No. 18-1269

In the Supreme Court of the United States

SIMON E. RODRIGUEZ, AS
CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF
UNITED WESTERN BANCORP, INC., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS
RECEIVER FOR UNITED WESTERN BANK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly interpreted a tax allocation agreement in light of the Internal Revenue Service regulations that govern affiliated corporations filing taxes on a consolidated basis.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-27a) is reported at 914 F.3d 1262. The opinion and order of the district court (Pet. App. 28a-66a) is reported at 574 B.R. 876. The opinion and order of the bankruptcy court (Pet. App. 67a-128a) is reported at 558 B.R. 409.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2018. A petition for rehearing was granted in part and denied in part on January 29, 2019 (Pet. App. 2a). The petition for a writ of certiorari was filed on April 1, 2019, and was granted on June 28, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-25a.

STATEMENT

A. Statutory And Regulatory Background

1. Filing a petition for Chapter 7 or Chapter 11 bankruptcy "creates an estate," which generally includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). Property in which "the debtor holds * * * only legal title and not an equitable interest," however, "becomes property of the [bankruptcy] estate * * * only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. 541(d). For example, "[b]ecause the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'" *Begier* v. *IRS*, 496 U.S. 53, 59 (1990). Similarly, "'if property is in the debtor's hands as agent'" for another, "title to the property remains in the * * * principal," and the property is "'not treated as property of the debtor's estate.'" 5 *Collier on Bankruptcy* ¶ 541.05[1][a], at 541-26 to 541-27 (Richard Levin & Henry J. Sommer eds., 16th ed. 2019) (*Collier*) (citation omitted).

2. Under the Internal Revenue Code, "[a]n affiliated group of corporations" may elect to file a "consolidated" income-tax return for the members of the group "in lieu of separate returns" for each affiliate. 26 U.S.C. 1501; see 26 U.S.C. 1502-1503. Corporations are "'affiliated'" for this purpose when they are connected by "stock ownership with a common parent" that owns (directly

or indirectly) 80% or more of each member's stock. 26 U.S.C. 1504(a)(1) and (2).

Congress directed the Secretary of the Treasury to "prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group" is properly determined. 26 U.S.C. 1502. An affiliated group may file a consolidated return only if all members of the group "consent to all the [Secretary's] consolidated return regulations." 26 U.S.C. 1501. The filing of a consolidated return is treated as such consent. *Ibid.*

To implement the consolidated-return statute, the Internal Revenue Service (IRS) has promulgated a comprehensive body of regulations. 26 C.F.R. 1.1502-0 to 1.1502-100. The IRS regulations enable affiliated corporations filing a consolidated return to obtain certain tax benefits that would not be available if the affiliates filed separately—most notably, the ability to offset affiliates' losses against the income of other affiliates when calculating tax liability for the group as a whole. 26 C.F.R. 1.1502-11(a). Affiliated corporations filing consolidated returns "continue[] to be separate taxable units," however, and "[t]he consolidated returns operate[] only to unite them for the purpose of tax computation and the equitable apportionment between them of the tax thus computed." *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 127 (1934).

To facilitate the IRS's processing of consolidated returns, the regulations generally require the members of an affiliated group to conduct their federal income tax business through "one entity (the agent)," which is "the sole agent that is authorized to act in its own name regarding all matters relating to the federal income tax

liability for the consolidated return year for each member of the group." 26 C.F.R. 1.1502-77(a)(1).[1] "[T]he common parent" corporation for the affiliated group will typically be "the agent." 26 C.F.R. 1.1502-77(c)(1).

The common parent is charged with filing one consolidated tax return on behalf of the members of the group. 26 C.F.R. 1.1502-75(h)(1). The consolidated return must include an "affiliations schedule," IRS Form 851, that reports the estimated tax payments made by each member of the group. *Ibid.* The common parent as "agent" is also responsible for "mak[ing] any election (or similar choice of a permissible option) that is available to a subsidiary in the computation of its separate taxable income"; for "fil[ing] for all extensions of time"; for "giv[ing] waivers, giv[ing] bonds, and execut[ing] closing agreements, offers in compromise, and all other documents"; and for "fil[ing] petitions and conduct[ing] proceedings before the United States Tax Court." 26 C.F.R. 1.1502-77(d)(1), (3), (4), and (10). Each of those actions is treated as having been done on behalf of each member of the group. See *ibid.*

"All correspondence concerning the income tax liability for the consolidated return year is carried on directly with the agent." 26 C.F.R. 1.1502-77(d)(2). Thus, various important documents from the IRS regarding the affiliated group "are mailed only to the agent, and the mailing to the agent is considered as a mailing to

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[1] For the tax-return years beginning on or after June 28, 2002 and before April 1, 2015—which include the years for the consolidated tax returns at issue in this case, Pet. App. 7a—the applicable regulations appear at 26 C.F.R. 1.1502-77B. We agree with petitioner (Br. 8 n.1) that the minor differences between those regulations and the currently applicable regulations are not material to this case, and we similarly refer to 26 C.F.R. 1.1502-77 throughout this brief.

each member." 26 C.F.R. 1.1502-77(d)(7) (notices of claim disallowance), 26 C.F.R. 1.1502-77(d)(8) (notices of deficiencies). This includes "[a]ny assessment of tax," which "may be made in the name of the agent" but which "is considered as an assessment with respect to each member." 26 C.F.R. 1.1502-77(d)(11). Likewise, a "[n]otice and demand for payment of taxes is given only to the agent, and such notice and demand is considered as a notice and demand to each member." 26 C.F.R. 1.1502-77(d)(12). When a taxpayer in an affiliated group requests a tax refund, "[t]he agent files claims for refund, and any refund is made directly to and in the name of the agent and discharges any liability of the Government to any member with respect to such refund." 26 C.F.R. 1.1502-77(d)(5); see also 26 C.F.R. 1.1502-78(a) and (b)(1).

The IRS regulations describing the common parent's responsibilities "are basically procedural in purpose and were adopted solely for the convenience and protection of the federal government." *Western Dealer Mgmt., Inc.* v. *England* (*In re Bob Richards Chrysler-Plymouth Corp.*), 473 F.2d 262, 265 (9th Cir.), cert. denied, 412 U.S. 919 (1973); see Pet. Br. 41-42 (agreeing that the regulations were adopted "so that the IRS can communicate with the affiliated group through a single intermediary").

3. The parties before this Court agree (Pet. Br. 10-11) that, when the IRS issues a tax refund to an affiliated group's common parent as agent for the group, two distinct issues arise. First, it is necessary to identify the entity or entities within the group to which the refund is allocated, *i.e.*, the entity or entities that are entitled ultimately to receive the funds. To resolve that question, the affiliated group's common parent

(and potentially a court) must determine whether the parent is entitled to keep the refund for itself, or whether it is instead obligated to distribute some or all of the refund to one or more affiliates. See Pet. Br. 10.

Second, where ultimate entitlement to a particular refund has been allocated to a corporate subsidiary within the group, it sometimes becomes necessary to determine whether the common-parent agent nevertheless "'owns' the refund[] received from the IRS"—that is, whether the parent has equitable title—"before forwarding [the refund] to the [subsidiary]." *FDIC* v. *Zucker* (*In re NetBank, Inc.*), 729 F.3d 1344, 1349 (11th Cir. 2013), cert. denied, 135 S. Ct. 476 (2014). That issue concerns the "capacity" in which the common parent holds the refund during the interim period between when the parent receives the refund from the IRS (per 26 C.F.R. 1.1502-77(d)(5)) and when it forwards the money to the proper affiliate(s). Pet. Br. 10. The latter question implicates concepts of agency and trust law, and it becomes significant primarily when the common parent enters bankruptcy. See *ibid.*

Many affiliated groups resolve issues concerning payment of taxes by group members, as well as allocation and interim ownership of tax refunds, by forming a contract among the members known as a "tax allocation agreement[]." See Dale L. Ponikvar & Russell J. Kestenbaum, *Aspects of the Consolidated Group in Bankruptcy: Tax Sharing and Tax Sharing Agreements*, 58 Tax Law. 803, 826 (2005); accord Pet. Br. 9. Every court of appeals that has considered the issue agrees that, when the members of an affiliated group have a tax allocation agreement that addresses allocation or interim ownership of a tax refund, the agreement interpreted under applicable state law governs those issues.

See *Official Comm. of Unsecured Creditors & Cold Spring Shipping, L.P.* v. *PSS Steamship Co.* (*In re Prudential Lines Inc.*), 928 F.2d 565, 570 (2d Cir.), cert. denied, 502 U.S. 821 (1991); *Cantor* v. *FDIC* (*In re Downey Fin. Corp.*), 593 Fed. Appx. 123, 125-126 (3d Cir. 2015); *Capital Bancshares, Inc.* v. *FDIC*, 957 F.2d 203, 207 (5th Cir. 1992); *FDIC* v. *AmFin Fin. Corp.*, 757 F.3d 530, 532-534 (6th Cir. 2014), cert. denied, 135 S. Ct. 1402 (2015); *Jump* v. *Manchester Life & Cas. Mgmt. Corp.*, 579 F.2d 449, 452 (8th Cir. 1978); *Bob Richards*, 473 F.2d at 264 (9th Cir.); *Barnes* v. *Harris*, 783 F.3d 1185, 1196-1197 (10th Cir. 2015); *Zucker* v. *FDIC* (*In re BankUnited Fin. Corp.*), 727 F.3d 1100, 1102-1103 (11th Cir. 2013), cert. denied, 571 U.S. 1244 (2014); accord Pet. App. 17a-18a.[2]

Under normal conditions (*i.e.*, outside bankruptcy), the allocation decision is usually what matters to an affiliated group. When a corporate parent receives a tax refund from the IRS, it simply determines how the refund is properly allocated to the members of the group and distributes it accordingly, and the question whether the parent held equitable title to the refund before distributing it ordinarily has no practical significance. That interim-ownership issue becomes significant, however, if the group's common parent is in bankruptcy when the IRS pays a tax refund. Even when an affiliated group has expressly allocated a tax refund to a subsidiary within the group, if the bankruptcy court

[2] An affiliated group's tax allocation agreement does not affect the IRS's decision whether to allow or deny a claim for a tax refund, nor does it affect any setoff rights the IRS may have with respect to the liabilities of a member of an affiliated group. See generally 26 U.S.C. 6402 (2019); *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947).

concludes that the parent holds both legal and equitable title to the refund until it is distributed, the refund will become part of the parent's bankruptcy estate, leaving the designated subsidiary as a mere unsecured creditor. By contrast, if a corporate parent holds only bare legal title to the refund as an agent for the subsidiary to which the refund was allocated, then the subsidiary is entitled to the money and the refund is not part of the parent's bankruptcy estate. Accord Pet. Br. 10-11, 52.

4. Some affiliated groups have as a member an insured depository institution regulated by the Department of the Treasury, the Federal Reserve System, or the Federal Deposit Insurance Corporation (FDIC). These federal financial regulators have long urged such groups to enter into written tax allocation agreements that resolve allocation and interim ownership of any tax refunds in particular ways. See 63 Fed. Reg. 64,757, 64,757-64,758 (Nov. 23, 1998) (describing the financial regulators' adoption of a uniform interagency policy statement in order to combine separate policy directives of the agencies in effect since 1978 without significantly altering the regulatory substance). That document states that "[a]ny practice that is not consistent with this policy statement may be viewed as an unsafe or unsound practice prompting either informal or formal corrective action." *Id.* at 64,758.

Regarding allocation of a tax refund, the financial regulators have consistently instructed that a financial "institution incurring a loss for tax purposes should * * * 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." 63 Fed. Reg. at 64,758. That instruction derives from the Federal Reserve Act, which generally requires transactions between an insured

depository institution and its affiliated companies to be no less favorable to the institution than comparable arrangements involving nonaffiliated companies. See 79 Fed. Reg. 35,228, 35,230 (June 19, 2014). The financial regulators' instruction—that a tax refund should be allocated to the insured depository institution whose economic activity generated it—also reflects the legal requirement that, because "each depository institution is viewed as, and reports [to financial regulators] as, a separate legal and accounting entity," insured depository institutions should record their "applicable income taxes * * * as if the institution had filed on a separate entity basis." 63 Fed. Reg. at 64,758.

Regarding the separate issue of interim ownership of a tax refund pending its distribution to the proper affiliate, the financial regulators have long instructed that "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. 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." 63 Fed. Reg. at 64,759 (citing 26 C.F.R. 1.1502-77(a)).[3]

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[3] In 2014—after the tax allocation agreement at issue in this case was adopted, Pet. App. 129a—the federal financial regulators issued an addendum to their interagency policy statement. That addendum even more explicitly instructs insured depository institutions and their affiliates to ensure that their tax allocation agreements "(1) [c]learly acknowledge that an agency relationship exists between the [corporate parent] and its subsidiary [insured depository institutions] with respect to tax refunds; and (2) do not contain other language to suggest a contrary intent." 79 Fed. Reg. at 35,230.

B. Proceedings In This Case

1. United Western Bancorp, Inc. (UWBI) was a Colorado holding company. Pet. App. 3a. Its principal subsidiary was United Western Bank (the Bank), a federally chartered savings and loan association also based in Colorado. *Id.* at 3a, 30a. UWBI and all of its subsidiaries, including the Bank, were members of an affiliated group that filed consolidated tax returns. *Id.* at 3a. They entered into a Tax Allocation Agreement (Agreement), *id.* at 129a-142a, effective January 1, 2008, in order to "establish a method for * * * allocating the consolidated tax liability of the Group among its members," *id.* at 129a. See *id.* at 3a-4a.

The Agreement generally requires each affiliate within the consolidated group to pay to UWBI "an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return," after which UWBI pays taxes on behalf of the consolidated group. Pet. App. 130a (§ A.1). Conversely, if an affiliate "incurs a net operating loss or excess tax credits, the * * * Affiliate is entitled to a refund equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return." *Ibid.* (§ A.1). A further provision of the Agreement states that "Affiliates that are insured depository institutions * * * shall never be liable for payments to UWBI under this Agreement in excess of what their tax liability would be computed on a separate-entity basis." *Id.* at 133a (§ C.5). The Agreement also states that, "[i]n the event of any * * * claim for refund, * * * the liability of the parties to this Agreement shall be redetermined to give effect to any such adjustment as if it had been made as part of the original computation of tax liability, and payments between the appropriate parties

shall be made within 10 business days after any such * * * refunds are received." *Id.* at 137a (§ H.1).

The Agreement describes the nature of the relationship that it creates among the contracting parties. "In essence, this Agreement requires that each first-tier subsidiary be treated as a separate taxpayer with UWBI merely being an intermediary between an Affiliate and the [IRS]." Pet. App. 131a (§ A.2). To that end, the Agreement states that "[e]ach Affiliate hereby appoints UWBI as its agent * * * for the purpose of filing such consolidated Federal income tax returns * * * or taking any action in connection therewith on behalf of the Affiliates." *Id.* at 137a (§ G.1).

The Agreement also incorporates a rule to govern its own construction. "The intent of this Agreement is to provide an equitable allocation of the tax liability of the Group among UWBI and the Affiliates. Any ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in favor of any insured depository institution." Pet. App. 138a (§ H.4). The Agreement "shall be governed by and construed in accordance with the laws of the State of Colorado." *Ibid.* (§ H.6) (capitalization altered).

2. For each tax year when the Agreement was operative, each member of the UWBI affiliated group "computed [its] tax liabilities and tax benefits on a separate-entity basis," Pet. App. 79a, consistent with the federal financial regulators' instruction that an insured depository institution like the Bank should calculate its income tax as if it filed separately, 63 Fed. Reg. at 64,758. UWBI then filed one federal income-tax return for each year on a consolidated basis. Pet. App. 80a. The dispute in this case concerns whether UWBI acquired equitable

title to a federal tax refund that relates to an overpayment of tax for the 2008 tax-filing year, a refund that UWBI would undisputedly have been required to pay over to the Bank if UWBI had not declared bankruptcy.

In 2008, the Bank generated, and paid taxes on, approximately $34 million in taxable income, while UWBI generated no taxable income. Pet. App. 7a. In 2010, the Bank lost more than $35 million, a portion of which it was permitted by the Internal Revenue Code to "carryback" to 2008 in order to reduce its taxable income (and thus the taxes it owed) for that year. See *id.* at 7a & n.2. In 2011, UWBI accordingly filed a request on behalf of the consolidated group for a refund of more than $4 million to recover taxes paid by the Bank on the Bank's 2008 taxable income. Pet. App. 7a; see 26 C.F.R. 1.1502-78(a) and (b)(1).

While that refund request was pending, the Bank failed, and respondent FDIC was appointed as receiver under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (12 U.S.C. 1811 *et seq.*). See Pet. App. 7a-8a; 12 U.S.C. 1813, 1821. As receiver, the FDIC succeeded to "all rights, titles, powers, and privileges of the insured depository institution," *i.e.*, the Bank. 12 U.S.C. 1821(d)(2)(A)(i). "Because the Bank was UWBI's principal, if not sole, source of income, the Bank's receivership" caused UWBI to become insolvent. Pet. App. 8a. UWBI filed a petition for Chapter 11 bankruptcy, which was subsequently converted to a Chapter 7 proceeding, and petitioner was appointed as the Chapter 7 trustee. *Ibid.*

The FDIC filed a proof of claim (J.A. 36-55) in UWBI's bankruptcy proceeding, asserting that the Bank was entitled to all of the $4 million tax refund

anticipated from the IRS "because the refund stemmed exclusively from the Bank's business loss carrybacks." Pet. App. 8a. Petitioner then initiated this adversary proceeding against the FDIC (J.A. 24-35), objecting to its proof of claim and asserting that the disputed tax refund belonged to UWBI. Pet. App. 9a. The FDIC counterclaimed (J.A. 56-95), and both parties moved for summary judgment, Pet. App. 9a, "agree[ing] on virtually all the basic material facts," *id.* at 76a. In 2015, the IRS deposited a tax refund of more than $4 million in the bankruptcy court's registry, where it remains pending resolution of this dispute. *Id.* at 69a.

3. The bankruptcy court granted petitioner's motion for summary judgment and denied the FDIC's motion. Pet. App. 67a-128a.

The bankruptcy court first recognized that affiliated groups "are free" to determine entitlement to tax refunds "contractually." Pet. App. 96a. The court stated that, because the members of the UWBI group had adopted the Agreement, the court would not apply the default rule articulated by the Ninth Circuit in *Bob Richards*, *supra*, and adopted by the Tenth Circuit in *Barnes*, *supra*, to resolve such disputes in the absence of a tax allocation agreement among the members of an affiliated group. See Pet. App. 116a-119a. The bankruptcy court stated that, instead, "the unambiguous terms of the [Agreement] as construed under Colorado law govern the rights and obligations of [UWBI] and the Bank and also dictate the ultimate entitlement to the Tax Refund on a beneficial basis." *Id.* at 97a (citation and footnote omitted).

In applying the Agreement to the dispute before it, the bankruptcy court recognized that "the Tax Refund

indisputably stems from the Bank's business loss carrybacks." Pet. App. 68a; see *id*. at 80a, 127a. The court concluded, however, that UWBI had both legal and equitable title to the tax refund. *Id.* at 95a-124a. The court observed that the IRS regulations provide for a tax refund for an affiliated group to be paid "directly to and in the name of" UWBI on behalf of the group, *id.* at 95a (citing 26 C.F.R. 1.1502-77(d)(5)), and the court found that the Agreement created a debtor-creditor relationship rather than an agency relationship between UWBI and the Bank, *id.* at 97a-116a. The court thus held that the refund was property of UWBI's estate, and that the Bank was a general unsecured creditor with a non-priority claim for the entire amount of the refund. *Id.* at 126a-127a. The bankruptcy court noted that petitioner "did not object to the dollar amount of the FDIC Claim," *ibid.*, and it concluded that "[t]he FDIC Claim shall be allowed in the amount of $4,081,335 as a non-priority, general unsecured claim against the [UWBI] bankruptcy estate," *id.* at 127a.

4. The district court reversed. Pet. App. 28a-66a; see 28 U.S.C. 158(a) (district courts exercise appellate jurisdiction over bankruptcy-court decisions).

The district court first observed that "[t]he Bankruptcy Court's judgment rested on a contract interpretation made as a matter of law," Pet. App. 29a, and that the parties "agree[d] (as do the various cases they cite) that the question of refund allocation is ultimately a matter of contractual intent," *id.* at 39a. Like the bankruptcy court, the district court acknowledged *Bob Richards* but found it unnecessary to rely on that decision because "the [Agreement] ultimately favors the FDIC." *Id.* at 49a-50a.

The district court next noted that the "crux of the dispute" in this case was who had interim ownership of the tax refund. Pet. App. 37a. As to that contested issue, the court analyzed the parties' Agreement "under Colorado law." *Id.* at 50a (capitalization and emphasis omitted). The court found that the Agreement "could be reasonably interpreted both to create an agency relationship (in which case [UWBI] was required to act toward the Refund as a fiduciary for the Bank) or a standard commercial relationship (in which case [UWBI] has no greater obligation to the Bank than it does to any other creditor)." *Id.* at 64a. But the court further found that the Agreement itself "breaks the tie in favor of the Bank" by requiring that "'[a]ny ambiguity in the interpretation hereof shall be resolved * * * in favor of any insured depository institution.'" *Ibid.* (citation omitted). The court accordingly determined that the Bank held equitable title to the refund, and that the refund therefore "is not part of [UWBI's] bankruptcy estate" under the Bankruptcy Code, 11 U.S.C. 541(d). Pet. App. 66a.

5. The court of appeals affirmed. Pet. App. 1a-27a.

a. The court of appeals agreed with the bankruptcy court and the district court that the reasoning in *Bob Richards* is not determinative when an affiliated group has adopted a tax allocation agreement. See Pet. App. 14a-18a. The court of appeals stated that it therefore would "look to the terms of the Agreement and, taking into account Colorado case law, decide whether it unambiguously addresses how tax refunds are to be handled." *Id.* at 18a.

After analyzing the terms of the Agreement, Pet. App. 18a-26a, the court of appeals agreed with the dis-

trict court that the Agreement is "ambiguous with respect to the type of relationship it intends to create between UWBI and * * * affiliates, such as the Bank, regarding the ownership of refunds from the IRS." *Id.* at 25a (citing *Pinnacol Assurance* v. *Hoff*, 375 P.3d 1214, 1229 (Colo. 2016)). Although some of the Agreement's provisions "quite clearly indicate the intent to create an agency relationship," others "arguably suggest the intent for UWBI to retain tax refunds before forwarding them on." *Id.* at 25a-26a.

Like the district court, however, the court of appeals recognized that "the Agreement itself provides a method for resolving the ambiguity," by directing that any ambiguity in the Agreement's terms "'shall be resolved * * * in favor of any insured depository institution.'" Pet. App. 26a (citing *id*. at 138a (§ H.4)). The court of appeals found it "[q]uite clear[ ]" that "construing the Agreement to create an agency relationship between UWBI and the Bank with respect to federal tax refunds"—thereby preserving the Bank's ownership of the tax refund that its economic activity had generated —"is more favorable to the Bank than construing the Agreement to create a debtor/creditor relationship and thus affording ownership of federal tax refunds to UWBI." *Id.* at 26a-27a. The court therefore held that the Agreement "must be read as creating only an agency relationship between UWBI and the Bank," so that UWBI does not hold equitable title to the refund and the refund is not part of UWBI's bankruptcy estate. *Id.* at 27a.

b. Petitioner filed a petition for rehearing and motion to clarify in the court of appeals, arguing that the $4 million tax refund at issue in this case was attributable mostly, but not solely, to the Bank's losses.

See Pet. C.A. Petition for Reh'g and Mot. for Clarification 4-11 (Aug. 3, 2018). The court granted the petition "to the limited extent" of deleting a footnote in its original opinion suggesting that petitioner had forfeited that argument below. Pet. App. 2a; cf. 893 F.3d 716, 722 n.3. The court "otherwise denied" the petition and motion, Pet. App. 2a, and declined to modify its finding that the tax refund was "[b]ased upon the Bank's 2010 net operating losses." *Id.* at 7a.

SUMMARY OF ARGUMENT

A. To decide whether the $4 million tax refund at issue in this case is part of UWBI's bankruptcy estate, or instead is property of the Bank, it is necessary to make two distinct constituent determinations. The first is whether UWBI would have been legally obligated to forward the refund to the Bank if UWBI had not declared bankruptcy.

In this Court, petitioner does not dispute that UWBI would have been subject to that obligation if no bankruptcy had occurred. The Bank's economic activity generated the refund, and the Agreement entitled the Bank to the same refund it would have received if it had filed a separate tax return. Because UWBI had no taxable income in the relevant taxable year, the Agreement would not have permitted UWBI to keep any part of the tax refund. Although petitioner argues at length about how a court should allocate a tax refund where an affiliated group has not made a tax allocation agreement, that issue is not presented by this case, because the affiliates here *did* enter an agreement that allocated this particular refund to the Bank.

B. The disputed issue in this case instead is whether, even though the Bank was entitled to receive the IRS refund within 10 days, the IRS's payment of the refund

to UWBI pursuant to 26 C.F.R. 1.1502-77(d)(5) would have given UWBI equitable title to the funds during the brief interim period before UWBI distributed the refund to the Bank. The answer to that question ultimately turns on the meaning of the parties' Agreement, but federal law provides relevant background for construing that contract.

Under longstanding federal regulations, a group of affiliated companies that chooses to file a consolidated return must designate one entity (usually the corporate parent) as the group's "agent" for dealing with the IRS. If the IRS concludes that the group is entitled to a tax refund, that refund "is made directly to and in the name of the agent and discharges any liability of the Government to any member with respect to such refund." 26 C.F.R. 1.1502-77(d)(5). In *Western Dealer Management, Inc.* v. *England* (*In re Bob Richards Chrysler-Plymouth Corp.*), 473 F.2d 262, 265, cert. denied, 412 U.S. 919 (1973), the Ninth Circuit correctly recognized that the IRS's payment of a tax refund to a corporate parent does not vest the recipient with equitable title to the money, because the parent receives a refund only in the capacity as an "agent," 26 C.F.R. 1.1502-77(d)(5), and under general agency law an agent handling its principal's property does not acquire equitable title to that property. This Court has explained that interpreting a codified term like "agent" by using general-law principles is ordinary legal interpretation that is distinct from the creation of a "federal common law" rule of decision. *Burlington Indus., Inc.* v. *Ellerth,* 524 U.S. 742, 755 (1998).

The consolidated-filing regulations, as properly construed in *Bob Richards*, enable the IRS to process consolidated returns efficiently without altering ownership

of a tax refund. The regulations also facilitate the formation of tax allocation agreements among affiliated groups by clarifying the limited reach of federal law: While parties are free to make different ownership arrangements by contract, a corporate parent that receives from the IRS a refund allocated to a subsidiary cannot assert any federal-law claim to interim ownership of that refund. The parties to the UWBI group's consolidated-filing Agreement might have directed that, even in circumstances where UWBI was required to forward a particular refund to another affiliated entity, UWBI would acquire equitable title to those funds for the interim period while the money was in its possession. The federal regulations establish, however, that the IRS's payment of the money to UWBI standing alone will not have that effect.

C. Because affiliated groups are free to structure the interim ownership of a tax refund by contract, the ultimate question for this Court is whether the parties intended through their Agreement to vest equitable title to this $4 million tax refund in the Bank or in UWBI. As to that dispositive question, the court of appeals correctly interpreted the Agreement to establish an agency relationship—not a debtor-creditor relationship—between UWBI and the Bank with respect to the tax refund. The Agreement itself states that it creates an agency relationship among the parties, and it obligated UWBI to distribute this tax refund to the Bank upon receiving it from the IRS. Interpreting this contract to leave the refund as the property of the Bank also accords with instructions that federal financial regulators have issued to insured depository institutions, and the parties would have made the Agreement with awareness of those requirements.

D. Petitioner has not shown that the Agreement created a debtor-creditor relationship under Colorado law. Contrary to petitioner's contention that the Agreement gave the Bank no control over UWBI, the contract imposed a mandatory duty on UWBI to promptly distribute to the Bank any IRS refund that arose from the Bank's taxes and losses. The Agreement's description of UWBI as an "agent" and an "intermediary" for dealings with the IRS belies petitioner's contention that the parties intended to vest UWBI with equitable title to funds that it held temporarily before forwarding them to other affiliates. And to the extent that the contract is ambiguous about the nature of the relationship that it created between UWBI and the Bank, the Agreement itself requires that any ambiguity must be resolved in the Bank's favor.

Because UWBI held this $4 million refund for the benefit of the Bank in the capacity as an agent, UWBI did not have equitable title to the refund. The refund therefore is the property of the Bank, and it is not part of UWBI's bankruptcy estate.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT THE TAX REFUND AT ISSUE HERE IS THE PROPERTY OF THE BANK AND THEREFORE IS NOT PART OF UWBI'S BANKRUPTCY ESTATE

This case involves the interpretation of the Agreement between the affiliated entities that formed UWBI's consolidated-filing group. The interpretation of that contract is governed by Colorado law, but federal tax and banking regulations establish pertinent background rules that inform the state-law inquiry.

Petitioner does not contest that, if UWBI had not entered bankruptcy, the Agreement would have required UWBI to distribute to the Bank the $4 million tax refund at issue here. The disputed question is instead whether UWBI would have acquired equitable title to the funds during the short interval between its receipt of the refund from the IRS and its payment of the money to the Bank. Petitioner contends that UWBI would have acquired equitable title to the refund under Colorado contract and agency law, so that the funds became property of the estate when UWBI filed for bankruptcy and the Bank has only an unsecured non-priority claim for the refund.

The court of appeals correctly rejected petitioner's arguments. The court explained that the parties to this Agreement, having designated the Bank to receive this tax refund, did not vest equitable title to the refund in UWBI. Rather, the Agreement gave UWBI the same role in the refund process that the IRS's consolidated-filing regulations envision for the head of an affiliated group: UWBI was the *agent* who would receive the refund from the IRS and then promptly distribute it to its owner the Bank. An agent handling its principal's property does not acquire equitable title to that property. See *Collier* ¶ 541.05[1][a], at 541-26 to 541-27; Restatement (Second) of Agency § 427 (1958) (Second Restatement).

Petitioner expounds at length about the purported deficiencies of the Ninth Circuit's decision in *Western Dealer Management, Inc.* v. *England* (*In re Bob Richards Chrysler-Plymouth Corp.*), 473 F.2d 262, cert. denied, 412 U.S. 919 (1973). But petitioner focuses its attack on an aspect of *Bob Richards* that is not at issue in this case. The court in *Bob Richards* announced a

default rule to govern the *ultimate allocation* of a tax refund when the members of a consolidated-filing group have not entered into any tax-allocation agreement. See *id*. at 265. The court stated that "[a]bsent any differing agreement we feel that a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member * * * should inure to the benefit of that member." *Ibid*. Whatever the merits of that default allocation rule, it is not implicated here, because the members of the UWBI group *did* have a tax allocation agreement, and the parties agree that the Bank would have been entitled to the tax refund at issue if UWBI had not filed for bankruptcy.

Petitioner largely ignores the *Bob Richards* court's separate discussion of the pertinent IRS regulations and their implications for the interim-ownership question that this case presents. With respect to the question that *is* disputed in this case—*i.e.*, whether UWBI would have acquired equitable title to the disputed refund during the brief interval before it paid the funds over to the Bank—the *Bob Richards* court correctly recognized that, under the applicable IRS regulations, a corporate parent to whom the IRS pays a refund for a consolidated-filing group receives the refund as an agent for the affiliates within the group. The IRS's payment of the refund to the parent as agent for the group's members does not give the parent any ownership interest that it would not otherwise possess under applicable state law. That aspect of *Bob Richards* was an interpretation of the text of a federal regulation; it was "not federal common law in 'the strictest sense.'" *Burlington Indus., Inc.* v. *Ellerth,* 524 U.S. 742, 755 (1998) (citation omitted). And although most affiliated groups are free

to alter interim ownership of their tax refunds by contract, the Agreement here confirmed the parties' intent to maintain UWBI's role as an agent for the Bank with respect to a refund paid by the IRS.

A. The Disputed Issue In This Case Concerns Interim Ownership Of The Tax Refund, Because The Bank Undisputedly Would Have Been Entitled To The Refund If No Bankruptcy Had Occurred

As described above, when an affiliated group receives a tax refund and the group's corporate parent is in bankruptcy, two separate questions arise. The first is whether a subsidiary would be entitled to the refund, under the governing allocation agreement or other applicable rules of law, if no bankruptcy had occurred. The second is whether, if a subsidiary would have received the refund under normal conditions, the common parent nevertheless acquired ownership (*i.e.*, equitable title) to the refund during the brief period after receiving it from the IRS and before distributing it to that subsidiary. See pp. 5-6, *supra*. Petitioner rightly acknowledges (Br. 10-11) that these questions are distinct. But only the latter question is currently before this Court, because the affiliated group's Agreement allocated the tax refund at issue here to the Bank and did not permit UWBI to keep any part of it. See Pet. Br. 51-52 (describing the question in this case as "whether the Bank rather than UWBI is the *equitable* owner of the refund"); Pet. 5-6 (describing the question presented as "[w]ho owns a tax refund that is paid to an affiliated group," specifically, whether "the parent hold[s the refund] for the subsidiary in an agency or trust capacity").

1. The bankruptcy court found that the $4 million refund "indisputably stems from" "the operations of the

Bank." Pet. App. 68a, 127a. The members of this affiliated group "computed the tax liabilities and tax benefits on a separate-entity basis for each Affiliate." *Id.* at 79a. For the 2008 return year, "the Bank generated [approximately $34 million] in taxable income," while UWBI "did not generate any taxable income." *Id.* at 80a. In 2010, the Bank generated a net operating loss of at least $35 million, which could be carried back to adjust "the Bank's 2008 income" tax liability. *Ibid.*; see *id.* at 77a (finding these facts "undisputed and accepted").

If the Bank had filed a separate income-tax return rather than joining UWBI's consolidated-filing group, it would have received from the IRS the $4 million refund that arose from its 2010 net operating loss. Under the Agreement, the Bank therefore was entitled to a refund in that same amount. The Agreement provides that an affiliate that "incurs a net operating loss * * * is entitled to a refund equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return." Pet. App. 130a (§ A.1). It further provides that the Bank, as an insured depository institution, would "never be liable for payments * * * in excess of what [its] tax liability would be computed on a separate-entity basis." *Id.* at 133a (§ C.5). When the affiliated group's refund claim was processed, the Agreement required the group's tax liability to "be re-determined to give effect to" the refund claim "as if it had been made as part of the original computation of tax liability," and it required payment to be made "within 10 business days after any such * * * refunds are received." *Id.* at 137a (§ H.1).

The parties to the Agreement thus unmistakably allocated ultimate entitlement to this tax refund to the Bank, the affiliate whose economic activity generated

the refund. If UWBI had not initiated bankruptcy proceedings, it would have had a "self-executing duty" under the Agreement to distribute the $4 million refund to the Bank within 10 days after receiving the money from the IRS. Pet. App. 34a. Petitioner conceded that point before the bankruptcy court when it declined to contest the dollar amount of the FDIC's proof of claim. See *id.* at 126a-127a. Although the bankruptcy court ruled in petitioner's favor with respect to the interim-ownership issue, it held that "[t]he FDIC Claim shall be allowed in the amount of $4,081,335 as a non-priority, general unsecured claim against the [UWBI] bankruptcy estate." *Id*. at 127a. Allowance of the claim would be appropriate only if UWBI owed that amount of money to the Bank. And petitioner's current contention that UWBI and the Bank stood in a debtor-creditor relationship with respect to the refund likewise assumes that a debt exists, *i.e.*, that UWBI was contractually required to forward the $4 million to the Bank as the entity whose economic activity had produced the refund.[4]

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[4] In its petition for rehearing in the court of appeals, petitioner claimed to have preserved an argument that the refund was attributable mostly, but not solely, to the activity of the Bank, because other members of the affiliated group had losses in 2010. See pp. 16-17, *supra*. In response, the court deleted its prior statement that the argument had been forfeited, but declined to modify its determination that the refund was "[b]ased upon the Bank's 2010 net operating losses." Pet. App. 7a. The district court made the same finding, see *id*. at 36a (stating that the refund "was entirely the result of revenue generated by the Bank in 2008 and losses incurred by the Bank in 2010"), as did the bankruptcy court, see *id*. at 68a, 80a, 127a. This Court does not "undertake to review concurrent findings of fact by" three courts below. *Exxon Co.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co.* v.

2. Despite the unanimous (and largely undisputed) factual findings by three courts below, the definitive instructions in the parties' Agreement, and the scope of the question presented, petitioner devotes the lion's share of its brief (at 24-51) to arguments about how a bankruptcy court should *allocate* a tax refund for an affiliated group *in the absence* of a tax allocation agreement. This case does not present this Court with an opportunity to consider that question. See *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'") (citation omitted). The FDIC and all three courts below *agree* with petitioner (Br. 13) that the Agreement controls which member of the affiliated group is entitled to any tax refund that the group receives. See Pet. App. 18a (court of appeals), 39a (district court), 97a (bankruptcy court); see also *id.* at 129a (contract provision stating that "UWBI and the Affiliates desire to establish a method for * * * allocating the consolidated tax liability of the Group among its members"); Br. in Opp. 9 (stating that "allocation of any tax refund is governed solely by the parties' agreement when such an agreement exists"). And as just explained, the Agreement unambiguously required that the refund at issue here be paid over to the Bank.

The question that *is* contested before this Court is one of *interim ownership*: Whether UWBI would have held equitable title to the tax refund during the brief

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Linde Air Prods. Co., 336 U.S. 271, 275 (1949)). In any event, even if petitioner were right that the Bank is entitled to nearly all (but not all) of the tax refund, the fractional remainder would be allocated to a different subsidiary in the group, not to UWBI, which had no taxable income for the 2008 tax year. Pet. App. 80a.

period between the IRS's issuance of the refund to UWBI (acting as an agent on behalf of the affiliated group) and UWBI's distribution of the refund to the Bank. Cf. Pet. App. 18a (court of appeals stating that it needed to determine "the nature of the relationship that UWBI and the Bank intended to create with one another"). That issue is one of contract interpretation, but the IRS regulations that govern the filing of consolidated returns provide relevant background that should inform the Court's reading of the parties' Agreement. A 1998 directive issued by federal financial regulators, which addressed participation by insured depository institutions in tax allocation agreements, provides further contextual evidence of the UWBI group members' likely intent. For the reasons that follow, the tax allocation agreement among the members of the UWBI consolidated-filing group did not give UWBI equitable title to the refund at issue here.

B. Under Federal Law, A Corporate Parent's Receipt Of A Tax Refund That It Is Required To Transmit To A Subsidiary Does Not Give The Parent Any Ownership Interest In The Funds

When an affiliated group has a contract that addresses the capacity in which the corporate parent holds a tax refund before distributing it in accordance with the group's allocation decision, that contract controls. See pp. 6-7, *supra*. But the IRS's consolidated-filing regulations provide relevant background against which tax allocation agreements are made. See *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 101-102 (2013) (contracts are often made against "background legal rules—the doctrines that typically or traditionally have governed a given situation when no agreement states otherwise"). Those regulations establish that the IRS's

payment of a tax refund to an affiliated group's common parent does not vest the parent with equitable title to the refund.

1. In the portion of its **Bob Richards** *opinion relevant here, the Ninth Circuit addressed the federal tax regulations that govern consolidated returns*

When ultimate entitlement to a federal tax refund has been allocated to a subsidiary within an affiliated group, the potential for uncertainty as to the interim ownership of that refund traces to one feature of the IRS's consolidated-filing regulations. In 26 C.F.R. 1.1502-77(d)(5), the IRS directed that the members of any consolidated-filing group must designate a single "agent" (typically the common parent) to deal with the IRS on behalf of the affiliated group. Under the regulations, the agent "files claims for refund, and any refund is made directly to and in the name of the agent and discharges any liability of the Government to any member with respect to such refund." *Ibid.*; see also 26 C.F.R. 1.1502-78(a) and (b)(1).

Nothing in the governing federal statutes compelled the IRS to adopt that approach. The IRS might instead have required the consolidated-filing group's representative simply to report the group's allocation decision concerning a particular refund to the IRS, at which point the IRS would pay the money directly to the affiliate(s) to which the refund was allocated. If the IRS had adopted that alternative approach, the common parent could not plausibly claim to hold even temporary equitable title to any refund that was payable to a subsidiary, since such a refund would never come into the parent's possession or control. Resolution of the equitable-title question presented here therefore depends in part on whether the IRS's policy of paying affiliated-group

refunds to the common parent, rather than employing an alternative distribution mechanism like the one described above, gives the parent an interim-ownership interest that it would not otherwise possess. In *Bob Richards*, the Ninth Circuit correctly recognized that the answer to that question is "No."

The court of appeals in *Bob Richards* addressed both the ultimate-entitlement and interim-ownership issues, though it did not clearly distinguish between the two. *Bob Richards* involved a tax refund for an affiliated group that had *not* entered a tax allocation agreement. 473 F.2d at 265. The court decided the case on the understanding that "[t]he entire refund * * * was due to the earnings history of the [subsidiary]." *Id.* at 263. The court stated that "[a]bsent any differing agreement we feel that a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member." *Id.* at 265. The court explained that "[a]llowing the parent to keep any refunds arising solely from a subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the parent." *Ibid.*

That portion of the *Bob Richards* opinion addressed the issue of *ultimate entitlement* to the refund, *i.e.*, whether the corporate parent would have been obligated to pay the refund over to the subsidiary if no bankruptcy had occurred. Petitioner devotes the bulk of its brief to a prolonged attack on that default refund-allocation rule. As explained above, however, pp. 23-27, *supra*, that issue is not presented in this case, because the UWBI affiliated group entered a tax allocation

agreement that conferred ultimate entitlement to this refund on the Bank. See Pet. App. 18a.[5]

The *Bob Richards* court went on to discuss the IRS regulations pertinent to consolidated-filing groups. 473 F.2d at 265. That discussion bears directly on the separate issue—which *is* presented here—of interim

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[5] Petitioner cites (Br. 42-43) this Court's decision in *United Dominion Industries, Inc.* v. *United States*, 532 U.S. 822 (2001), for the proposition that "income or losses giving rise to a consolidated tax refund" cannot typically be "attributable to a particular member of an affiliated group." Although the allocation issue is not presented here, that argument reflects a misreading of *United Dominion*. First, the Court in *United Dominion* addressed the calculation of the tax liability owed by a consolidated group to the IRS; the case did not concern the distribution within a group of a tax refund paid by the IRS. See *FDIC* v. *FBOP Corp.*, 252 F. Supp. 3d 664, 686-687 (N.D. Ill. 2017). Second, the members of the UWBI affiliated group could easily determine the allocation of this $4 million tax refund because they had calculated their individual tax liabilities as if they had filed as separate entities. See Pet. App. 79a-80a. Indeed, this affiliated group was instructed by federal financial regulators to record each insured depository institution's "applicable income taxes * * * as if the institution had filed on a separate entity basis," and to distribute refunds accordingly. 63 Fed. Reg. at 64,758; see pp. 8-9, *supra*; p. 42, *infra*. Third, the *Bob Richards* court's allocation analysis is consistent with the tax-law principle that affiliated corporations "continue[ ] to be separate taxable units," and "[t]he consolidated returns operate[ ] only to unite them for the purpose of tax computation and the equitable apportionment between them of the tax thus computed." *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 127 (1934). Finally, while *Bob Richards*'s analysis regarding ultimate entitlement to a tax refund in the absence of a tax allocation agreement appears to be a default rule of federal common law, see Br. in Opp. 16, other courts have understood general principles of state property law similarly to entitle a subsidiary to a tax refund that was generated by the subsidiary's economic activity, absent any contractual language manifesting the parties' intent to achieve a different result. See *FBOP*, 252 F. Supp. 3d at 682-683.

ownership of an affiliated group's tax refund while it is in the hands of the corporate parent as agent for the members of the group. The *Bob Richards* court observed that "[t]he only reason for the tax refunds not being paid directly to the subsidiary is because income tax regulations require that the parent act as the sole agent, when duly authorized by the subsidiary, to handle all matters relating to the tax return." *Id.* at 265 & n.6 (citing the predecessor to 26 C.F.R. 1.1502-77). The court explained, however, that those regulations "are basically procedural in purpose and were adopted solely for the convenience and protection of the federal government." *Id.* at 265. The *Bob Richards* court found that the regulations mean what they say—the corporate parent "received the tax refund from the government only in its capacity as agent for the consolidated group." 473 F.2d at 265. That analysis supports the conclusion that, absent any contrary agreement among the members of a consolidated-filing group, federal law does not give the parent any interim ownership interest in refunds to which another affiliate is ultimately entitled.

Petitioner repeatedly uses the term "*Bob Richards* rule" to refer to the Ninth Circuit's initial holding that, absent any contrary agreement among the members of an affiliated group, a tax refund that is attributable solely to one affiliate's economic activity should be allocated to that affiliate. But *Bob Richards* also supports the distinct proposition that, once it has been determined that a particular refund is ultimately payable to a subsidiary, the common parent's role in interacting with the IRS on behalf of the affiliated group does not give the parent temporary equitable title to that refund. Specifically, the *Bob Richards* court understood the predecessor to 26 C.F.R. 1.1502-77 to mean that an

affiliated group's corporate parent (like UWBI)—which the regulations describe as an "agent" for the members of a group in their dealings with the IRS—does not acquire ownership over a tax refund that has been allocated to a subsidiary simply because the IRS elected, for reasons of its own convenience, to issue that refund to the parent. That regulation, properly construed, serves the important federal purpose of enabling the IRS to efficiently process consolidated tax refunds for an affiliated group *without* altering ownership of the refund within the group.

2. **Bob Richards** ***reflects a correct interpretation of the federal tax regulations and their relevance to disputes like this one***

a. The pertinent IRS regulations require each consolidated-filing group to designate a single entity (typically the corporate parent) as "the agent * * * for each member of the group," and they describe the parent's obligation to collect a tax refund for the group as one of the "matters subject to agency." 26 C.F.R. 1.1502-77(a)(1), (d), and (d)(5). The regulations' use of a term ("agent") that "'is obviously transplanted from * * * the common law * * * brings the old soil with it.'" *Sekhar* v. *United States*, 570 U.S. 729, 733-734 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). As this Court has explained in a similar interpretive context, "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992) (brackets and citation omitted).

In construing statutes that incorporate common-law terms, this Court has "relied on the general common law[,] * * * rather than on the law of any particular State, to give meaning to th[o]se terms," in recognition of "the fact that 'federal statutes are generally intended to have uniform nationwide application.'" *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740 (1989) (citation omitted). Among many other cases, the Court used that interpretive approach in *Burlington Industries* to interpret Title VII of the Civil Rights Act of 1964. 524 U.S. at 754. The Court explained that Congress, by defining the statutory term "'employer'" to include "'agents,'" had "directed federal courts to interpret Title VII based on agency principles." *Ibid.* (citation omitted). The Court further concluded that, "[g]iven such an explicit instruction, * * * a uniform and predictable standard must be established as a matter of federal law," *ibid.*, and the Court turned to the Second Restatement of Agency as "a useful beginning point for a discussion of general agency principles," *id.* at 755.

The principles this Court applies in interpreting Acts of Congress also frequently bear directly on the construction of agency regulations. See, *e.g.*, *Green* v. *Brennan*, 136 S. Ct. 1769, 1776 (2016) (interpreting a regulation by "begin[ning] * * * with its text" and then, to resolve ambiguity, "turn[ing] to other canons of interpretation"); accord 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 31:6, at 698 (new ed. 2009) ("When a regulation is legislative in character, rules of interpretation applicable to statutes should be used to determine its meaning."). As applied to 26 C.F.R. 1.1502-77, that interpretive methodology strongly indicates that the

IRS's payment to an affiliated group's corporate parent of a tax refund that the group has allocated to a subsidiary does not vest the parent with temporary equitable title to the refund.

The IRS's characterization of the parent as an "agent" in connection with a refund, 26 C.F.R. 1.1502-77(a) and (d)(5), calls upon the general law of agency. And it has been black-letter law for decades that an agent who collects property on behalf of its principal does not acquire equitable title to that property. See Restatement of Trusts § 8 cmt. a at 28 (1935) ("[A]n agent as such does not have title to the property of his principal, although he may have powers with respect to it."); Second Restatement § 427, at 296 ("an agent who has received goods or money for the principal has a duty to * * * deliver them to the principal upon his demand"); Restatement (Third) of Agency § 8.12, at 386 (2006) (Third Restatement) ("An agent has a duty, subject to any agreement with the principal, * * * not to deal with the principal's property so that it appears to be the agent's property."). A leading bankruptcy treatise has therefore described it as "settled under the [Bankruptcy] Code" that, "if property is in a debtor's hands as * * * agent," "absent state statutory enactment to the contrary," "title to the property remains in the * * * principal"; "the debtor's estate holds only the same interest[;] and the * * * principal may recover the property or its proceeds." *Collier* ¶ 541.05[1][a], at 541-26 to 541-27 (explaining 11 U.S.C. 541(d)).

b. Petitioner correctly observes that the IRS regulations imposing procedural duties on a common-parent agent, including the duty to receive a refund under 26 C.F.R. 1.1502-77(d)(5), were "made 'solely for the

convenience of the IRS,' so that the IRS can communicate with the affiliated group through a single intermediary." Pet. Br. 41 (citation omitted); see *Bob Richards*, 473 F.2d at 265 ("[T]hese regulations are basically procedural in purpose and were adopted solely for the convenience and protection of the federal government."); *Jump* v. *Manchester Life & Cas. Mgmt. Corp.*, 579 F.2d 449, 452 (8th Cir. 1978) (same). Petitioner is also correct that the regulations' use of the term "agent" is largely irrelevant in determining how a particular tax refund should ultimately be *allocated* among the members of an affiliated filing group. The regulations do, however, speak directly to the question of interim ownership that is presented in this case. The regulations establish that, when the ultimate entitlement to a particular refund has been allocated to a subsidiary rather than to the parent (as the Agreement here allocated the $4 million refund to the Bank), the parent's role as the immediate recipient of the refund from the IRS does not give the parent any ownership interest in the money.[6]

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[6] The *Bob Richards* court's *initial* holding as described above—*i.e.*, that in the absence of a tax allocation agreement among the members of a consolidated-filing group, a tax refund attributable solely to the economic activity of one affiliate should be allocated to that affiliate, 473 F.3d at 265—appears to be a default rule of federal common law. See Br. in Opp. 16. The court's separate analysis of the interim-ownership issue, however, reflects the application of general common-law principles to construe a term in the pertinent IRS regulations that has a common-law meaning. Using general-law principles in this way to interpret a codified term "is not federal common law in the strictest sense, *i.e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute . . . , but, rather, to the judicial creation of a special federal rule of decision." *Burlington Industries*, 524 U.S. at 755 (quoting *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997)) (internal quotation marks omitted).

Contrary to petitioner's suggestion, it makes no difference to the agency relationship referenced in the IRS regulations that the common parent is designated as "agent for 'the group' as a whole, not for any individual subsidiary." Pet. Br. 42 (citation omitted). Under general tenets of agency law, "[m]ultiple principals may consent that an agent take action on their behalf in the same transaction or other matter," and "[w]hen there is no substantial conflict among the principals' interests or their instructions to the agent, the agent may fulfill duties owed to all principals." Third Restatement § 3.16 cmt. b at 296-297. That was the case here. UWBI had a duty to determine which of the subsidiaries in the group was entitled to the $4 million refund, and to distribute the refund accordingly; but its role in performing those functions did not give it ownership of the money.

Petitioner is also wrong in attributing to the FDIC a "conce[ssion] that both the [Internal Revenue] Code and the consolidated-return regulations are 'silent with respect to the legal and equitable ownership of * * * a tax refund.'" Pet. Br. 24 (quoting Br. in Opp. 2). While the Code is silent as to those issues (as the FDIC's brief in opposition stated), the regulations are not. By describing a common parent's collection of a refund for an affiliated group as a matter of "agency," the regulations preclude any suggestion that the IRS's payment of the refund to the common parent as agent vests the parent with equitable title to the refund. 26 C.F.R. 1.1502-77(d)(5).

c. This understanding of 26 C.F.R. 1.1502-77(d)(5) has the additional virtue of harmonizing that regulation with other features of federal tax law, specifically

26 U.S.C. 6402(k) and the IRS's regulations implementing that provision. Those regulations provide (as relevant here) that, when the IRS determines that a particular tax refund is "attributable to losses or credits of [an] insolvent corporation," the IRS may in certain circumstances pay the refund "to the fiduciary of [the] insolvent financial institution." 26 C.F.R. 301.6402-7(a). The regulations further explain that "[t]his section determines the party to whom a refund * * * will be paid but is not determinative of ownership of any such amount among current or former members of a consolidated group (including the [insolvent] institution)." 26 C.F.R. 301.6402-7(j).

By explicitly decoupling the identification of the proper payee from the determination of who owns the relevant funds, the IRS's Section 6402(k) regulations reinforce the *Bob Richards* court's understanding of 26 C.F.R. 1.1502-77(d)(5). The regulatory requirement that an affiliated-filing group deal with the IRS through a single representative was adopted for the convenience of the IRS, and it was not intended to give the designated representative any special advantage vis-à-vis other members of the group. In particular, by describing the designated representative as the affiliated-filing group's "agent," 26 C.F.R. 1.1502-77(d)(5) disavows any suggestion that the IRS's payment of a refund to the representative gives that entity any ownership interest (temporary or permanent) in the funds. Rather, absent some contrary contractual arrangement among the parties, ownership of a refund resides throughout the distribution process with the affiliate or affiliates that are ultimately entitled to the money.

3. The IRS regulations do not give a corporate parent a claim to interim ownership of a tax refund allocated to a subsidiary, but a consolidated-filing group may confer interim ownership on the parent in its tax allocation agreement

As described above, when an affiliated group's federal tax refund has been allocated to a subsidiary in the group, the IRS regulations provide that the common parent collects the refund from the IRS only in the capacity as an "agent." 26 C.F.R. 1.1502-77(d)(5). The regulations thus clarify the limited reach of federal law: The IRS's decision to pay the refund to the parent as agent for the group's members does not give the parent any ownership interest that it would not otherwise possess under a contract or other state law. A parent corporation like UWBI therefore may not use federal law to claim any interim ownership interest in a tax refund that has been allocated to a subsidiary during the period before the refund has been distributed to the proper subsidiary. Instead, absent a contrary agreement among the members of a consolidated-filing group (or some other provision of state law), equitable title to the refund continues to reside during that interim period with the affiliate to which the refund has been allocated, rather than with the parent that has received it in its capacity as the group's agent.

Federal law does not prevent the members of affiliated groups from agreeing to different arrangements. Just as such groups can determine by contract how tax refunds paid by the IRS to the group's agent will ultimately be allocated, most groups are likewise free to determine that the corporate parent will hold equitable title to a refund until the money has been forwarded to the proper affiliate. But because the IRS pays a refund

to an affiliated group's representative in its capacity as the members' "agent," affirmative contractual evidence of the parties' intent is needed for the parent to obtain temporary ownership of a refund that has been allocated to another member of the group.[7]

As explained above, it is undisputed that the Agreement here allocated ultimate entitlement to the $4 million tax refund to the Bank rather than to UWBI. Petitioner nevertheless contends that UWBI held equitable title to the funds at the time it declared bankruptcy, and that the funds therefore became property of the estate. Because the IRS's payment of the refund to UWBI as the group's "agent" would not have vested UWBI with any such ownership interest, UWBI must identify affirmative contractual language manifesting the parties' intent to achieve that result. For the reasons that follow, petitioner cannot make that showing.

C. The Tax Allocation Agreement That Governs This Case Did Not Transfer Ownership Of The Bank's Tax Refund Away From The Bank

The court of appeals correctly construed the Agreement here to direct that ownership of the tax refund would remain with the Bank—the entity whose economic activity generated the refund and that was entitled ultimately to receive it—rather than passing to UWBI during the brief interval between payment by the IRS and distribution of the funds to the proper affiliate. The Agreement expressly reflects the parties' intent that UWBI would act as an "intermediary" or

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[7] Another source of law besides the IRS regulations may constrain the consolidated group's choices regarding allocation and interim ownership of any tax refund. See, *e.g.*, pp. 8-9, *supra*.

"agent" in receiving refunds from the IRS and distributing them to the proper recipients. And under settled common-law principles, an agent who performs that role does not acquire equitable title to the funds that it is charged with receiving and distributing. Additional contextual factors confirm that understanding of the governing contract.

1. The Agreement describes the nature of the relationship between the Bank and UWBI: "In essence, this Agreement requires that each first-tier subsidiary [*e.g.*, the Bank] be treated as a separate taxpayer with UWBI merely being an intermediary between an Affiliate and the Internal Revenue Service." Pet. App. 131a (§ A.2). The use of the term "intermediary" is fully consistent with an intention among the parties to establish an agency relationship. See *Webster's Third New International Dictionary* 1180 (1993) (defining "intermediary" through "intermediate" as acting "as intermediate agent"). The parties' use of the word "merely" to describe UWBI's intermediary status further belies any inference that UWBI would acquire equitable title to the funds it was required to pass on to others.

Another provision of the Agreement confirms that "[e]ach Affiliate hereby appoints UWBI as its agent * * * for the purpose of * * * making any election, application[,] or taking any action in connection [with a consolidated tax return] on behalf of the Affiliates." Pet. App. 137a (§ G.1). As the court of appeals observed, the Agreement thus "clearly points to the existence of an agency relationship between UWBI and its affiliates, rather than a debtor/creditor relationship. In other words, [the contract] suggests that UWBI will simply act as a conduit through which the refund will pass." *Id.* at 21a; see *id.* at 25a (stating that Section G

also "quite clearly indicate[s] the intent to create an agency relationship"). Each affiliate's appointment of UWBI "as its agent" demonstrates the contracting parties' intent that UWBI would not acquire equitable title when handling affiliates' property, because that is the nature of an agency relationship. See p. 34, *supra*. Colorado courts frequently apply general agency principles, see, *e.g.*, *City of Aurora ex rel. Util. Enter.* v. *Colorado State Eng'r*, 105 P.3d 595, 622 (Colo. 2005) (en banc) (citing Second Restatement); *Stortroen* v. *Beneficial Fin. Co. of Colo.*, 736 P.2d 391, 395 (Colo. 1987) (en banc) (same), and petitioner does not argue that Colorado courts would recognize equitable title in an agent that collects property on behalf of its principal. On the contrary, petitioner all but acknowledges (Br. 52) that, "if UWBI is holding the refund as an agent for the Bank," then the Bank is the equitable owner of the refund.

The proper textual analysis of the Agreement here is especially clear because the contract supplies its own rule of construction. The Agreement states that "[a]ny ambiguity in the interpretation hereof shall be resolved * * * in favor of any insured depository institution." Pet. App. 138a (§ H.4). Because the Bank is an insured depository institution, petitioner cannot prevail unless the Agreement *unambiguously* vested UWBI with equitable title to the tax refund at issue here. Cf. Pet. Br. 55-56 (arguing that "UWBI is unambiguously both legal and equitable owner of the tax refund"). Petitioner cannot make that showing, so the Agreement "must be read as creating only an agency relationship between UWBI and the Bank." Pet. App. 27a.

2. The conclusion that UWBI did not acquire equitable title to the refund at issue here also accords with

background requirements that the contracting parties would have understood at the time they entered the Agreement. See *McCutchen*, 569 U.S. at 101-102. Well before the UWBI affiliated group adopted this Agreement, federal financial regulators had issued instructions concerning insured depository institutions' participation in tax allocation agreements based on the requirements of the Federal Reserve Act. See 63 Fed. Reg. at 64,757-64,758. The financial regulators' interagency statement explained that "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. 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." *Id.* at 64,759 (citing 26 C.F.R. 1.1502-77(a)).

Petitioner dismisses (Br. 38) the interagency directive as a "non-binding policy statement." But the statement was a published interpretation of the federal laws that govern insured depository institutions, issued by the agencies responsible for regulating those institutions, and backed up by the possibility of sanction. See 63 Fed. Reg. at 64,758 (stating that an affiliated group's failure to structure ownership of its tax refund in accordance with the policy statement "may be viewed as an unsafe and unsound practice prompting either informal or formal corrective action"). The sophisticated corporate parties who entered the Agreement would undoubtedly have been aware of the interagency statement, which "provide[d] the background against which the group's [tax allocation agreement] was entered." *FDIC* v. *Zucker* (*In re NetBank, Inc.*), 729 F.3d 1344,

1350 (11th Cir. 2013), cert. denied, 135 S. Ct. 476 (2014).[8] If the UWBI affiliated group members had wished to depart from that background expectation, they would not have described UWBI as an "agent"—the very term that the financial regulators and the IRS had used to describe a common parent that does *not* acquire ownership of an affiliate's refund.

3. Finally, petitioner identifies no cogent reason why the parties to this Agreement would have chosen to vest UWBI with temporary equitable title to a tax refund that the Agreement allocates to a subsidiary and requires be distributed within 10 days. Cf. *Zucker* v. *FDIC* (*In re BankUnited Fin. Corp.*), 727 F.3d 1100, 1108 (11th Cir. 2013) (stating that the court "cannot imagine" why an affiliated group would create a debtor-creditor relationship for a tax refund allocated to one subsidiary), cert. denied, 571 U.S. 1244 (2014). To be sure, different consolidated-filing groups may have sound reasons to adopt different formulas for *allocating* tax refunds among group members. But with respect to a refund (like this one) that the governing agreement allocates to a subsidiary, no evident purpose would be served by vesting the parent corporation with temporary equitable title to the funds. The capacity in which the parent holds the funds pending their distribution to the proper recipient is likely to make a practical difference only when the parent enters bankruptcy. And in that scenario, the natural effect of vesting UWBI with temporary equitable title would be to advantage

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[8] The court of appeals in *NetBank* considered the financial regulators' interagency policy statement for the additional reason that the relevant tax allocation agreement itself referenced the statement. 729 F.3d at 1350.

UWBI's creditors (whose interests petitioner now represents) at the expense of subsidiaries like the Bank. It is implausible to suppose that the corporate affiliates that fashioned the UWBI group's tax allocation agreement would deliberately advantage non-parties to the contract at the expense of the group's own members.

D. Petitioner's Reading Of The Agreement Is Inconsistent With Established Principles Of Agency Law And Contract Interpretation

As explained above, the Agreement here states that "[e]ach Affiliate" appoints UWBI as its "agent" to act "on behalf of the Affiliates," Pet. App. 137a (§ G.1), and that UWBI is, "[i]n essence, * * * merely * * * an intermediary between an Affiliate and the [IRS]," *id.* at 131a (§ A.2). The Agreement also required UWBI to distribute this $4 million refund to the Bank within 10 days of receiving it from the IRS. *Id.* at 130a (§ A.1), 137a (§ H.1). Petitioner nevertheless contends (Br. 55-56) that the Agreement *unambiguously* created a debtor-creditor rather than agency relationship between UWBI and the Bank. Petitioner's brief devotes only two paragraphs to that dispositive issue, Pet. Br. 52-53, and its arguments are contrary to basic principles of agency law and contract interpretation.

In arguing that the Agreement did not actually create an agency relationship despite the Agreement's use of that term, petitioner contends that "[t]he 'label' the parties use in describing their relationship is immaterial." Pet. Br. 52 (citation omitted). That argument is misconceived. Although labels are not *dispositive*, see Third Restatement § 1.02, and "an agency relation may exist even though the parties do not call it an agency," *Stortroen*, 736 P.2d at 395, petitioner identifies no Colorado decision that has rejected contracting parties'

description of their own relationship as one of agency. And while the Restatement contemplates the possibility of that result, it primarily urges judicial skepticism of an "agency" label where accepting that designation would "circumvent[ ] an otherwise-applicable" legal rule in order "to limit or prevent liability." Third Restatement § 1.02 cmt. b at 51. That concern is not implicated here.

Petitioner is also wrong in arguing (Br. 53) that the "control" needed for an agency relationship is "entirely absent" from this contract. The concept of "control" in this context "embraces a wide spectrum of meanings," and it suffices that "the principal initially states what the agent shall and shall not do, in specific or general terms." Third Restatement § 1.01 cmt. f at 26. Indeed, an agreement whereby "P sends A to get goods from B" is a classic example of an agency relationship. Second Restatement § 349 cmt. d, illus. 7, at 118; see *Argus Real Estate, Inc.* v. *E-470 Pub. Highway Auth.*, 97 P.3d 215, 217 (Colo. App. 2003) (finding that an agency relationship had been created by a contract stating that the parties "entered into an agreement for [A] to serve as agent to collect" money owed to P).

Under the Agreement here, an affiliate like the Bank that incurs a net operating loss is "entitled" to a refund for the same amount that it would have received if filing taxes separately. Pet. App. 130a (§ A.1). Once UWBI receives a refund from the IRS, it "shall" recalculate each group member's tax liability for the relevant year as if the refund claim had been part of the original tax filing, and it "shall" pay the refund to the proper subsidiary (or subsidiaries) as allocated "within 10 business days." *Id.* at 137a (§ H.1). The Agreement thus imposed a "self-executing duty" on UWBI to ensure

that the Bank received a refund commensurate with the Bank's taxes and losses, and to distribute the refund to the Bank promptly after receiving it from the IRS. *Id.* at 34a. The Agreement's mandatory instructions provide the "control" that suffices for the creation of an agency relationship.

The fact that the Agreement gives UWBI discretion regarding *other* aspects of the affiliated group's tax administration (Pet. Br. 53) does not negate the existence of an agency relationship with respect to the distribution of tax refunds within the consolidated-filing group. UWBI "may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment." Third Restatement § 1.01 cmt. c at 20. UWBI's ability to exercise discretion on other tax matters did not diminish its mandatory obligation to ensure that the Bank received the same refund that it would have received as a separate taxpayer promptly after the IRS issued any refund.

It likewise makes no difference to the creation of the agency relationship that "UWBI is the Bank's parent corporation." Pet. Br. 53. The IRS's longstanding consolidated-return regulations require each consolidated-filing group to designate a single "agent" to represent the group in its dealings with the IRS, while expressing the expectation that the "agent" typically will be the common parent. See pp. 3-4, *supra*. Moreover, Congress expressly conditioned the "privilege" of an affiliated group to file a consolidated tax return on "all corporations" in the group giving "consent" to all of the IRS's consolidated-return regulations. 26 U.S.C. 1501. Making that consent is not within the corporate parent's

discretion but is "reserved exclusively to each subsidiary," 26 C.F.R. 1.1502-77(e)(1), and each subsidiary must execute a specific document, IRS Form 1122, providing that consent, 26 C.F.R. 1.1502-75(h)(2). Federal financial regulators have likewise instructed, with respect to consolidated-filing groups that include insured depository institutions, that "a parent company that receives a tax refund from a taxing authority obtains th[o]se funds as agent for the consolidated group on behalf of the group members." 63 Fed. Reg. at 64,759. Petitioner's suggestion that a corporate parent is incapable of serving for any purpose as its subsidiary's "agent" flies in the face of those federal pronouncements.[9]

Finally, petitioner identifies no language in the Agreement here that affirmatively suggests an intent to vest UWBI with equitable title to tax refunds allocated to another affiliate. Petitioner simply assumes that this result must follow if a court concludes that the relationship between UWBI and the Bank was not *actually* an agency relationship under Colorado law. But petitioner does not contend that Colorado law required the UWBI group to vest UWBI with equitable title to the refund at issue here pending its transmittal to the Bank. Rather, the determination whether the group's consolidated-filing Agreement had that effect turns on the intent of the parties that formed the Agreement. See *School Dist. No. 1 in the Cnty. of Denver* v. *Denver*

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[9] Petitioner's suggestion (Br. 53) that UWBI could use its power to "replace[] the Bank's directors and exercise[] pervasive control over its operations" to force the Bank to give up ownership of a tax refund that arises from the Bank's economic activity, for nothing in return, would subject the affiliated group to a serious risk of violating the federal banking laws. See 79 Fed. Reg. at 35,230.

Classroom Teachers Ass'n, 433 P.3d 38, 41 (Colo. 2019) (en banc) (explaining that in Colorado, the "primary goal" of contract interpretation "is to discern and effectuate the * * * intent" of the contracting parties).

The Agreement's characterization of UWBI as an "agent" and "intermediary" would be strong evidence that the consolidated-filing group's members did not intend to confer any such ownership interest upon UWBI, even if a court concluded that some Colorado-law prerequisite to the formation of an actual agency relationship had not been satisfied. Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (explaining that, although a statutory provision declaring Amtrak not to be a government agency was not dispositive for constitutional purposes, the provision was "assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control—for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities"). The inference that the contracting parties did not intend UWBI to obtain equitable title is especially sound because the Agreement here was drafted against the backdrop of the IRS's consolidated-filing rules and the financial regulators' guidance, both of which use the term "agent" to describe an entity that receives and disburses refunds *without* acquiring ownership of the money. Use of the term "agent" in the UWBI group's tax allocation Agreement thus was the most straightforward way of disavowing any intent to produce the result that petitioner advocates.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 11 U.S.C. 541 provides in pertinent part:

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * * *

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

* * * * *

2. 26 U.S.C. 1501 provides:

Privilege to file consolidated returns

An affiliated group of corporations shall, subject to the provisions of this chapter, have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under section 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

3. 26 U.S.C. 1502 provides:

Regulations

The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. In carrying out the preceding

sentence, the Secretary may prescribe rules that are different from the provisions of chapter 1 that would apply if such corporations filed separate returns.

4. 26 U.S.C. 1504(a)(1) and (2) provide:

Definitions

(a) Affiliated group defined

For purposes of this subtitle—

(1) In general

The term "affiliated group" means—

(A) 1 or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if—

(B)(i) the common parent owns directly stock meeting the requirements of paragraph (2) in at least 1 of the other includible corporations, and

(ii) stock meeting the requirements of paragraph (2) in each of the includible corporations (except the common parent) is owned directly by 1 or more of the other includible corporations.

(2) 80-percent voting and value test

The ownership of stock of any corporation meets the requirements of this paragraph if it—

(A) possesses at least 80 percent of the total voting power of the stock of such corporation, and

(B) has a value equal to at least 80 percent of the total value of the stock of such corporation.

5. 26 U.S.C. 6402(k) provides:

Authority to make credits or refunds

(k) Refunds to certain fiduciaries of insolvent members of affiliated groups

Notwithstanding any other provision of law, in the case of an insolvent corporation which is a member of an affiliated group of corporations filing a consolidated return for any taxable year and which is subject to a statutory or court-appointed fiduciary, the Secretary may by regulation provide that any refund for such taxable year may be paid on behalf of such insolvent corporation to such fiduciary to the extent that the Secretary determines that the refund is attributable to losses or credits of such insolvent corporation.

6. 26 C.F.R. 1.1502-75 provides in pertinent part:

Filing of consolidated returns.

(a) Privilege of filing consolidated returns—(1) *Exercise of privilege for first consolidated return year.* A group which did not file a consolidated return for the immediately preceding taxable year may file a consolidated return in lieu of separate returns for the taxable year, provided that each corporation which has been a member during any part of the taxable year for which the consolidated return is to be filed consents (in the manner provided in paragraph (b) of this section) to the regulations under section 1502. If a group wishes to exercise its privilege of filing a consolidated return, such consolidated return must be filed not later than the last day prescribed by law (including extensions of time) for

the filing of the common parent's return. Such consolidated return may not be withdrawn after such last day (but the group may change the basis of its return at any time prior to such last day).

* * * * *

(b) *How consent for first consolidated year exercised*—(1) *General rule*. The consent of a corporation referred to in paragraph (a)(1) of this section shall be made by such corporation joining in the making of the consolidated return for such year. A corporation shall be deemed to have joined in the making of such return for such year if it files a Form 1122 in the manner specified in paragraph (h)(2) of this section.

* * * * *

(h) *Method of filing return and forms*—(1) *Consolidated return made by common parent corporation.* The consolidated return shall be made on Form 1120 for the group by the common parent corporation. The consolidated return, with Form 851 (affiliations schedule) attached, shall be filed with the district director with whom the common parent would have filed a separate return.

(2) *Filing of Form 1122 for first year.* If, under the provisions of paragraph (a)(1) of this section, a group wishes to file a consolidated return for a taxable year, then a Form 1122 ("Authorization and Consent of Subsidiary Corporation To Be Included in a Consolidated Income Tax Return") must be executed by each subsidiary. For taxable years beginning before January 1, 2003, the executed Forms 1122 must be attached to the consolidated return for the taxable year. For taxable

years beginning after December 31, 2002, the group must attach either executed Forms 1122 or unsigned copies of the completed Forms 1122 to the consolidated return. If the group submits unsigned Forms 1122 with its return, it must retain the signed originals in its records in the manner required by § 1.6001-1(e). Form 1122 is not required for a taxable year if a consolidated return was filed (or was required to be filed) by the group for the immediately preceding taxable year.

(3) *Persons qualified to execute returns and forms.* Each return or form required to be made or prepared by a corporation must be executed by the person authorized under section 6062 to execute returns of separate corporations.

* * * * *

7. 26 C.F.R. 1.1502-77 provides in pertinent part:

Agent for the group.

(a) *Agent for the group*—(1) *Sole agent.* Except as provided in paragraphs (e) and (f)(2) of this section, one entity (the agent) is the sole agent that is authorized to act in its own name regarding all matters relating to the federal income tax liability for the consolidated return year for each member of the group and any successor or transferee of a member (and any subsequent successors and transferees thereof). The identity of that agent is determined under the rules of paragraph (c) of this section.

(2) *Agent for each consolidated return year.* Agency for the group is established for each consolidated return year and is not affected by the status or

membership of the group in later years. Thus, subject to the rules of paragraph (c) of this section, the agent will generally remain agent for that consolidated return year regardless of whether one or more subsidiaries later cease to be members of the group, whether the group files a consolidated return for any subsequent year, whether the agent ceases to be the agent or a member of the group in any subsequent year, or whether the group continues pursuant to § 1.1502-75(d) with a new common parent in any subsequent year.

* * * * *

(c) *Identity of the agent*—(1) *In general*. Except as otherwise provided in this section, the agent for a current year is the common parent and the agent for a completed year is the common parent at the close of the completed year or its default successor, if any. Except as specifically provided otherwise in this paragraph (c), any entity that is an agent pursuant to paragraph (c)(3) of this section (agent following group structure change), paragraph (c)(5) of this section (agent designated by agent terminating without default successor), paragraph (c)(6) of this section (agent designated by Commissioner), or paragraph (c)(7) of this section (agent designated by resigning agent), or any entity subsequently serving as agent following such agent, acts as an agent for and under the same terms and conditions that apply to a common parent. For example, such an agent would generally be able to designate an agent if it terminates without a default successor; however, an entity that became agent pursuant to a designation by the Commissioner under paragraphs (c)(6)(i)(A)(*2*), (*3*), or (*4*) of this section is not permitted to designate an agent

if it terminates without a default successor. Other special rules described in this paragraph (c) apply.

* * * * *

(d) *Examples of matters subject to agency.* With respect to any consolidated return year for which it is the agent—

(1) The agent makes any election (or similar choice of a permissible option) that is available to a subsidiary in the computation of its separate taxable income, and any change in an election (or similar choice of a permissible option) previously made by or for a subsidiary, including, for example, a request to change a subsidiary's method or period of accounting;

(2) All correspondence concerning the income tax liability for the consolidated return year is carried on directly with the agent;

(3) The agent files for all extensions of time, including extensions of time for payment of tax under section 6164, and any extension so filed is considered as having been filed by each member;

(4) The agent gives waivers, gives bonds, and executes closing agreements, offers in compromise, and all other documents, and any waiver or bond so given, or agreement, offer in compromise, or any other document so executed, is considered as having also been given or executed by each member;

(5) The agent files claims for refund, and any refund is made directly to and in the name of the agent and discharges any liability of the Government to any member with respect to such refund;

(6) The agent takes any action on behalf of a member of the group with respect to a foreign corporation including, for example, elections by, and changes to the method of accounting of, a controlled foreign corporation in accordance with § 1.964-1(c)(3);

(7) Notices of claim disallowance are mailed only to the agent, and the mailing to the agent is considered as a mailing to each member;

(8) Notices of deficiencies are mailed only to the agent (except as provided in paragraph (f)(3) of this section), and the mailing to the agent is considered as a mailing to each member;

(9) Notices of final partnership administrative adjustment under section 6223 with respect to any partnership in which a member of the group is a partner may be mailed to the agent, and, if so, the mailing to the agent is considered as a mailing to each member that is a partner entitled to receive such notice (for other rules regarding partnership proceedings, see paragraph (f)(2)(iii) of this section);

(10) The agent files petitions and conducts proceedings before the United States Tax Court, and any such petition is considered as also having been filed by each member;

(11) Any assessment of tax may be made in the name of the agent, and an assessment naming the agent is considered as an assessment with respect to each member; and

(12) Notice and demand for payment of taxes is given only to the agent, and such notice and demand is considered as a notice and demand to each member.

(e) *Matters reserved to subsidiaries.* Except as provided in this paragraph (e) and paragraph (f)(2) of this section, no subsidiary (unless it is or becomes an agent pursuant to paragraph (c) of this section) has authority to act for or to represent itself in any matter related to the tax liability for the consolidated return year. The following matters, however, are reserved exclusively to each subsidiary—

(1) The making of the consent required by § 1.1502-75(a)(1);

(2) Any action with respect to the subsidiary's liability for a federal tax other than the income tax imposed by chapter 1 of the Code (including, for example, employment taxes under chapters 21 through 25 of the Code, and miscellaneous excise taxes under chapters 31 through 47 of the Code); and

(3) The making of an election to be treated as a Domestic International Sales Corporation under § 1.992-2.

* * * * *

8. 26 C.F.R. 1.1502-78 provides in pertinent part:

Tentative carryback adjustments.

(a) *General rule.* If a group has a consolidated net operating loss, a consolidated net capital loss, or a consolidated unused business credit for any taxable year, then any application under section 6411 for a tentative carryback adjustment of the taxes for a consolidated return year or years preceding such year shall be made by the common parent corporation for the carryback year (or the agent determined under § 1.1502-77(c) or

§ 1.1502-77B(d) for the carryback year) to the extent such loss or unused business credit is not apportioned to a corporation for a separate return year pursuant to § 1.1502-21(b), 1.1502-22(b), or 1.1502-79(c). In the case of the portion of a consolidated net operating loss or consolidated net capital loss or consolidated unused business credit to which the preceding sentence does not apply and that is to be carried back to a corporation that was not a member of a consolidated group in the carryback year, the corporation to which such loss or credit is attributable shall make any application under section 6411. In the case of a net capital loss or net operating loss or unused business credit arising in a separate return year that may be carried back to a consolidated return year, after taking into account the application of § 1.1502-21(b)(3)(ii)(B) with respect to any net operating loss arising in another consolidated group, the common parent for the carryback year (or the agent determined under § 1.1502-77(c) or § 1.1502-77B(d) for the carryback year) shall make any application under section 6411.

(b) *Special rules*—(1) *Payment of refund.* Any refund allowable under an application referred to in paragraph (a) of this section shall be made directly to and in the name of the corporation filing the application, except that in all cases where a loss is deducted from the consolidated taxable income or a credit is allowed in computing the consolidated tax liability for a consolidated return year, any refund shall be made directly to and in the name of the common parent corporation for the carryback year (or the agent determined under § 1.1502-77(c) or § 1.1502-77B(d) for the carryback year). The payment of any such refund shall discharge any liability of the Government with respect to such refund.

* * * * *

(3) *Groups that include insolvent financial institutions*. For further rules applicable to groups that include insolvent financial institutions, see § 301.6402-7 of this chapter.

(c) *Examples.* The provisions of paragraphs (a) and (b) of this section may be illustrated by the following examples:

Example 1. Corporations P, S, and S-1 filed a consolidated return for the calendar year 2003. P, S, and S-1 also filed a consolidated return for the calendar year 2006. The group incurred a consolidated net operating loss in 2006 attributable to S-1 which may be carried back to 2003 as a consolidated net operating loss carryback. If a tentative carryback adjustment is desired, P, the common parent for the carryback year, must file an application under section 6411 and any refund will be made to P.

* * * * *

9. 26 C.F.R. 301.6402-7 provides in pertinent part:

Claims for refund and applications for tentative carryback adjustments involving consolidated groups that include insolvent financial institutions.

(a) *In general*—(1) *Overview.* Section 6402(i) authorizes the Secretary to issue regulations providing for the payment of a refund directly to the statutory or court-appointed fiduciary of an insolvent corporation that was a subsidiary in a consolidated group, to the extent the Secretary determines that the refund is at-

tributable to losses or credits of the insolvent corporation. This section provides rules for the payment of refunds and tentative carryback adjustments to the fiduciary of an insolvent financial institution that was a subsidiary in a consolidated group.

(2) *Notice.* This section provides notice to the common parent of a consolidated group of which an insolvent financial institution is or was a member that—

(i) The fiduciary for the institution may, in addition to the common parent, act as agent for the group in certain matters relating to the tax liability of the group in the year in which a loss arose and for the year to which a claim for refund or application for tentative carryback adjustment relates; and

(ii) The Internal Revenue Service may deal directly with the common parent or the fiduciary (or both) as agent for the group to the extent provided in this section.

(b) *Definitions.* For purposes of this section, the following terms have the meanings set forth below:

(1) *Carryback year group.* A carryback year group is a consolidated group of which a corporation that is or becomes an insolvent financial institution is a member during a consolidated carryback year.

(2) *Consolidated carryback year.* A consolidated carryback year is a consolidated return year to which a loss arising in a loss year is carried back.

(3) *Fiduciary.* A fiduciary is—

(i) The Federal Deposit Insurance Corporation;

(ii) The Resolution Trust Corporation; or

(iii) Any other entity established by federal law, or a federal agency, that is identified by the Commissioner in a revenue ruling or revenue procedure as a fiduciary for purposes of this section;

in its capacity as an authorized receiver or conservator of an insolvent financial institution.

(4) *Insolvent financial institution.* An insolvent financial institution (an institution) is a bank or domestic building and loan association for which the fiduciary is authorized to act as a receiver or conservator—

(i) On the ground that the institution is insolvent within the meaning of 12 U.S.C. 191, 12 U.S.C. 1821(c)(5)(A), 12 U.S.C. 1464(d)(2)(A)(i), or 12 U.S.C. 1464(d)(2)(C)(i) or any applicable state law (or any successor statute which adopts a substantially similar standard); or

(ii) On grounds other than insolvency, provided that the institution is insolvent within the meaning of paragraph (b)(4)(i) of this section at any time after commencement of the conservatorship or receivership.

A reference to an institution under these regulations includes, as the context requires, a reference to predecessors and successors of the institution.

(5) *Loss year.* A loss year is a taxable year for which any member or former member of the carryback year group claims a loss that may be carried back.

(6) *Loss year group.* A loss year group is a consolidated group of which a corporation that is or becomes an insolvent financial institution is a member during a loss year.

(7) *Procedure effective date.* The procedure effective date is the day on which the Internal Revenue Service has processed the notice described in paragraph (d)(1) of this section to the extent necessary for all Internal Revenue Service Centers to have access to information indicating that—

(i) Appropriate notice to the Internal Revenue Service has been filed; and

(ii) Payments with respect to losses of an institution are to be paid in accordance with the procedures set forth in this section.

(8) *Definitions in § 1.1502-1.* Unless otherwise provided, the definitions contained in § 1.1502-1 of this chapter apply in this section.

(c) *Deemed agency status of fiduciary*—(1) *In general.* Notwithstanding the general treatment of a common parent as the agent of a group under §§ 1.1502-77 and 1.1502-78 of this chapter, if the fiduciary satisfies the notice requirements of paragraph (d)(1) of this section, the fiduciary may also be deemed to be an agent under §§ 1.1502-77 and 1.1502-78 of this chapter—

(i) Of the loss year group (if any) for purposes of filing a consolidated return for the loss year;

(ii) Of the carryback year group for purposes of filing a claim for refund or an application for a tentative carryback adjustment for the consolidated carryback year under paragraph (e) of this section and receiving payments of any refund or tentative carryback adjustment under paragraph (g) of this section; and

(iii) Of the carryback year group, the loss year group or any other group of which the institution is a

member for any matter pertaining to the determination of the refund or tentative carryback adjustment, but only to the extent provided in paragraph (c)(2) of this section.

(2) *Limitation.* The fiduciary may act as an agent for matters described in paragraph (c)(1)(iii) of this section only to the extent—

(i) Authorized by the district director, in his/her sole discretion, after receiving a written request from the fiduciary; or

(ii) Requested by the Internal Revenue Service under paragraph (f)(3) of this section.

(d) *Notice requirements*—(1) *Notice to the Internal Revenue Service.* To satisfy the notice requirement of this paragraph (d)(1), the fiduciary must file Form 56-F, Notice Concerning Fiduciary Relationship of Financial Institution, with the Internal Revenue Service Center indicated on the form. However, in its sole discretion, the Internal Revenue Service may treat notice to it in any other manner as satisfying the notice requirement under this paragraph (d)(1).

(2) *Notice to the common parent*—(i) *Form 56-F.* The fiduciary must send a copy of the form 56-F filed with the Internal Revenue Service Center or any other notice provided to the Service under paragraph (d)(1) of this section to the common parent of the loss year group (if any) and the common parent of all carryback year groups (if different from the loss year group).

(ii) *Claim for refund and loss year return.* If a claim for refund is filed by the fiduciary in accordance with paragraph (e)(1) of this section, the fiduciary must provide a copy of the claim for refund to the common

parent of the carryback year group. If a loss year return is filed by the fiduciary in accordance with paragraph (e)(3) of this section, the fiduciary must provide a copy of the loss year return to the common parent of the loss year group (if any).

(iii) *Additional information.* The fiduciary must provide to the affected common parent a copy of the request for agency status referred to in paragraphs (c)(2)(i) and (ii) of this section, and a copy of any additional information submitted to the Internal Revenue Service as agent under paragraph (c)(1)(iii) of this section.

(e) *Filing requirements of the fiduciary*—(1) *Claim for refund by the fiduciary.* If the fiduciary accepts a claim for refund filed by the common parent, the fiduciary may claim a refund under this section by filing a copy of the common parent's claim for refund. If no claim for refund is filed by the common parent for the consolidated carryback year or the fiduciary does not accept a claim for refund filed by the common parent, the fiduciary may claim a refund under this section by filing its own claim for refund under section 6402, based on all information pertaining to the institution and all information pertaining to other members of the carryback year group and the loss year group to which the fiduciary has reasonable access. Any claim for refund filed by the fiduciary under this paragraph (e)(1) must contain the title "Claim for refund under section 6402(i) of the Code" at the top of the first page of the claim, and the following must be attached to the claim:

(i) The name and employer identification number of the institution that was a member of the carryback year group;

(ii) The name of the fiduciary;

(iii) A schedule demonstrating that the amount of the refund claimed by the fiduciary is determined in accordance with paragraph (g) of this section;

(iv) A representation that the institution is an insolvent financial institution as defined in paragraph (b)(4) of this section;

(v) A representation that the fiduciary has satisfied the requirements set forth in paragraphs (d)(2)(i) and (ii) of this section; and

(vi) A statement executed by an authorized representative of the fiduciary and any paid preparer utilized by the fiduciary that provides "Under penalties of perjury, I declare that I have examined the items listed in § 301.6402-7T(e)(1)(i) through (v), including accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than fiduciary) is based on all information of which the preparer has any knowledge."

(2) *Application for tentative carryback adjustment pursuant to section 6411.* Notwithstanding section 6411 and § 1.1502-78 of this chapter, an application for a tentative carryback adjustment must be signed by both the common parent of the carryback year group and the fiduciary if the payment with respect to the tentative carryback adjustment is not made before the procedure effective date (whether or not the application was filed before the procedure effective date). Any application for a tentative carryback adjustment filed under this paragraph (e)(2) must contain the title "Application for tentative carryback adjustment under section

6402(i) of the Code" at the top of the first page of the application. In addition, the following must be attached to the application:

(i) The name and employer identification number of the institution that was a member of the carryback year group;

(ii) The name of the fiduciary;

(iii) A schedule demonstrating that the amount claimed by the fiduciary is determined in accordance with paragraph (g) of this section;

(iv) A representation that the institution is an insolvent financial institution as defined in paragraph (b)(4) of this section; and

(v) A representation that the fiduciary has satisfied the requirements set forth in paragraph (d)(2)(i) of this section.

(3) *Loss year return by the fiduciary.* If the institution is a member of a loss year group, and either the common parent does not file a loss year return or the fiduciary does not accept the loss year return filed by the common parent, the fiduciary may file a loss year return with respect to the loss year group. A loss year return can only be filed by the fiduciary in conjunction with the filing of a claim for refund under paragraph (e)(1). The return must be based on all information pertaining to the institution and all information pertaining to other members to which the fiduciary has reasonable access. Any return filed by the fiduciary under this paragraph (e)(3) must contain the title "Loss year return under section 6402(i) of the Code" at the top of the first page of the return, and the following must be attached to the return:

(i) The name and employer identification number of the institution that is a member of the loss year group;

(ii) The name of the fiduciary;

(iii) A representation that the institution is an insolvent financial institution as defined in paragraph (b)(4) of this section; and

(iv) A representation that the fiduciary has satisfied the requirements set forth in paragraphs (d)(2)(i) and (ii) of this section.

(4) *Additional information.* If the fiduciary files additional information under paragraph (c)(1)(iii) of this section, the fiduciary must attach a representation that it has satisfied the requirements set forth in paragraph (d)(2)(iii) of this section.

(5) *Election to waiver carryback.* Any election filed after December 30, 1991, by the common parent of a loss year group under section 172(b)(3) to relinquish the entire carryback period with respect to a consolidated net operating loss arising in a loss year is not effective with respect to the portion of the consolidated net operating loss attributable to a subsidiary that is an institution. Instead, the fiduciary may make the election under section 172(b)(3) with respect to the portion attributable to the institution after the notice described in paragraph (d)(1) of this section is filed. For purposes of this paragraph (e)(5), the portion attributable to an institution is determined under the principles of paragraph (g)(2)(ii) of this section.

(f) *Processing and reconciliation of information by the Internal Revenue Service*—(1) *Loss year return if the insolvent financial institution is a member of a loss year group.* The Internal Revenue Service

may, in its sole discretion, adjust a loss year return filed by the common parent of a loss year group to take into account information filed by the fiduciary in accordance with paragraph (e) of this section, or accept or adjust a loss year return for the loss year group filed by the fiduciary. Nothing in this section relieves the common parent of a loss year group of its duty to file a consolidated return taking into account an institution's items of income, gain, loss, deduction, and credit for any taxable year, or obligates the Internal Revenue Service to accept a return filed by the fiduciary as the return of the loss year group.

(2) *Claim for refund with respect to consolidated carryback year.* The Internal Revenue Service may, in its sole discretion, adjust a claim for refund filed by the common parent of a carryback year group to take into account information filed by the fiduciary in accordance with paragraph (e) of this section, or accept or adjust a claim for refund for the carryback year group filed by the fiduciary. Nothing in this section obligates the Internal Revenue Service to pay a claim for refund, or to accept a claim for refund, filed by the fiduciary as a claim for refund for the carryback year group.

(3) *Additional information.* In determining the amount of any refund that may be paid to the fiduciary under paragraph (g) of this section, the Internal Revenue Service may, in its sole discretion, take into account any information that the Internal Revenue Service deems relevant and may require the fiduciary to file any additional information the Internal Revenue Service deems appropriate.

(g) *Payment of a refund or a tentative carryback adjustment to fiduciary*—(1) *In general.* If a claim

for refund or an application for a tentative carryback adjustment is filed for the consolidated carryback year in accordance with paragraph (e) of this section, the Internal Revenue Service may, in its sole discretion, pay to the fiduciary all or any portion of the refund or tentative carryback adjustment that the Internal Revenue Service determines under this section to be attributable to the net operating losses of the institution. Nothing in this section obligates the Internal Revenue Service to pay to the fiduciary all or any portion of a claim for refund or application for tentative carryback adjustment.

(2) *Portion of refund or tentative carryback adjustment attributable to the net operating loss of an insolvent financial institution*—(i) *In general.* The portion of a refund or tentative carryback adjustment attributable to a net operating loss of an institution that is carried to a consolidated carryback year is determined based on the absorption, as described in paragraph (g)(2)(iii) of this section, of the institution's net operating loss carried to the consolidated carryback year.

(ii) *Member's net operating loss.* If the loss year is a consolidated return year, references in this section to the net operating loss of a member of the loss year group is a reference to the portion of the loss year group's consolidated net operating loss attributable to the member. The consolidated net operating loss for a taxable year that is attributable to a member is determined by a fraction, the numerator of which is the separate net operating loss of the member for the year of the loss and the denominator of which is the sum of the separate net operating losses for that year of all members having such losses. For this purpose, the separate net operating loss of a member is determined by computing

the consolidated net operating loss by taking into account only the member's items of income, gain, deduction, and loss, including the member's losses and deductions actually absorbed by the group in the taxable year (whether or not absorbed by the member).

(iii) *Absorption of net operating losses.* The absorption of net operating losses generally is determined under applicable principles of the Code and regulations, including the principles of section 172 and §§ 1.1502 21(b) or 1.1502-21A(b) (as appropriate) of this chapter. Notwithstanding any contrary rule or principle of the Code or regulations, if an institution and another member of the carryback year group have net operating losses that arise in taxable years ending on the same date and are carried to the same consolidated carryback year, the carryback year group's consolidated taxable income for that year is treated as offset first by the loss attributable to the institution to the extent thereof.

(3) *Examples.* For purposes of the examples in this section, all groups file consolidated returns, all corporations have calendar taxable years, the facts set forth the only corporate activity, the fiduciary has met the notice and filing requirements of this section, and the common parent has filed a return for the loss year and a claim for refund. The principles of this paragraph (g) are illustrated by the following examples.

Example 1. Absorption of net operating losses, (a) P owns all the stock of S1, an insolvent financial institution, and S2, a corporation that is not a financial institution. For Year 1, P, S1, and S2 each have $50 of income, and the P group's consolidated taxable income is $150. On May 31 of Year 2, S1 becomes insolvent and

is placed in receivership under the supervision of a fiduciary. For Year 2, the P group has a consolidated net operating loss of $200, of which $100 is attributable to S1 and $100 is attributable to S2.

(b) Under paragraph (g)(2)(iii) of this section, the $150 of consolidated taxable income for Year 1 is offset first by the $100 portion of the consolidated net operating loss for Year 2 attributable to S1. The remaining $50 is treated as offset by $50 of the $100 of consolidated net operating loss attributable to S2. Thus, the refund attributable to $100 of the loss may be payable to the fiduciary and the refund attributable to $50 of the loss may be payable to P. The remaining $50 consolidated net operating loss, available to be carried forward, is entirely attributable to S2.

Example 2. Separate return net operating loss, The facts are the same as in *Example 1,* except that S1 left the P group at the end of Year 1 and its $100 of loss in Year 2 is incurred in a separate return limitation year. Under paragraph (g)(2)(iii) of this section, the generally applicable absorption principles of section 172 and § 1.1502-21 of this chapter apply. Although S1 and S2 are carrying back losses to Year 1 from taxable years ending on the same date (Year 2), S1's loss is subject to a $50 limitation under § 1.1502-21(c) of this chapter and only $50 of S1's loss is absorbed before S2's net operating loss. Therefore, the refund attributable to $50 of the net operating loss of S1 may be payable to the fiduciary, and the refund attributable to $100 of the net operating loss of S2 may be payable to P. The remaining $50 net operating loss of S1 is available to be carried forward.

(4) *Refund or tentative carryback adjustment allocation agreement.* The determination of the portion

of any refund or tentative carryback adjustment payable to the fiduciary under this paragraph (g) shall be made without regard to—

(i) Any agreement among the members of the consolidated group; or

(ii) Whether the fiduciary is otherwise entitled to any portion of the refund or tentative carryback adjustment under applicable law.

* * * * *

(j) *Determination of ownership.* This section determines the party to whom a refund or tentative carryback adjustment will be paid but is not determinative of ownership of any such amount among current or former members of a consolidated group (including the institution).

(k) *Liability of the Government.* Any refund or tentative carryback adjustment paid to the fiduciary discharges any liability of the Government to the same extent as payment to the common parent under § 1.1502-77 or § 1.1502-78 of this chapter. Furthermore, any refund or tentative carryback adjustment paid to the fiduciary is considered a payment to all members of the carryback year group. Any determination made by the Internal Revenue Service under this section to pay a refund or tentative carryback adjustment to a fiduciary or the common parent may not be challenged by the common parent, any member of the group, or the fiduciary.

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