September 20, 2021

Via Electronic Mail

Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218
Washington, D.C. 20219

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

Manuel E. Cabeza, Counsel
Attn: Comments, Room MB-3128
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington D.C. 20429

Re: Call Report Revisions

To Whom It May Concern:

The Bank Policy Institute and the Institute of International Bankers (together, the Associations)[1] welcome the opportunity to respond to the joint notice and request for comment by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency regarding revisions to the Consolidated Reports of Condition and Income (Call Reports).[2] The Associations are generally supportive of the proposed new Call Report line item related to the Standardized Approach for Counterparty Credit Risk final rule; however, we urge the agencies not to proceed with the proposed revisions that would establish requirements for tax

1 See Appendix A for descriptions of the Associations.

2 86 Fed. Reg. 38810 (July 22, 2021).

allocation agreements between institutions and their holding companies in a consolidated tax filing group.[3]

I. The agencies should not proceed with the Call Report revisions related to the Tax Allocation Agreement NPR.

Several of the proposed revisions to the Call Reports are intended to align with the changes contained in the recently issued Tax Allocation Agreement NPR. Specifically, the proposal would revise the instructions to the Call Reports to clarify deferred tax assets (DTAs) and deferred tax liabilities (DTLs, and together with DTAs, deferred tax items) resulting from temporary differences must remain with the asset or liability that has generated those temporary differences and that an institution must not derecognize DTAs for net operating losses (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 Associations submitted a comment letter to the agencies on July 9, 2021, responding to the Tax Allocation Agreement NPR[4] and strongly opposing the use of the final rule to address regulatory capital issues associated with the treatment of deferred tax items in the Call Reports. The point remains applicable here as well that the Tax Allocation Agreement NPR provides insufficient justification for these revisions, which would include a potential requirement for firms to deviate from US GAAP when completing the Call Reports. Therefore, the proposed revisions to clarify the Call Report instructions should not be made without further consideration for the complexities of the relevant transactions.

In addition to the arguments described in the July 9th comment letter, the timing of this proposal to revise the Call Report instructions to align with changes proposed in the Tax Allocation Agreement NPR prior to such rule's finalization increases the operational burden on respondent firms. Additionally, the timing raises questions regarding the full consideration of the comments received on the Tax Allocation Agreement NPR given that the current proposal was issued only 13 days after the comment period on the Tax Allocation Agreement NPR closed. Generally, reporting changes related to regulations are not proposed until the related rule is finalized. This timing allows respondent firms to begin preparatory work in anticipation of the efforts associated with implementing the related reporting proposal. However, the current proposal to revise the Call Reports was published in the Federal Register less than two weeks after the close of the comment period for the Tax Allocation Agreement NPR and in advance of a final rulemaking. Issuing a reporting proposal to align with a rule that has not yet been finalized, and therefore for which the agencies could make significant adjustments based on review of public comments, puts firms at a distinct disadvantage in operating efficiently to ensure that they have proper controls in place. This sequencing does not afford firms the additional preparation time to implement reporting changes and leaves open the possibility of a pivot in the requirements from the agencies when finalizing the rule, which would eliminate the opportunity for firms to comment on the reporting changes in the context of the full regulatory package.

In light of the issues highlighted in the Associations' July 9th comment letter as further described during our September 15th meeting with the agencies, and the abovementioned concerns related to

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3 86 Fed. Reg. 24755 (May 10, 2021) (hereafter the Tax Allocation Agreement NPR).

4 A copy of the Association's comment letter responding to the Tax Allocation Agreement NPR is included herein as Appendix B.

timing, we urge the agencies not to proceed with these proposed revisions to the Call Report instructions.

II. If the agencies proceed with the revisions related to the derecognition of DTAs, we recommend a less prescriptive and more principles-based approach where firms are afforded flexibility as to which tax attributes can or cannot be derecognized, considering the facts and circumstances of the relevant transactions and so long as the institution is not disadvantaged.

As highlighted throughout our July 9th comment letter, the Associations have significant concerns with the prescriptive nature of the requirements proposed in the Tax Allocation Agreement NPR that would have the effect of removing an institution's professional judgment with respect to the treatment of various tax items. This is particularly true of the proposed comprehensive disallowance of derecognizing DTAs for NOLs or tax credit carryforwards on separate-entity regulatory reports prior to the time when such carryforwards are absorbed by the consolidated group. This prohibition, which is also reflected in the current proposal, does not offer any flexibility to firms allowing for their consideration of the facts and circumstances of the transaction, and would seem to eliminate certain business as usual practices thereby creating significant operational burdens above and beyond any reporting burden. Additionally, the concrete language of the proposal on derecognizing DTAs does not take the materiality of deferred tax items into consideration. Absent such considerations, derecognition of all DTAs, no matter how de minimis, would be prohibited with no real benefit. The rigidity in the proposed revisions to the Call Reports for derecognition of these items would create the potential for substantial and far-reaching implications and administrative burden. For example, there would be substantial implications in stress testing that would require firms to make potentially significant adjustments to their DFAST calculations, as there are more instances of NOL and tax carryforward generation during CCAR.

We therefore recommend that, should the agencies not accept our recommendation in Section I and proceed with the proposed revisions to the Call Reports related to the Tax Allocation Agreement NPR, the agencies should take a more principles-based approach with respect to the derecognition of DTAs, which may include for instance a standard where the parent holding company is expected to be treated as an agent with fiduciary responsibilities to do no harm and the institution is not disadvantaged and treated as no worse than a non-affiliate, similar to the arm's length standard of section 23B of the Federal Reserve Act.[5] The agencies note that the requirements proposed in the Tax Allocation Agreement NPR, which include these proposed Call Report revisions, "are intended to be consistent with sections 23A and 23B."[6] The Associations agree with the requirement under section 23B 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,"[7] and believe this concept can be embedded into a less prescriptive approach to the derecognition of DTAs in the Call Reports. Such an approach would offer firms the flexibility to allow them to continue to use their professional judgement with a focus on protecting the institution, by considering the facts and circumstances of the relevant transaction to determine whether or not a DTA would be derecognized for NOLs or tax credit

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[5] 12 U.S.C. § 371c and 12 U.S.C. § 371c-1.

[6] Tax Allocation Agreement NPR at 24758.

[7] *Id.*

carryforwards on its separate-entity regulatory reports prior to the time when such carryforwards are absorbed by the consolidated group for the purposes of the Call Report.

For example, in instances where a firm has assessed and monitored a tax attribute, considering the history and support in US GAAP financials, as well as books and records, and determined that the attribute will unwind with the inability to be utilized and that no entity will be harmed, the principles-based approach we are seeking would allow firms to cash settle tax attributes with lower-tiered entities, even if they cannot be utilized with the current year tax return, should such firms choose to do so. This type of practice would only occur if there were certainty at the time of settlement that the attributes will be used in the foreseeable future by the consolidated group and not expire unutilized, which should address the agencies' concerns related to a settlement being reversible.

Another example of this less prescriptive approach to the derecognition of DTAs where firms are permitted to use professional judgement would be for institutions to receive a settlement payment for some or all of its tax attributes or properly record the DTA for such tax attributes on the institution's books in advance of the attribute being absorbed by the group if the institution is treated fairly. As discussed in the July 9th comment letter, such settlements could provide for contingent adjustments if the attributes are absorbed in a different rate environment than prevailed at the time of settlement, which we believe would also address some of the concerns expressed by the agencies that settlement may be calculated at a rate lower than the future tax rates against which the credit may be claimed. Further, there would be significant administrative burden associated with not permitting this flexibility and instead using a forced approach to settlements. Permitting firms to do later contingent adjustments would, in a number of instances, allow for more efficient administrative tracking by firms, and also would have the benefit of protecting the institution just as well as if settlement occurs when the DTA is absorbed.

Similarly, banks should be permitted to use their professional judgment to derecognize transferred carryforward DTAs under certain circumstances. One example that firms would be able to apply using the recommended principles-based approach is in the event that there is a provision in the tax allocation agreement pertaining to the consolidated group that would provide for compensatory payments to be made to the institution within a specified timeframe (e.g., 18 months) in the event of material changes in the value of carryforward DTAs. Inclusion of a provision along these lines we believe would mitigate concerns expressed by the agencies in the Tax Allocation Agreement NPR related to valuation changes.

Further, this principles-based approach, centered on protecting the institution, would provide the flexibility to also allow institutions to transfer carryforward DTAs in exchange for cash which could be prudent and beneficial because such transactions improve the safety and soundness of institutions. The institution that generated the carryforward DTA receives the substantial advantage of receiving cash for these tax attributes and is no longer exposed to an asset that is illiquid, nearly impossible to hedge, and subject to idiosyncratic risk (particularly in times of distress). In fact, the liquidity of the institution is immediately enhanced by the cash received in exchange for an uncertain tax attribute that may never be used in the event of insolvency or other distress of the institution or consolidated group.

The above are merely a few examples to demonstrate the flexibility that is needed in the Call Report instructions with respect to the derecognition of DTAs that would still protect the institution and is not intended to be exhaustive in light of the nuanced and complex nature of the relevant transactions, nor is it intended to imply that these examples should be made into requirements. Considering the instances above, we strongly believe that if the agencies proceed with the instructional changes to address the derecognition of DTAs, a less rigid and prescriptive, principles-based approach would be appropriate, as such an approach would provide firms with necessary flexibility while also protecting the institution.

III. If the agencies proceed with the proposed revisions to the Call Reports related to the Tax Allocation Agreement NPR in their entirety, a number of clarifications are needed in the final instructions.

If the agencies do not accept the recommendation herein as well as in the Associations' comment letter on the Tax Allocation Agreement NPR not to proceed with the prescribed treatment of deferred tax items and thus the proposed instructional revisions to the Call Reports, we recommend that the agencies clarify a number of items.

Specifically, the terms "timing difference" and "temporary difference" are used repeatedly throughout the proposal, however no definition or clarity on the term "timing difference" is provided in the proposal or draft reporting instructions. While a definition for "temporary difference" is provided in the general glossary of FASB's Accounting Standards Codification,[8] no definition is available for "timing difference." Additionally, "timing differences" is only referenced in the section of the proposal titled "Temporary Difference Deferred Tax Items," which further contributes to the ambiguity of the term. Firms generally consider "temporary differences" to be those differences that result in a book vs. tax difference in the recognition period, whereas firms consider "timing differences" to refer to the difference in book vs. tax recognition of income or expense of a particular asset or liability net of CECL or depreciation. That is, the "temporary differences" that would not be included in the "timing differences" referenced in the proposal would be a firm's tax attributes such as NOL/tax credit, other carryforwards, etc. We therefore request that the agencies confirm that the firms' general understanding of these terms is accurate and recommend that the instructions clarify the term "timing difference" and how it is differentiated from "temporary difference."

Further, if the agencies do not accept either of the recommendations outlined in Section I and Section II above, the proposed addition of language that would prohibit derecognition of DTAs raises questions given the complexity of these transactions. For instance, it is not clear whether valuation allowances would be permitted in light of the proposed change in the Call Report instructions that would prohibit DTAs. Valuation allowances can occur when a firm's management has concluded that it is not likely that a DTA, such as an NOL carryover, would be utilized in the future as firms do not anticipate enough future taxable income in that particular jurisdiction to take advantage of the full NOL. As a specific example, if a firm had an NOL in a particular state and then ceased to do business in that state, it would not be likely that the NOL attributable to such state would be utilized, and a valuation allowance would be established. The proposal and proposed instructions do not address such nuances and therefore, confirmation is needed that such a valuation allowance would not be considered a derecognition of a DTA that is prohibited from the Call Reports.

Additionally, the Tax Allocation Agreement NPR provides that in certain cases, firms are required to settle a bank NOL when it can be carried back on a separate basis and not on a consolidated basis. This seems to be inconsistent with the proposed language in the draft instructions to the Call Reports that state that "[a]n institution must not derecognize deferred tax assets [...] on its separate-entity regulatory reports prior to the time when such carryforwards are absorbed by the consolidated group."

8 *See* FASB ASC 740-10-05-7.

The discrepancy between this concept of a separate entity treatment as described in the Tax Allocation Agreement NPR compared to the proposed instructional changes to the Call Reports leads to further questions ultimately creating challenges for firms. Thus, if the agencies do not accept the recommendations described in our July 9th comment letter that would allow for greater flexibility in the application of a separate entity framework, clarification is needed on how the prohibition of derecognition of DTAs and the proposed separate entity treatment fit together and work in tandem.

* * * * *

The Associations appreciate the opportunity to comment on the proposal. If you have any questions, please contact the undersigned at alix.roberts@bpi.com and swebster@iib.org.

Respectfully submitted,

Alix Roberts
Assistant Vice President, Regulatory Affairs
Bank Policy Institute

Stephanie Webster
General Counsel
Institute of International Bankers

cc: Michael Gibson
Mark Van Der Weide
Board of Governors of the Federal Reserve System

Benjamin McDonough
Grovetta Gardineer
Office of the Comptroller of the Currency

Doreen Eberley
Nicholas Podsiadly
Federal Deposit Insurance Corporation

Appendix A

The Bank Policy Institute

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

The Institute of International Bankers

The Institute of International Bankers is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the United States. The IIB's mission is to help resolve the many special legislative, regulatory, tax, and compliance issues confronting internationally headquartered institutions that engage in banking, securities and other financial activities in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions.

Appendix B

Copy of the Associations' July 9th comment letter

July 9, 2021

Via Electronic Mail

Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218
Washington, D.C. 20219

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
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Washington, D.C. 20551

James P. Sheesley, Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: Tax Allocation Agreements (OCC: Docket ID OCC-2020-0043, Federal Reserve: Docket No. R-1746, FDIC: RIN 3064-AF62)

To Whom It May Concern:

The Bank Policy Institute[1] and the Institute of International Bankers[2] (together, the "Associations") welcome the opportunity to comment on the proposal by the Board of Governors of the

[1] BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans and are an engine for financial innovation and economic growth.

[2] The Institute of International Bankers is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the United States. The IIB's mission is to help resolve the many special legislative, regulatory, tax, and compliance issues confronting internationally headquartered institutions

Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency regarding the proposed requirements for tax allocation agreements between institutions and their holding companies (the "Proposed Rule").[3] The Associations support the goals of the Proposed Rule to protect the financial condition of the insured depository institutions and OCC-chartered uninsured institutions that would be covered by the rule as well as to minimize losses to the Deposit Insurance Fund in receivership. However, we are concerned that the prescriptive nature of the proposed requirements would remove an institution's professional judgment and may result in(i) detrimental results for the regulated institution, and (ii) unduly burdensome tracking requirements for the consolidated group.

I. The proposed rule appropriately requires treatment of a common parent as agent.

The Associations agree strongly with the main thrust of the Proposed Rule, namely that all institutions should, on a mandatory basis, have written tax allocation agreements confirming the agency status of their common parent when it receives a refund attributable to the subsidiary institution. The Associations' members have interpreted prior guidance in this area as effectively mandatory, but the Proposed Rule appropriately clarifies that result for all regulated entities.

The Associations note the Proposed Rule uses a variety of terms to refer to a parent of an institution, including "holding company," "parent holding company," and "parent company". However, these terms may not refer to the same entities in every organizational structure and as such the final rule should clarify to which entities the requirements apply.

II. The final rule should allow for flexibility rather than prescriptive application of a separate entity framework.

The Proposed Rule would require that certain other tax concepts be explicitly stated in the written tax allocation agreement. To the extent that those statements reflect broad principles derived from the idea that the institution should be treated no less favorably than if it filed taxes on a separate entity basis, then the Associations also agree that the Proposed Rule is desirable and appropriate.

However, some of those statements are more granular and prescriptive, and as to these the Associations urge caution. The agencies are not writing on a clean slate here; detailed tax and U.S. generally accepted accounting principles ("GAAP") rules have been promulgated in this area.[4] The fact patterns that may arise in the tax context are very complicated and varied, and prescriptive rules may arrive at an illogical answer in some of those situations. If the separate entity theory were extended too far, then it would result in very material administrative burdens without producing materially greater protection of the regulated institution. The institutions should be permitted to continue to exercise professional judgment with respect to interpreting the agreed principles in particular situations. The following examples illustrate certain oversimplifications in the tax analysis.

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that engage in banking, securities and other financial activities in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions.

3 Tax Allocation Agreements, 86 Fed. Reg. 24755 (May 10, 2021).

4 *See* 12 U.S.C. §§ 1502, 1552.

First, it should be acknowledged that treating the institution on a separate entity basis could be beneficial or detrimental to the institution, depending on the situation. The agencies give an example where the institution could have carried back a net operating loss (“NOL”) on a standalone basis, but not on a group basis, and thus that separate entity treatment is beneficial. However, there are many other possibilities. For example, if the institution pays foreign income taxes but has no foreign source of income (due to, for example, the apportionment of interest expense), then it would not be entitled to a foreign tax credit on a separate entity basis, notwithstanding that the credit could be taken by the group because other members have foreign source income. Similarly, if the institution would have a heavy apportionment factor to a high tax state on a standalone basis which is moderated by the group’s lesser apportionment to that state, the institution would have paid higher state taxes on a separate entity basis.

Such acknowledgement illustrates that a doctrinaire fixation on separate entity status quickly gives rise to very difficult questions as to the synergistic effect of attributes among group members. Sometimes the group liability is worse than each member’s separate entity liability (1+1=3), sometimes better (1+1=1.5), and in many situations it is very difficult to decide which attributes produced the difference. For example, foreign tax credits and interest deductions are both desirable tax attributes but each tends to crowd the other out, and particularly as a result of the Tax Cuts and Jobs Act, the crowding out can occur in a non-linear way based on the presence or absence of other attributes.[5] Moreover, financial institutions incur large amounts of nearly offsetting interest income and interest expense, and the tax rules are specifically crafted in the case of financial institutions to analyze interest deductibility in this context. As a result, GAAP has a complex and nuanced methodology to resolve the proper allocation of the benefit of interest deductions, and professional judgment is necessary to analyze each fact pattern. It would not be appropriate for the Proposed Rule to end-run these considerations or create a different set of outcomes.

Second, the Proposed Rule’s treatment of an institution and its subsidiaries as a single entity works correctly in some situations, but not in others. This is true particularly in the context of state taxation, where the institution may not be consolidated with its subsidiaries.

Finally, the Proposed Rule appears to mandate that the application of a prior year overpayment to a subsequent year tax liability be treated in all circumstances as a “refund”, and therefore trigger an obligation to compensate the institution.[6] While this is sometimes the correct answer, there are other times in which this mandate would result in an improper acceleration of compensation to the institution. This treatment may also lead to institutional challenges in tracking and settling these transactions.

As a result of the foregoing, the Associations recommend that the final rule avoid overly prescriptive application of the “separate entity” theory. The Associations’ members understand and agree with that theory, but they need flexibility to apply it correctly in distinct factual situations. At the very least, implementation of these prescriptive rules should be deferred, in order to give the institutions and their advisors time to have a dialogue with the agencies about possible unintended consequences.

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5 *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

6 86 Fed. Reg. at 24758 n.12.

III. The agencies should revisit certain administrative requirements to avoid unintended results.

The Proposed Rule mandates certain administrative outcomes that are burdensome and unnecessary to protect the regulated institution, which are set forth below.

First, the Proposed Rule strictly mandates timing of payments to and from the institution. For example, the Proposed Rule requires that a parent must "promptly" remit an institution's tax refund. Instead, these matters should be left to the professional judgment of relevant tax personnel at the institutions, subject to the overarching standard that excessive anticipation or delay of payments could be recharacterized by the agencies as extensions of credit under section 23A or 23B of the Federal Reserve Act.[7] Regulated entities need to maintain some flexibility to promote orderly payment processing.

Second, the Proposed Rule mandates a broad accessibility rule with respect to tax work papers.[8] Work paper access should be limited to the agencies, rather than be extended to commercial predecessors or successors, in order to prevent an inappropriate disclosure of confidential information. Moreover, the agencies should have authority to request only those work papers that are relevant to calculating the institution's separate entity liability, and its corresponding entitlements under the tax allocation agreement. In addition, the agencies should not be permitted to access any information that would not have been available to the Internal Revenue Service in its examination capacity. Privacy concerns must be respected in this regard.

IV. The agencies should not address regulatory capital issues in the final rule.

Finally, the Proposed Rule covers the treatment of deferred tax assets ("DTAs") and deferred tax liabilities ("DTLs") under GAAP, and potential required deviations from GAAP when completing Call Reports, a topic entirely distinct from the matters discussed above. The Associations and their members strongly oppose utilizing this regulatory package to address such issues, which are quite complex. The agencies have described their reasoning in a cursory fashion in the preamble, and a rulemaking on such complex matters should be accompanied by a much more extensive articulation of which transactions are of concern and why.

The following are some examples of the analytical flaws in the regulatory capital analysis.

First, the discussion in the section of the Proposed Rule "Temporary Difference Deferred Tax Items" argues for a GAAP "clarification" that temporary differences must remain with the asset or liability that has generated those temporary differences.[9] The agencies lack the requisite authority to decide the GAAP treatment of such items. Moreover, the agencies' reasoning is faulty unless the proposed rule is interpreted very narrowly. The agencies illustrate their thinking by citing temporary differences that arise by reason of the tax basis of an asset or liability differing from its GAAP value. The issue is that temporary differences can arise for many other reasons, and in those cases it will not be clear which asset or liability is responsible for the temporary difference, or even whether any asset or liability can be so-identified. For example, temporary differences may result from differing timing rules

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7 12 U.S.C. § 371c and 12 U.S.C. § 371c-1.

8 86 Fed. Reg. at 24760.

9 86 Fed. Reg. at 24760.

with respect to income or expense, even though such items do not factor into asset basis. This is the case with certain types of compensation which may be deducted earlier for tax purposes than for GAAP purposes. In addition, the treatment of liabilities for tax and GAAP purposes is much more complicated than "tax basis differing from GAAP value." If included in a final rule, this provision should be strictly limited to temporary differences where the basis of an asset differs from its GAAP value. No inference should be drawn as to the rule for other temporary differences.

Second, the discussion in the section titled "Operating Loss and Tax Credit Carryforward DTAs" argues for a Call Report provision that explicitly deviates from GAAP.[10] GAAP forms a view as to carryforwards based on a nuanced and evolved analysis of all of the facts and circumstances of the reporting group's particular circumstances. As a result, the agencies should not override the GAAP rules absent a very clear demonstration that the GAAP result is deleterious to the safety and soundness of the regulated institution. The agencies' first concern appears to be that any settlement of NOL or credit carryforwards should be prohibited if it results in any accretion to the institution's regulatory capital, since such carryforwards receive a 100% haircut in the absence of settlement. Regulated groups should be permitted to improve the institution's capital position by settling such carryforwards for cash, irrespective of the amount. Such transactions do not deprive the institution of any asset that is given credence for regulatory capital purposes. In actuality, of course, the regulated groups do not seek to settle the carryforwards for pennies on the dollar; when they are settled it is in a manner that is carefully considered to be fair to the institution given all facts and circumstances. Notwithstanding this considered analysis, the Proposed Rule advocates an across-the-board disallowance on the grounds that "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."[11] However, the settlement may not be reversible, in which case the cash received is exactly of the same quality as a capital contribution. Additionally, even if it is reversible, such reversal would be a subsequent reduction in capital that would only be permissible if a dividend could have been paid. We further note that complying with this proposal may lead to institutional challenges and operational burdens in allocating and tracking carryforwards (which are sensitive to changing income projections and profiles), particularly for large groups with multiple reporting entities.

The agencies also advance a second argument for the prohibition of settlements of carryforwards, which is that the settlement may be calculated at a rate lower than the future tax rates against which the credit may be claimed. The Proposed Rule states that "[a]s 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…"[12] The answer to this challenge, however, should not be to bar all settlements but rather should be to mandate that settlements must be fair to the institution, taking into account all relevant facts and circumstances. For example, a settlement could provide for contingent adjustments (favorable, unfavorable, or both) if the attributes are absorbed in a different rate environment than prevailed at the time of settlement. Therefore, the agencies should allow either that an institution may receive a settlement payment for some or all of its tax attributes or properly record the DTA for such tax attributes on the institution's books in advance of the attribute being

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[10] 86 Fed. Reg. at 24761.

[11] 86 Fed. Reg. at 24761.

[12] 86 Fed. Reg. at 24761.

absorbed by the group, if the institution is treated fairly, taking into account all facts and circumstances of such transaction.

The Associations do not raise these regulatory capital questions to seek specific tailoring of this portion of the Proposed Rule, but instead to illustrate the inaccuracies inherent in such an approach. This Proposed Rule is an inappropriate means of dealing with these issues.

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The Associations appreciate the opportunity to comment on the proposal. If you have any questions, please contact the Dafina Stewart at *dafina.stewart@bpi.com* or Briget Polichene at *bpolichene@iib.org*.

Respectfully Submitted,

Briget Polichene

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Senior Vice President, Associate General Counsel
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Chief Executive Officer
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cc: Benjamin McDonough
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Board of Governors of the Federal Reserve System