INTRODUCTION

Increasingly, thrifts are becoming parts of highly integrated corporate structures. They are more frequently being acquired as a key component of an overall strategy to provide comprehensive financial services. These affiliations can involve outsourcing of critical functions of the thrift and cross marketing of products. As a result, these thrifts may be subject to decisions that are made with regard to the best interest of the corporate structure, without considering the potential positive or negative impact on the thrift standing alone. This highlights the need for increased supervisory attention to ensure that actions of an affiliate do not pose a material risk to the safety, soundness, or stability of the subsidiary thrift.

Companies in a holding company enterprise are more likely to abuse the relationship with the thrift when they have a high risk profile or experience financial difficulties. A holding company can negatively affect the thrift by pressuring it to:

- Provide resources to the holding company or other affiliates;
- Take on additional risk; or
- Enter into transactions that it normally would not enter into.

The risk profile of a holding company enterprise can strategically, or inadvertently, be altered by:

- Entering into new activities without thoroughly evaluating the risks or failing to implement policies and procedures to manage such risk;
- Making risky investments;
- Engaging in potentially abusive transactions with insiders or other affiliates;
- Incurring significant debt;
- Issuing trust preferred or other hybrid securities without a well thought out plan as to how to deploy the proceeds; or
- Growing without adequate capital support.

Even activities or investments that appear to present little risk can adversely impact the thrift if they are mismanaged. Losses or lower than anticipated returns can result in the holding company exerting undue pressure on the thrift to help meet the demands of its other obligations. Such pressures can result in key decision makers providing inadequate oversight over the thrift relationship or endorsing inappropriate actions with regard to the best interests of the thrift.

As reiterated throughout this Handbook, the primary purpose of a holding company examination is to assess the effect of the holding company enterprise on the safety and soundness of its subsidiary thrift. **In many respects, your conclusions about the relationship between the thrift and the holding company enterprise will rely upon findings you made in other components of the holding company examination.**

While being concerned with the potential adverse ways in which a holding company may impact the thrift, you should not overlook the fact that many holding company relationships have the potential to offer benefits to the thrift. A thrift's integration in a holding company enterprise can lead to significant economies of scale for the corporate family as a whole. In addition, it is not unusual for a thrift to benefit from the experience and expertise of key decision makers within the holding company enterprise. The thrift may also benefit from the holding company's reputation, but you must realize that this is a double-edged sword. The thrift may also suffer from its holding company's reputation if it becomes poor, either due to financial reverses or adverse publicity from litigation. This is especially the case if the thrift has a similar name or is otherwise linked in the public's mind. Therefore, you must objectively evaluate the relationship component by assessing the:

- Influence that the controlling shareholders and other companies in the holding company enterprise have on the thrift and the role the thrift plays in achieving the overall goals and objectives of the holding company enterprise; and
- Effectiveness of the primary decision makers with respect to overseeing the operations of the thrift.

ASSESSING THE HOLDING COMPANY ENTERPRISE'S INFLUENCE ON THE THRIFT

You can draw preliminary conclusions about the nature of the holding company relationship by asking yourself the following questions:

- Are systems and operations interdependent? Are accounting records, bank accounts or transactional records commingled? Would it be difficult or even impossible for the thrift to "stand alone" in the event of the financial collapse of the parent holding company?[1]
- Are key thrift functions outsourced to affiliates, thereby causing the thrift to heavily rely upon the holding company? Do corporate policies facilitate the build-up of franchise value in the thrift?
- Are riskier activities or investments concentrated in the thrift?
- How material is the thrift to the holding company enterprise or its controlling shareholders? In light of their other interests, is the thrift immaterial and, therefore, vulnerable to a lack of support or inadequate oversight?
- Does the level of debt, or earnings volatility, of the holding company or other affiliates pose an undue risk to the thrift?
- Is the holding company (or other affiliates) acquiring investments, other assets, or involved in other activities that could pose risk to the thrift?
- Is the holding company involved in litigation that could adversely effect the thrift due to adverse publicity?
- Does the holding company pressure the thrift to make investments that generate benefits for the holding company or other affiliates, including tax benefits, compensating balances or "quid pro quo" type arrangements?
- Are there significant transactions (especially loans, guarantees, asset sales/purchases, and service contracts) between the thrift and affiliates or between the holding company and insiders or other affiliates that may indirectly impact the thrift?
- Is the holding company management familiar with thrift regulations and accounting practices?
- Are there management ties between the thrift and its holding company? Is the thrift being run independently of the holding company, or are there numerous interlocks within senior management, raising concerns about management loyalty to the thrift?

Evaluating these factors will help you understand the thrift's position within the consolidated entity. It will also reveal any stresses placed upon the thrift by the parent, and disclose weaknesses in nonthrift subsidiaries. You should review the Management Representation letter given to the external auditors. Such letters, or an accompanying letter from their attorney, should detail any pending or threatened litigation that could adversely affect the holding company.

In order to better understand the corporate goals and objectives and holding company relationship, you should review business plans, budgets and board minutes.

[1] Generally a thrift is not directly liable for the debts of a holding company or its other affiliates, and, thus, should be insulated from any serious financial difficulties experienced by such entities. Creditors may, however, attempt to pursue a thrift for repayment of an affiliate's (including a holding company's) unpaid delinquent debt. In most cases, courts will not hold one corporate entity responsible for the debts of the other unless the entities have been intermingled.

Business Plans and Budgets

You should obtain and review a copy of the holding company's business/strategic plan and budget if these documents are available. These documents will assist you in determining the holding company's plans regarding its thrift subsidiary. The budget and pro-forma financial statements will help you reach a conclusion as to whether planned activities are feasible. Encourage holding companies to meet with OTS when considering significant transactions as an effective way to communicate and avoid potential problems.

When no business plan exists, you should discuss the company's plans with senior holding company management. Management should be able to clearly state goals and objectives even if no formal plan is available. There must be evidence of corporate direction. Also, discuss the company's plans with thrift management to determine their understanding of the influence and level of involvement of the holding company. Does thrift management consider the holding company a positive influence that sets appropriate policies, effectively communicates, and properly oversees the operations of the thrift? Or does thrift management view the holding company as subjecting it to excessive risk? What is the thrift's interpretation of where it fits in strategically? Does thrift management feel the two entities achieve synergies, or do they feel the level of interdependence is such that the parent adversely influences the thrift and the thrift's corporate identity is compromised?

Whether by review of written plans or interviews of management, you must determine how the thrift fits within the corporate structure and if there are any plans to significantly change the institution's activities or operations. Plans and budgets should also allow you to identify any anticipated shift in financial policy that affects the thrift, especially policies that relate to dividends, management fees, or the financial condition of the subsidiary thrift. Overall, you should be able to assess whether the plans are prudent or inappropriately increase risk to the thrift.

Board Minutes

Board minutes are a valuable source of information regarding the holding company's plans and activities. You should review the minutes to determine what strategic plans, initiatives and operations were discussed and approved. The board minutes will also disclose what operating policies and procedures were adopted. The board minutes will begin to give you a sense of the effectiveness of the directors and management.

EFFECTIVENESS OF DECISION MAKERS

The board of directors and senior management of the holding company are evaluated on how their actions affect the holding company and the thrift. Management and the board's competence, integrity, and risk sensitivity are assessed with that in mind.

Some holding companies acquire thrifts as passive investments, while others plan to implement integrated cross marketing strategies. The holding company's plans and objectives regarding its control of the thrift will affect how active holding company management is with regard to decisions that affect the thrift.

Other factors, such as the asset size and the proportion of income the thrift contributes within the holding company, will determine how material the thrift is on a consolidated basis. Common sense dictates that the greater the holding company's investment in the thrift, and the more material the thrift is to the holding company's consolidated operations, the more likely that holding company management will exercise significant influence over the thrift. Holding companies that passively invest in a thrift may simply monitor performance as long as they are receiving a reasonable expected rate of return on their investment. These same holding companies may also take a more aggressive management posture when expectations are not met. The effectiveness of management can often impact the thrift. Active management of any company by its directorate and senior management is essential to manage risk. A weak or ineffective board of di-

rectors or management team can fail to identify and address problems within the holding company enterprise that can adversely affect the thrift. Therefore, at least a brief review of management's effectiveness is appropriate.

Another point to consider is that the management of the holding company and the thrift often overlap and may be very similar. While there are regulatory restrictions (and often conditions of approval that OTS imposes at the time of acquisition) that apply to the composition of the thrift's board of directors,[2] no similar restrictions apply to the holding company's directorate.

Even in situations where the board members or management personnel are similar, you should recognize that their roles and responsibilities with respect to the holding company will differ from those of the thrift. You should be watchful for conflicts of interest. Directors, officers, and employees of a thrift owe a fiduciary duty to the thrift and must not advance their own personal or business interests. Individuals that have dual roles at both the thrift and the holding company or other affiliate may find themselves in an awkward situation if the interests of the two entities compete. Similarly, since the holding company can exert influence over the activities and transactions in which the thrift engages, all directors and officers should avoid using this influence in a manner that advances their personal interests at the expense of the thrift.

Board of Directors

Directors should fulfill their legal and fiduciary responsibilities and bring a certain functional expertise to the holding company. As representatives of the holding company in the business community, directors contribute to the company's public image and reputation. This can have a direct effect on the integrity and viability of both the holding company and the subsidiary thrift.

From a legal perspective, directors must control and govern the affairs of the holding company.

[2] See 12 CFR 563.33.

The holding company directorate should include independent directors on the board. These individuals can provide a detached perspective and an analysis for the board of directors.

The OTS "*Directors' Responsibilities Guide*" and "*Directors' Guide to Management Reports*" are available on the OTS website (*ots.treas.gov*). Although written with the thrift director in mind, these resources provide a wealth of information, including references to other publications regarding director responsibilities. In addition, Section 310 of the Thrift Activities Handbook provides information on the oversight role of thrift directors.

As a general matter, directors must:

- Select and retain competent management for the holding company;
- Provide oversight of the company's activities; and
- Review the performance of management.

More specific to holding companies, the directors must oversee the level of risk assumed by its subsidiaries, including the thrift. The board should:

- Approve overall business strategies;
- Approve policies that outline management oversight and risk tolerances; and
- Periodically review and reevaluate the business plan, strategies, and risk management policies and procedures of all significant subsidiaries.

Policies and Procedures

Holding companies, particularly diversified holding companies, may be involved in a wide range of different businesses. These companies should maintain written policies and procedures that outline their approach to managing the various businesses. Holding company management should ensure that policies are in place to prevent practices that put the thrift or the consolidated entity at unacceptable risk.

Review policies and procedures to ensure that they are sound, prudent, and commensurate with the risk profile of the company. Consider how they affect the holding company, as well as the thrift subsidiary. Interview management to ensure they have considered the relevant risks and arrived at a well-reasoned and informed decision to enter each line of business. You should assess the effectiveness of the policies in managing risk. Pay particular attention to the degree of influence the holding company has over the thrift with regard to activities like funding.

Management

While the board is responsible for selecting, reviewing, and compensating management, management is responsible for operating the company under the parameters established by the board. Holding company management has the potential to negatively affect the long-term viability of the holding company, as well as the subsidiary thrift. Because of this, you should perform a focused review of management. You should expand the scope of your review of management when:

- Unusual turnover of senior management occurs;
- Management willingly accepts unusually high risks;
- A major portion of management's compensation is derived from bonuses or stock options that encourage excessive risk taking, especially if such incentives are based on short-term performance;
- There is a concern about the reputation, competence, or credibility of management; or
- A contest for control of the company appears likely.

Key management functions include:

- Providing the board with information for strategic planning;
- Directing the company's activities and monitoring operations;
- Establishing effective internal controls that set appropriate limits on risk-taking; and
- Evaluating performance.

You can identify key managers and their areas of responsibility by reviewing the PERK package, the H-(b)11, or an organizational chart. You can also ascertain management responsibilities through informal interviews with management. Once key officials have been identified, and responsibilities defined, you can consider their qualifications and assess management's overall effectiveness. To do so, you should consider whether management:

- Effectively develops and implements long-range plans to meet goals set by the directorate;
- Adheres to and enforces policies and operating procedures; and
- Ensures adequate internal controls, books, records and systems.

Internal Controls, Books, Records, and Systems

Effective and efficient operations, reliable financial reporting and compliance with relevant laws, regulations and internal policies are products of a good system of internal controls. Such systems are a function of the size, type, organizational structure and complexity of the company. We have seen occasions where holding companies have grown rapidly and have not properly integrated their systems. As a company grows in size and complexity, the systems and depth of the staff should grow in tandem. In addition, complex holding companies, or those with a high risk profile, should have an ongoing dialogue with OTS to get our assessment about the adequacy of their systems and internal controls.

Internal controls and accounting systems should include a mechanism to ensure regulatory compliance and to ensure the thrift maintains corporate separateness. Procedures should exist to both avoid violations and correct noted violations. You should identify any areas of weakness in internal controls, accounting systems and records.

You should then determine the possible effect of such weakness on both the holding company and the insured thrift. An additional source of information is the Management Representation letter to the holding company's external auditors detailing pending or threatened litigation. A pattern of similar legal actions against a holding company may reflect a weakness in internal controls that is resulting in unnecessary litigation. Such litigation not only has monetary costs, but often results in reputational costs as well.

A holding company should be subject to regular internal audits to confirm that it complies with its policies and procedures, and is operating in a safe and sound manner. Material findings should be reported to the board or an appropriately elected audit committee.

Holding companies whose subsidiary thrift(s) have consolidated aggregate assets of $500 million or greater must obtain an independent audit.[3] Such audits must be performed by independent public accountants that satisfy the qualifications outlined in 12 CFR 562.4(d), including the independence requirements and interpretations of the Securities and Exchange Commission. Thrift Activities Handbook Section 350, External Audits, outlines the specific guidelines for OTS-required audits.

EVALUATING INTERCOMPANY TRANSACTIONS AND TAX SHARING ARRANGEMENTS

In many cases, it is appropriate and beneficial for a company to engage in business transactions with its affiliates and insiders. When such transactions directly involve a thrift, however, they may be prohibited by regulation or otherwise objectionable when contrary to the thrift's best interests. Even when transactions do not directly involve the thrift, they may have an indirect impact on the thrift. For example, by making an unsound loan or risky investment, the holding company could jeopardize the financial resources it has available to support its subsidiary thrift. Furthermore, to compensate for a poor investment, the holding company may place additional pressure on the thrift to pay dividends, engage in other transactions, or pursue higher yielding investments.

Transactions Directly With the Thrift

Two areas where, historically, we have observed abuses in the holding company relationship are intercompany transactions and tax sharing arrangements. Both of these can serve as a means to divert funds from the thrift to its holding company. While thrift payments are reviewed in the course of the thrift examination, you can assist in this review by cross-checking the holding company's books and records and its valuation of transactions with those of the thrift. This will allow you to ensure that intercompany transactions, including tax payments, are properly recorded and identified.

In addition to ensuring regulatory compliance and avoiding abuses, evaluating intercompany transactions will:

- Help you understand the thrift's position within the consolidated entity;
- Reveal any stresses placed upon the thrift by the parent; and
- Disclose the relative weaknesses of affiliates.

It is important to distinguish appropriate transactions from those that are, or could become, abusive or are otherwise inconsistent with safe and sound operations. Permissible affiliate transactions should:

- Not be abusive or detrimental to the thrift;
- Be based on safe and sound practices; and
- Comply with applicable statutory and regulatory standards.

[3] See 12 CFR 562.4(b)(2).

OTS regulations regarding transactions with affiliates are found in 12 CFR 563.41 and 563.42.[4] Beyond identifying specific transactions to determine regulatory compliance, you must also strive to understand the motives for such transactions. For additional information on the restrictions and limitations that apply to affiliate transactions, you should refer to Thrift Activities Handbook Section 380, Transactions with Affiliates and Insiders. As noted above, you should coordinate your review of intercompany transactions with the examiner performing the review of affiliate transactions on the thrift examination.

Transactions with Insiders and Other Affiliates that May Indirectly Impact the Thrift

You must not limit your review to transactions that directly involve the thrift. You must also consider transactions that the holding company engages in with its insiders and other affiliates. While the transaction with affiliate regulations at 12 CFR 563.41 and 563.42, and insider lending restrictions at 12 CFR 563.43, do not technically apply to such transactions, you cannot ignore transactions that the holding company enters into with such parties and the potential effect of those transactions on the thrift subsidiary. Despite the fact that you will not apply the specific standards and thresholds outlined in the affiliate and insider regulations that apply to the thrift, you should review these transactions and consider the following elements:

- The principal business of the holding company. If the transaction is a loan, and the principal business of the holding company is to lend money, there may be less of a concern – depending on some of the other factors below. If the holding company is a nonfinancial company, any type of loan would be a red flag.
- The purpose of the transaction. A mortgage on a principal residence would be less of a concern than a loan to support the purchase of the company's stock. Loans to support stock purchases can have the effect of a company's equity being financed by its own debt.
- Whether the company has an ethics or conflicts of interest policy. If so, does the transaction conform with the policy? If not, what type of waiver was given, and who authorized it?
- The terms of the transaction. Was the transaction entered into on favorable terms or at market rates? The more favorable the terms, the greater the possibility of corporate abuse.
- If a loan, the performance of the loan. Is the loan performing? If not, why not and what actions has the holding company taken to address the situation?
- Whether the board of directors or committee of the board approved the transaction. You should use your judgment to determine whether the transaction is material enough to warrant the board's attention. If there was approval, you should determine whether independent directors participated in the decision, and interested directors abstained.
- The size of the transaction in relation to the holding company's capital and other investments, and its potential impact on the holding company's capital, cash flow, and earnings.

It is important that you identify signs of corporate abuse at the holding company. Not only is there reputational risk to the thrift, but if insiders have found a way to abuse the resources of the holding company, you must consider the possibility they will try to find a way to abuse their relationship with the thrift. If you identify a material loan or other transaction that appears problematic, you should:

- Bring the loan or transaction to the attention of senior regional management.
- Discuss the loan with holding company management.

[4] In addition to the transaction with affiliate rules, additional regulatory standards set forth in 12 CFR 563.43 limit how much and on what terms a thrift may lend to its own insiders (directors, officers, principal shareholders and related interests) and insiders of an affiliate.

- Factor the effect of the loan or transaction into your assessment of each component rating, as well as the holding company's overall rating.
- Consider what, if any, supervisory measures are appropriate to safeguard the thrift (for example, limiting dividends from the thrift, requiring prior notice of intercompany transactions, or instructing the holding company to develop and implement policies and procedures to govern transactions with affiliated entities or insiders).

Tax Sharing Agreements

If the timing of tax payments upstreamed to a holding company is too far in advance of when the holding company must submit its taxes, or if a tax refund due to the thrift is not downstreamed promptly by the holding company, it may be considered an unsecured loan and, therefore, a violation of the affiliate regulations.

As a general rule, intercorporate tax settlements between the subsidiary thrift and the consolidated group should result in no less favorable treatment to the institution than if the institution had filed its own separate return. A holding company and its subsidiaries are encouraged to enter into a written, comprehensive tax allocation agreement tailored to their specific circumstances. The respective boards of directors should approve the agreement. The agreement should:

- Limit a subsidiary thrift's tax payments to what the thrift would pay if computing its income taxes on its own;
- Discuss the amount and timing of the thrift's payments for current tax expense, including estimated tax payments;
- Discuss reimbursements to a thrift when it has a loss for tax purposes; and
- Prohibit the payment or other transfer of deferred taxes by the thrift to another member of the consolidated group.

For additional guidance, refer to the "Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure," dated 11/23/98, or contact your regional accountant (see Appendix A).

MANAGEMENT INTERLOCKS

Another aspect of your review of management is its compliance with management interlocks regulations. The Depository Institution Management Interlock Act[5] and the OTS's management interlocks regulation[6], promote competition by generally prohibiting a management official from serving simultaneously with two unaffiliated depository institutions or their holding companies in situations where the management interlock may have an anticompetitive effect. The scope of the prohibition depends on the size and the location of the organizations. For example, management interlocks are *generally* prohibited if both unaffiliated depository organizations, or any depository institution affiliate, have offices in the same community. Management officials cannot serve two unaffiliated depository organizations that have offices or any depository institution affiliate in the same Relevant Metropolitan Statistical Area (RMSA) if both institutions have assets of $20 million or more. A management official of a depository organization (or any depository institution affiliate) with assets of greater than $2.5 billion may not serve as a management official at an unaffiliated depository organization (or any depository institution affiliate) with assets of greater than $1.5 billion.

If management interlocks exist, you need to determine if the interlock falls within the permitted interlocking relationships noted in 12 CFR Section 563f.4. If not, the institution or its holding company may apply to OTS for a general exemption or determine its eligibility for a small market exemption. OTS may grant an exemption if we determine that the official's dual service would not result in a monopoly, a substantial lessening of competition, or otherwise threaten safety and

[5] See 12 USC Sections 3201-3208.

[6] See 12 CFR 363f.

soundness. The small market share exemption allows interlocks for depository organizations (and affiliates) that hold, in the aggregate, no more than 20 percent of the deposits in each RMSA or the community in which both depository organizations (or affiliates), provided that the interlock does not violate the major asset prohibition noted above (12 CFR 563f.5). The depository organization does not need to apply to OTS for the small market exemption, but the institution must maintain records supporting its eligibility for the small market exemption and reconfirm such determination on an annual basis.

Management must institute corrective action if the required prior approval was not obtained. You can detect the existence of management interlocks through:

- Interviews
- Review of minutes
- Review of CIIS, LEXIS/NEXIS, Westlaw/Vutext services
- Contact with other agencies.

RATING THE RELATIONSHIP COMPONENT

The Relationship rating is an assessment of the effectiveness of the holding company's board and senior management, as well as issues associated with the interdependence of the subsidiary thrift. Consider the degree of influence the holding company has over the thrift and how this influence affects thrift operations. Factors in the assessment will include:

- Technical competence, leadership, appointment of officers, management depth, salary administration, budget and tax planning;
- Knowledge of relevant laws and regulations;
- Ability to plan and respond to changing circumstances;
- Ability of holding company management to monitor and direct subsidiary operations to ensure both sound business operation and compliance with holding company policies and procedures;
- Adequacy of system of internal controls, including the internal audit function;
- Dividend Policy; and
- Dependency, indicated by the ability of the holding company and the nonbank subsidiaries to operate independently and not depend on the subsidiary thrift to support them.

You should assign a ***relationship component rating of "1"*** if the holding company serves as a resource to the thrift. The board of directors and executive management of such companies ensure that control is exercised in the best interests of the thrift. They act with integrity, communicate effectively with the thrift and the OTS, and oversee the operations of each entity. The thrift retains independence as a financial institution without adverse influence from the parent. Integrated systems create efficiencies that do not interfere with the thrift's independence. In other words, the thrift could stand alone in the event of a financial collapse by the holding company. Intercompany accounts and relationships reveal no stress placed upon the thrift.

You should assign a ***relationship component rating of "2"*** if the holding company's influence does not adversely impact the thrift. Such companies may show a significant level of influence, possibly insensitive to the fact that the thrift is a separate regulated entity. Nonetheless, the thrift continues to perform acceptably, and the holding company has not caused the thrift to increase its risk profile. Intercompany accounts and relationships show no significant stress placed upon the thrift.

You should assign a ***relationship component rating of "3"*** to holding companies that show a clear disregard for the independent needs of the thrift or the poor financial condition of the holding company enterprise poses an imminent threat to the health and stability of the subsidiary thrift.

There is little effort to insulate the thrift from the risks of other activities conducted in the holding company enterprise. Indeed, there is a distinct lack of appreciation for the importance of separate corporate identities, as indicated by inadequate recordkeeping or controls that distinguish among separate legal entities or by a disturbing pattern of affiliate transactions. Further, the directorate and management of the holding company have demonstrated an inclination to subject the thrift to excessive risk as a result of the activities of the parent and/or the nonbank subsidiaries. Systems are so integrated that there is an excessive reliance by the thrift on the holding company or other affiliates that it would have difficulty standing alone. The thrift's separate corporate identity is severely compromised. The directorate and senior management do not communicate with the OTS regarding major changes in the direction of the company.

SUMMARY

The ability of a holding company to create value for its shareholders and to be a resource for the subsidiary thrift depends to a large extent on the quality of management and the commitment of its directorate.

The relationship between the holding company and its subsidiary thrift is an important factor in the regulation of holding companies. Consider the independence, influence and integration of the thrift, and ultimately whether the board and management act in the best interests of the thrift. To do this, consider:

- Business plans and budgets;
- Intercompany accounts and relationships;
- Tax sharing agreements;
- Quality of management;
- Quality of the board of directors, including their compliance with regulatory and statutory guidelines;
- Effectiveness of management, including whether they properly plan, control and oversee the operations of the institution; and
- The existence of conflicts of interests and management interlocks.

It is important that the activities of the holding company enterprise do not pose undue risk to the thrift and that the operations of either entity are not so integrated that either entity cannot stand alone.

See Attached Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 98–17]

FEDERAL RESERVE SYSTEM

[Docket No. R–1022]

FEDERAL DEPOSIT INSURANCE CORPORATION

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[Docket No. 98–93]

Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure

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

ACTION: Notice of interagency policy statement.

SUMMARY: The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) (collectively, the Agencies) are adopting a uniform interagency policy statement regarding intercompany tax allocation agreements for banking organizations and savings associations (institutions) that file an income tax return as members of a consolidated group. The intent of this interagency policy statement is to provide guidance to institutions regarding the allocation and payment of taxes among a holding company and its depository institution subsidiaries. In general, intercorporate tax settlements between an institution and its parent company should be conducted in a manner that is no less favorable to the institution than if it were a separate taxpayer. This policy statement is the result of the Agencies' ongoing effort to implement section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), which requires the Agencies to work jointly to make uniform their regulations and guidelines implementing common statutory or supervisory policies.

DATES: This interagency policy statement is effective November 23, 1998.

FOR FURTHER INFORMATION CONTACT: *OCC:* Gene Green, Deputy Chief Accountant, (202/874–4933), or Tom Rees, Senior Accountant, (202/874–5411), Office of the Chief Accountant, Core Policy Division, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

Board: Charles Holm, Manager, (202/452–3502), or Arthur Lindo, Supervisory Financial Analyst, (202/452–2695), Division of Banking Supervision and Regulation, 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), Diane Jenkins (202/452–3544).

FDIC: For supervisory issues, Robert F. Storch, Chief, (202/898–8906), or Carol L. Liquori, Examination Specialist, (202/898–7289), Accounting Section, Division of Supervision; for legal issues, Jamey Basham, Counsel, (202/898–7265), Legal Division, FDIC, 550 17th Street, NW, Washington, DC 20429.

OTS: Timothy J. Stier, Chief Accountant, (202/906–5699), or Christine Smith, Capital and Accounting Policy Analyst, (202/906–5740), Accounting Policy Division, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

Section 303(a)(3) of the of the CDRI Act directs the Agencies, consistent with the principles of safety and soundness, statutory law and policy, and the public interest, to work jointly to make uniform regulations and guidelines implementing common statutory or supervisory policies. Section 303(a)(1) of the CDRI Act also requires the Agencies to review their regulations and written policies and to streamline those regulations where possible.

In 1978, the FDIC, the OCC, and the Board each published a separate policy statement regarding the allocation and payment of income taxes by depository institutions which are members of a group filing a consolidated income tax return. The OTS provides supervisory guidance on this subject in its Holding Company Handbook. As part of the ongoing effort to fulfill the section 303 mandate, the Agencies have reviewed, both internally and on an interagency basis, the present policy statements and the supervisory guidance that has developed over the years. As a result of this review, the Agencies identified minor inconsistencies in the policy statements and supervisory guidance. Although largely limited to differences in language and not to the substance of the policies and guidelines themselves, the Agencies determined that it would be beneficial to adopt a uniform interagency policy statement regarding intercorporate tax allocation in a holding company structure.

II. Policy Statement

This interagency policy statement reiterates and clarifies the position the Agencies will take as they carry out their supervisory responsibilities for institutions regarding the allocation and payment of income taxes by institutions that are members of a group filing a consolidated return. The interagency policy statement reaffirms that intercorporate tax settlements between an institution and the consolidated group should result in no less favorable treatment to the institution than if it had filed its income tax return as a separate entity. Accordingly, tax remittances from a subsidiary institution to its parent for its current tax expense should not exceed the amount the institution would have paid had it filed separately. The payments by the subsidiary to the parent generally should not be made before the subsidiary would have been obligated to pay the taxing authority had it filed as a separate entity. Similarly, an institution incurring a tax loss should receive a refund from its parent. The refund should be in an amount no less than the amount the institution would have received as a separate entity, regardless of whether the consolidated group is receiving a refund. However, adjustments for statutory tax considerations which may arise in a consolidated return are permitted as long as the adjustments are made on a basis that is equitable and consistently applied among the holding company affiliates. Regardless of the method used to settle intercorporate income tax obligations, when depository institution members prepare regulatory reports, they must provide for current and deferred income taxes in amounts that would be reflected as if the institution had filed on a separate entity basis.

An institution should not pay its deferred tax liabilities or the deferred portion of its applicable income taxes to its parent since these are not liabilities required to be paid in the current reporting period. Similarly, transactions in which a parent ''forgives'' any portion of a subsidiary institution's deferred tax liability should not be reflected in the institution's regulatory reports. This is because a parent cannot relieve its subsidiary of this potential future obligation to the taxing authorities, since these authorities can collect some or all of a group liability

from any of the group members if tax payments are not made when due.

Finally, the Agencies recommend that financial institution members of a consolidated group have a written, comprehensive tax allocation agreement to address intercorporate tax policies and procedures.

This interagency policy statement revises and replaces the Board's ''Policy Statement on Intercorporate Income Tax Accounting Transactions of Bank Holding Companies and State Member Banks,'' (43 FR 22782, May 26, 1978); the OCC's ''Statement of Policy on Income Tax Remittance to Holding Company Affiliates,'' (Banking Circular No. 105, May 22, 1978); the FDIC's Statement of Policy on ''Income Tax Remittance by Banks to Holding Company Affiliates'' (43 FR 22241, May 24, 1978); and the OTS's ''OTS Tax-Sharing Policy,'' (Section 500, ''Funds Distribution,'' OTS Holding Companies Handbook). This interagency policy statement does not materially change any of the guidance previously issued by any of the Agencies.

The text of the interagency policy statement follows:

Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure

The Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision (''the Agencies'') are issuing this policy statement to provide guidance to banking organizations and savings associations regarding the allocation and payment of taxes among a holding company and its subsidiaries. A holding company and its depository institution subsidiaries will often file a consolidated group income tax return. However, each depository institution is viewed as, and reports as, a separate legal and accounting entity for regulatory purposes. Accordingly, each depository institution's applicable income taxes, reflecting either an expense or benefit, should be recorded as if the institution had filed on a separate entity basis.[1] Furthermore, the amount and timing of payments or refunds should be no less favorable to the subsidiary than if it were a separate taxpayer. Any practice that is not consistent with this policy statement may be viewed as an unsafe and unsound practice prompting either informal or formal corrective action.

Tax Sharing Agreements

A holding company and its subsidiary institutions are encouraged to enter into a written, comprehensive tax allocation agreement tailored to their specific circumstances. The agreement should be approved by the respective boards of directors. Although each agreement will be different, tax allocation agreements usually address certain issues common to consolidated groups. Therefore, such an agreement should:

- Require a subsidiary depository institution to compute its income taxes (both current and deferred) on a separate entity basis;
- Discuss the amount and timing of the institution's payments for current tax expense, including estimated tax payments;
- Discuss reimbursements to an institution when it has a loss for tax purposes; and
- Prohibit the payment or other transfer of deferred taxes by the institution to another member of the consolidated group.

Measurement of Current and Deferred Income Taxes

Generally accepted accounting principles, instructions for the preparation of both the Thrift Financial Report and the Reports of Condition and Income, and other guidance issued by the Agencies require depository institutions to provide for their current tax liability or benefit. Institutions also must provide for deferred income taxes resulting from any temporary differences and tax carryforwards.

When the depository institution members of a consolidated group prepare separate regulatory reports, each subsidiary institution should record current and deferred taxes as if it files its tax returns on a separate entity basis, regardless of the consolidated group's tax paying or refund status. Certain adjustments for statutory tax considerations that arise in a consolidated return, e.g., application of graduated tax rates, may be made to the separate entity calculation as long as they are made on a consistent and equitable basis among the holding company affiliates.

In addition, when an organization's consolidated income tax obligation arising from the alternative minimum tax (AMT) exceeds its regular tax on a consolidated basis, the excess should be consistently and equitably allocated among the members of the consolidated group. The allocation method should be based upon the portion of tax preferences, adjustments, and other items generated by each group member which causes the AMT to be applicable at the consolidated level.

Tax Payments to the Parent Company

Tax payments from a subsidiary institution to the parent company should not exceed the amount the institution has properly recorded as its current tax expense on a separate entity basis. Furthermore, such payments, including estimated tax payments, generally should not be made before the institution would have been obligated to pay the taxing authority had it filed as a separate entity. Payments made in advance may be considered extensions of credit from the subsidiary to the parent and may be subject to affiliate transaction rules, i.e., Sections 23A and 23B of the Federal Reserve Act.

A subsidiary institution should not pay its deferred tax liabilities or the deferred portion of its applicable income taxes to the parent. The deferred tax account is not a tax liability required to be paid in the current reporting period. As a result, the payment of deferred income taxes by an institution to its holding company is considered a dividend subject to dividend restrictions,[2] not the extinguishment of a liability. Furthermore, such payments may constitute an unsafe and unsound banking practice.

Tax Refunds From the Parent Company

An institution incurring a loss for tax purposes should record a current income tax benefit and receive a refund from its parent in an amount no less than the amount the institution would have been entitled to receive as a separate entity. The refund should be made to the institution within a reasonable period following the date the institution would have filed its own return, regardless of whether the consolidated group is receiving a refund. If a refund is not made to the institution within this period, the institution's primary federal regulator may consider the receivable as either an extension of credit or a dividend from the subsidiary to the parent. A parent company may reimburse an institution more than the refund amount it is due on a separate entity basis. Provided the

[1] Throughout this policy statement, the terms ''separate entity'' and ''separate taxpayer'' are used synonymously. 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* that are included with the institution in the consolidated group return.

[2] These restrictions include the Prompt Corrective Action provisions of section 38(d)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1831o(d)(1)) and its implementing regulations: for insured state nonmember banks, 12 CFR part 325, subpart B; for national banks, 12 CFR 6.6; for savings associations, 12 CFR part 565; and for state member banks, 12 CFR 208.45.

institution will not later be required to repay this excess amount to the parent, the additional funds received should be reported as a capital contribution.

If the institution, as a separate entity, would not be entitled to a current refund because it has no carryback benefits available on a separate entity basis, its holding company may still be able to utilize the institution's tax loss to reduce the consolidated group's current tax liability. In this situation, the holding company may reimburse the institution for the use of the tax loss. If the reimbursement will be made on a timely basis, the institution should reflect the tax benefit of the loss in the current portion of its applicable income taxes in the period the loss is incurred. Otherwise, the institution should not recognize the tax benefit in the current portion of its applicable income taxes in the loss year. Rather, the tax loss represents a loss carryforward, the benefit of which is recognized as a deferred tax asset, net of any valuation allowance.

Regardless of the treatment of an institution's tax loss for regulatory reporting and supervisory purposes, a parent company that receives a tax refund from a taxing authority obtains these funds as agent for the consolidated group on behalf of the group members.[3] Accordingly, an organization's tax allocation agreement or other corporate policies should not purport to characterize refunds attributable to a subsidiary depository institution that the parent receives from a taxing authority as the property of the parent.

Income Tax Forgiveness Transactions

A parent company may require a subsidiary institution to pay it less than the full amount of the current income tax liability that the institution 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.

In contrast, a parent cannot make a capital contribution to a subsidiary institution by ''forgiving'' some or all of the subsidiary's deferred tax liability. Transactions in which a parent ''forgives'' any portion of a subsidiary institution's deferred tax liability should not be reflected in the institution's regulatory reports. These transactions lack economic substance because the parent cannot legally relieve the subsidiary of a potential future obligation to the taxing authorities. Although the subsidiaries have no direct obligation to remit tax payments to the taxing authorities, these authorities can collect some or all of a group liability from any of the group members if tax payments are not made when due.

[3] See 26 CFR 1.1502–77(a).

Dated: October 14, 1998.

Julie L. Williams,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, October 29, 1998.

Jennifer J. Johnson,

Secretary of the Board.

By order of the Board of Directors.

Dated at Washington, DC, this 5th day of November, 1998.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Dated: October 14, 1998.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

[FR Doc. 98–31179 Filed 11–20–98; 8:45 am]

BILLING CODE 4810–13–P, 6210–01–P, 6714–01–P, 6720–01–P

DEPARTMENT OF THE TREASURY

Customs Service

Proposed Collection; Comment Request; Lay Order Period—General Order Merchandise

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning Lay Order Period—General Order Merchandise. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 22, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, DC 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION: Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Lay Order Period—General Order Merchandise Cost Submissions.

OMB Number: 1515–0220.

Form Number: N/A.

Abstract: This collection is required to ensure that the operator of an arriving carrier, or transfer agent shall notify a bonded warehouse proprietor of the presence of merchandise that has remained at the place of arrival or unlading without entry beyond the time period provided for by regulation.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, Individuals, Institutions.

Estimated Number of Respondents: 300.

Estimated Time Per Respondent: 15 hours.

Estimated Total Annual Burden Hours: 7,500.

Estimated Total Annualized Cost to the Public: N/A.

Dated: November 16, 1998.

J. Edgar Nichols,

Team Leader, Information Services Group.

[FR Doc. 98–31237 Filed 11–20–98; 8:45 am]

BILLING CODE 4820–02–P