

[59] Public Law 106–102, sec. 722, 113 Stat. 1338 (codified at 12 U.S.C. 4809).

[60] 12 U.S.C. 4802(a).

[61] 12 U.S.C. 4802.

[62] 2 U.S.C. 1532.

taxes and deferred tax items on a *separate entity basis* include the applicable income taxes and deferred tax items of its subsidiaries, unless eliminated in consolidation for regulatory reporting purposes.

II. General Provisions

A. *Purpose.* A [BANK] must ensure that its inclusion in a consolidated or combined group tax return does not prejudice the interests of any [BANK] that is a member of the consolidated group. For purposes of this standard, intercorporate tax settlements between a [BANK] and its parent company do not prejudice the interests of a [BANK] provided that the settlements are conducted in a manner that is no less favorable to the [BANK] than if it were a separate taxpayer.

B. *Measurement of Current and Deferred Income Taxes.* U.S. generally accepted accounting principles and instructions for the preparation of Reports of Condition and Income require [BANKS] to provide for their current tax liability or benefit as well as for deferred income taxes resulting from any temporary differences and tax carryforwards.

1. When the [BANKS] in a consolidated group prepare separate regulatory reports, each [BANK] must record current and deferred taxes as if it filed its tax returns on a separate entity basis, regardless of the consolidated group's tax paying or refund status. Adjustments for statutory tax considerations that arise in a consolidated return may be made to the [BANK's] liability as calculated on a separate entity basis, as long as they are made on a consistent and equitable basis among all members of the consolidated group.

2. A [BANK] must recognize all of its deferred tax items, including those based on or attributable to temporary differences or net operating loss or tax credit carryforwards on its separate-entity regulatory reports, and these items cannot be presented separate from the entity that reports the asset or liability that gave rise to them. A [BANK] is prohibited from derecognizing any of its deferred tax items unless those items are reversed, are settled through payment to the [BANK] because the items are absorbed in a current tax period by the consolidated tax group, or are transferred in connection with the transfer of the associated assets or liabilities that gave rise to the deferred tax items.

C. *Tax Refunds.*

1. A [BANK] that files tax returns as part of a consolidated group must enter into a tax allocation agreement that specifies that a parent company that receives a tax refund from a taxing authority obtains these funds as agent for the [BANK] member whose tax attributes created the tax refund. This refund could be the result of a current year tax loss carried back to years with taxable income or quarterly payments made in excess of the current tax liability owed by the [BANK]. The agreement must specify that the parent hold such funds in trust for the exclusive benefit of the member [BANK] that owns the funds and must promptly remit the funds held in trust to such member [BANK]. The agreement must also specify that the parent company does not obtain any ownership interest in any tax refund because it receives a tax refund from a taxing authority.

2. If a [BANK's] loss or credit is used to reduce the consolidated group's overall tax liability, the [BANK] must reflect the tax benefit of the loss or credit in the current portion of its applicable income taxes in the period the loss or credit is incurred, and the [BANK] must obtain compensation for the use of its loss or credit at the time that it is used. If a [BANK's] loss or credit is not absorbed in the current period by the consolidated group, the [BANK] must not recognize the tax benefit in the current portion of its applicable income taxes in the loss year. Rather, the tax loss or credit represents a loss carryforward, the benefit of which is recognized as a deferred tax asset, net of any valuation allowance.

3. If a [BANK] would have received a refund from the taxing authority if it had filed on a separate entity basis, but there is no ability to obtain an actual refund because other members in the consolidated group had losses that offset the [BANK's] separate tax liability for the previous year, the [BANK] must obtain no less than its stand-alone refund amount from the parent company on or before the date the [BANK] would have filed its own return if it had filed on a separate entity basis. To the extent the group has previously made a payment to the [BANK] for the use of its loss by the group, such amount can offset the amount due.

D. *Income Tax Forgiveness Transaction.* A tax allocation agreement may allow a subsidiary [BANK] to pay a parent company less than the full amount of the current income tax liability that the [BANK] would have owed if calculated on a separate entity basis. Provided the parent will not later require the [BANK] to pay the remainder of such stand-alone current tax liability, the [BANK] must account for this unremitted liability as having been paid with a simultaneous capital contribution by the parent to the [BANK]. In contrast, because a parent cannot relieve a [BANK] of future tax liability to a taxing authority, a [BANK] may not enter into a transaction in which a parent purports to forgive some or all of the [BANK's] deferred tax liability, through a capital contribution or otherwise.

III. Intercompany Tax Allocation Agreements

A. Intercompany Tax Allocation Agreement. Each [BANK] that is part of a consolidated group must enter into a written tax allocation agreement with its holding company that protects the tax position of the [BANK] and is consistent with the principles in Section II and the terms described below, as well as the requirements of sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c–1). The board of directors, or a duly authorized committee thereof, of each [BANK] and each holding company must approve the tax allocation agreement.

B. *Terms.* The tax allocation agreement must:

1. Expressly state and not contain language to suggest a contrary intent:

a. That an agency relationship exists between the [BANK] and its holding company with respect to tax refunds and that the [BANK] owns the tax assets that were created from its tax attributes;

b. That any refund received from the taxing authority and due to the [BANK] is held in trust by the holding company; and

c. That, notwithstanding any other transactions to the contrary, the [BANK] must receive promptly any tax refund attributable to the [BANK's] tax attributes.

2. Include the following paragraph or substantially similar language:

''The [name of holding company] is an agent for the [name of institution] (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 [name of holding company] receives a tax refund [attributable to income earned, taxes paid, or losses incurred by the Institution] from a taxing authority, these funds are obtained as agent for the Institution. Any tax refund attributable to income earned, taxes paid, or losses incurred by the Institution is the property of and owned by the Institution, and must be held in trust by the [name of holding company] for the benefit of the Institution. The [name of holding company] must 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 [name of holding company] with an ownership interest in a tax refund that is attributable to income earned, taxes paid, or losses incurred by the Institution. The [name of 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.''

3. With respect to tax payments from the [BANK] to its affiliates:

a. Prohibit payments in excess of the current period tax expense or reasonably calculated estimated tax expense of the [BANK] on a separate entity basis;

b. Prohibit payment for the settlement of any deferred tax liabilities of the [BANK]; and

c. Prohibit payment from occurring earlier than when the [BANK] would have been obligated to pay the taxing authority had it filed as a separate entity.

d. Provide that if, on the basis of payments previously made during the year for estimated tax owed, the [BANK] would have been entitled to a refund if it had filed on a separate entity basis, the affiliate must repay such excess in an amount equal to the refund the institution would have been entitled to.

4. State that if a [BANK's] loss or credit is used to reduce the consolidated group's overall tax liability, the [BANK] must reflect the tax benefit of the loss or credit in the current portion of its applicable income taxes in the period the loss or credit is incurred, and the parent company must compensate the [BANK] for the use of its loss or credit at the time that it is used.

5. State that all materials, including, but not limited to, returns, supporting schedules, workpapers, correspondence, and other documents relating to the consolidated federal income tax return and any consolidated, combined, or unitary group state or local returns must be made available on demand to the [BANK] or any successor during regular business hours. The tax allocation agreement must provide that this obligation will survive any termination of the tax allocation agreement.

End of Common Proposed Guidelines on Tax Allocation Agreements

List of Subjects

12 CFR Part 30

Safety and soundness standards.

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business information, Consumer protection, Crime, Currency, Federal Reserve System, Flood insurance, Insurance, Investments, Mortgages, Reporting and recordkeeping requirements, Securities.

12 CFR Part 364

Banks, banking, Information.

Adoption of Proposed Common Guidelines

The adoption of the proposed common guidelines by the agencies, as modified by the agency-specific text, is set forth below:

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons stated in the SUPPLEMENTARY INFORMATION, the Office of the Comptroller of the Currency proposes to amend part 30 of chapter I of Title 12, Code of Federal Regulations as follows:

PART 30—SAFETY AND SOUNDNESS STANDARDS

■ 1. The authority citation for part 30 continues to read as follows:

Authority: 12 U.S.C. 1, 93a, 371, 1462a, 1463, 1464, 1467a, 1818, 1828, 1831p–1, 1881–1884, 3102(b) and 5412(b)(2)(B); 15 U.S.C. 1681s, 1681w, 6801, and 6805(b)(1).

Appendix F [Added]

■ 2. Amend part 30 by adding Appendix F as set forth at the end of the common preamble.

Appendix F [Amended]

■ 3. Amend Appendix F of part 30 by:
■ a. Removing ''[BANK]'' and adding in its place ''national bank or Federal savings association'', removing ''[BANKS]'' and adding in its place ''national banks and Federal savings associations'', and removing ''[BANK's]'' and adding in its place ''national bank's or Federal savings association's'' whenever they appear.
■ b. Removing ''[AGENCY]'' and adding in its place ''OCC'', whenever it appears.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

12 CFR Chapter II

Authority and Issuance

For the reasons stated in the SUPPLEMENTARY INFORMATION, the Board proposes to amend chapter II of Title 12, Code of Federal Regulations as follows:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

■ 4. The authority citation for part 208 continues to read as follows:

Authority: 12 U.S.C. 24, 36, 92a, 93a, 248(a), 248(c), 321–338a, 371d, 461, 481–486, 601, 611, 1814, 1816, 1817(a)(3), 1817(a)(12), 1818, 1820(d)(9), 1833(j), 1828(o), 1831, 1831o, 1831p–1, 1831r–1, 1831w, 1831x, 1835a, 1882, 2901–2907, 3105, 3310, 3331–3351, 3905–3909, 5371, and 5371 note; 15 U.S.C. 78b, 78I(b), 78l(i), 780–4(c)(5), 78q, 78q–1, 78w, 1681s, 1681w, 6801, and 6805; 31 U.S.C. 5318; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

Appendix D–3 [Added]

■ 5. Amend part 208 by adding Appendix D–3 as set forth at the end of the common preamble:

Appendix D–3 [Amended]

■ 6. Amend Appendix D–3 of part 208 by:
■ a. Removing ''[BANK]'' and adding in its place ''state member bank'', removing ''[BANK]'' and adding in its place ''state member banks'', and removing ''[BANK's]'' and adding in its place ''state member bank's'', whenever it appears.
■ b. Removing ''[AGENCY]'' and adding in its place ''Board'' whenever it appears.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the common preamble, the Federal Deposit Insurance Corporation proposes to amend part 364 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 364—STANDARDS FOR SAFETY AND SOUNDNESS

■ 7. The authority citation for part 364 continues to read as follows:

Authority: 12 U.S.C. 1818 and 1819 (Tenth), 1831p–1; 15 U.S.C. 1681b, 1681s, 1681w, 6801(b), 6805(b)(1).

Appendix C [Added]

■ 8. Amend part 364 by adding Appendix C as set forth at the end of the common preamble.

Appendix C [Amended]

■ 9. Amend Appendix C of part 364 by:
■ a. Removing ''[BANK]'' and adding in its place ''FDIC-supervised institution'',

removing ''[BANKS]'' and adding in its place ''FDIC-supervised institutions'', and removing ''[BANK's]'' and adding in its place ''FDIC-supervised institution's'', whenever it appears.

■ b. Removing ''[AGENCY]'' and adding in its place ''FDIC'' whenever it appears.

Blake J. Paulson,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on April 21, 2021.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2021–09047 Filed 5–7–21; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 328

RIN 3064–AF71

False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking and request for information.

SUMMARY: The Federal Deposit Insurance Corporation is seeking comment on a proposed rule to implement section 18(a)(4) of the Federal Deposit Insurance Act. Section 18(a)(4) of the Federal Deposit Insurance Act prohibits any person from making false or misleading representations about deposit insurance or from using the Federal Deposit Insurance Corporation's name or logo in a manner that would imply that an uninsured financial product is insured or guaranteed by the Federal Deposit Insurance Corporation. The proposed rule would describe: The process by which the Federal Deposit Insurance Corporation will identify and investigate conduct that may violate section 18(a)(4) of the Federal Deposit Insurance Act; the standards under which such conduct will be evaluated; and the procedures which the Federal Deposit Insurance Corporation will follow when formally and informally enforcing the provisions of section 18(a)(4) of the Federal Deposit Insurance Corporation Act.

DATES: Comments are due on or before July 9, 2021. Comments on the Paperwork Reduction Act burden estimates are due on or before July 9, 2021.

ADDRESSES: You may submit comments, identified by RIN 3064–AF71, by any of the following methods:

- *FDIC website: https://www.fdic.gov/regulations/laws/federal/.* Follow instructions for submitting comments on the agency website.
- *FDIC Email: Comments@fdic.gov.* Include RIN 3064–AF71 on the subject line of the message.
- *Mail:* James P. Sheesley, Assistant Executive Secretary, Legal-ESS, Attention: Comments—RIN 3064–AF71, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should submit only information that you wish to make publicly available.

Please note: All comments received will be posted generally without change to *https://www.fdic.gov/regulations/laws/federal/,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Richard M. Schwartz, Counsel, Legal Division, (202) 898–7424; Michael P. Farrell, Counsel, Legal Division, (202) 898–3853, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

Section 18(a)(4) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(a)(4), (Section 18(a)(4)) prohibits any person from misusing the name or logo of the Federal Deposit Insurance Corporation (FDIC) or from engaging in false advertising or making knowing misrepresentations about deposit insurance. The FDIC has observed an increasing number of instances where financial services providers or other entities or individuals have misused the FDIC's name or logo or have made false or misleading representations that would suggest to the public that these providers' products are FDIC-insured. To provide transparency into how the FDIC will address these and similar concerns, the FDIC is proposing to adopt regulations to further clarify its procedures for identifying, investigating, and where necessary taking formal and informal action to address potential violations of Section 18(a)(4). The regulations would also establish a point-of-contact for receiving complaints about potentially false or misleading representations regarding deposit insurance and would direct depositors and prospective depositors to where they could obtain information or verification about deposit insurance claims. Although the FDIC is not required to promulgate regulations to implement section 18(a)(4), the FDIC nonetheless believes that the proposed rule, if adopted, would establish a more transparent process that will benefit all parties and would promote stability and confidence in FDIC deposit insurance and the nation's financial system.

II. Background

The FDIC has steadfastly and proactively sought to protect depositors and prospective depositors by limiting use of the FDIC's name, seal, and logo to insured depository institutions (IDIs) and preventing false and misleading representations about the manner and extent of FDIC deposit insurance (deposit insurance). Under Federal law, it is a criminal offense to misuse the FDIC name or make false representations regarding deposit insurance.[1] Moreover, the FDIC has independent authority to investigate and take administrative enforcement actions, including the power to issue cease and desist orders and impose civil money penalties, against any person who: (1) Falsely represents or implies that any deposit liability, obligation, certificate, or share is insured by the FDIC; or (2) otherwise knowingly misrepresents: (a) That any deposit liability, obligation, certificate, or share is insured, or (b) the extent or manner

[1] *See* 18 U.S.C. 709 (''Whoever, except as expressly authorized by Federal law, uses the words 'Federal Deposit', Federal Deposit Insurance', or 'Federal Deposit Insurance Corporation' or a combination of any three of these words, as the name or a part thereof under which he or it does business, or advertises or otherwise represents falsely by any device whatsoever that his or its deposit liabilities, obligations, certificates, or shares are insured or guaranteed by the Federal Deposit Insurance Corporation, or by the United States or by any instrumentality thereof, or whoever advertises that his or its deposits, shares, or accounts are federally insured, or falsely advertises or otherwise represents by any device whatsoever the extent to which or the manner in which the deposit liabilities of an insured bank or banks are insured by the Federal Deposit Insurance Corporation . . . Shall be punished . . . by a fine under this title or imprisonment for not more than one year . . .'').