

FEDERAL RESERVE SYSTEM**[Docket No. OP-1158]****Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970****AGENCY:** Board of Governors of the Federal Reserve System.**ACTION:** Proposed interpretation and supervisory guidance with request for public comment.

SUMMARY: The Board proposes to adopt an interpretation of the anti-tying restrictions of section 106 of the Bank Holding Company Act Amendments of 1970 and related supervisory guidance. The interpretation describes the scope and purposes of section 106, the elements of a tying arrangement prohibited by section 106, and the statutory and regulatory exceptions to the prohibitions of section 106. The interpretation also includes examples of the types of conduct, actions and arrangements by banks that are prohibited and permissible under section 106. The Board believes that adoption of the interpretation will assist banks and their customers in understanding the scope of the anti-tying restrictions of the statute. The related supervisory guidance discusses the types of internal controls that should help banks comply with section 106. The proposed interpretation and guidance reflect the principles that the Board will apply in enforcing section 106 and conducting anti-tying reviews at banking organizations.

DATES: Comments must be received on or before September 30, 2003.**ADDRESSES:** Comments should refer to Docket No. OP-1158 and may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. However, because paper mail in the Washington area and at the Board of Governors is subject to delay, please consider submitting your comments by e-mail to

regs.comments@federalreserve.gov or faxing them to the Office of the Secretary at 202-452-3819 or 202-452-3102. Members of the public may inspect comments in Room MP-500 of the Martin Building between 9 a.m. and 5 p.m. on weekdays pursuant to section 261.12, except as provided in section 261.14, of the Board's Rules Regarding Availability of Information (12 CFR 261.12 and 261.14).

FOR FURTHER INFORMATION CONTACT: Scott G. Alvarez, Associate General Counsel (202-452-3583), Kieran J.

Fallon, Senior Counsel (202-452-5270), Mark E. Van Der Weide, Counsel (202-452-2263), or Andrew S. Baer, Counsel (202-452-2246), Legal Division; or Michael G. Martinson, Associate Director (202-452-3640), or Michael J. Schoenfeld, Senior Supervisory Financial Analyst (202-452-2836), Division of Banking Supervision and Regulation; Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact 202-263-4869.

SUPPLEMENTARY INFORMATION:**Background**

Section 106 of the Bank Holding Company Act Amendments of 1970 (section 106) generally prohibits a bank from conditioning the availability or price of one product on a requirement that the customer also obtain another product from the bank or an affiliate of the bank.¹ Thus, for example, the statute prohibits a bank from conditioning the availability of a loan from the bank (or a discount on the loan) on the requirement that the customer also purchase an insurance product from the bank or an affiliate.²

Congress adopted section 106 in 1970 at the same time that it expanded the ability of bank holding companies to engage in nonbanking activities under section 4(c)(8) of the Bank Holding Company Act (BHC Act).³ Congress expressed concern that banks might use their ability to offer bank products—credit in particular—in a coercive manner to gain a competitive advantage in markets for nonbanking products and services (such as insurance sales).⁴ Congress therefore decided to impose the special anti-tying restrictions in section 106 on banks.

Section 106 does not apply to the nonbank affiliates of a bank or other nonbank entities.⁵ The nonbank

affiliates of banks, as well as banks themselves, however, are subject to the anti-tying restrictions contained in the Federal antitrust laws (the Sherman and Clayton Acts).⁶

Although section 106 prohibits banks from imposing certain types of tying arrangements on their customers, the statute also expressly permits banks to engage in other forms of tying and authorizes the Board to grant additional exceptions to the statute's restrictions by regulation or order. For example, section 106 and the Board's regulations expressly permit a bank to condition the availability or price of a product or service on a requirement that the customer also obtain a "loan, discount, deposit, or trust service" (a "traditional bank product") from the bank or an affiliate of the bank.⁷

Although the general prohibitions of section 106 can be stated fairly simply, determining whether a violation of the statute has occurred often requires a careful analysis of the facts and circumstances associated with the particular transaction (or proposed transaction) at issue. For example, as noted above, several important exceptions exist to the statute's prohibitions. Moreover, the actions, statements and policies of the bank involved in the particular transaction often play an important role in determining whether the bank has violated section 106.

The Federal banking agencies have long required that banking organizations establish and maintain appropriate policies and procedures to ensure compliance with the anti-tying restrictions of section 106,⁸ and the agencies monitor these policies and procedures through the supervisory process. For example, the anti-tying policies and procedures of bank holding companies and state member banks are reviewed and evaluated by Federal Reserve examiners as part of the compliance examinations of these organizations. In addition, examiners may conduct more targeted examinations of the marketing programs, anti-tying training materials, internal reports and internal tying investigations of a banking organization.

Over the past several months, Board staff also has met with customers of

¹ 12 U.S.C. 1972. Although part of the Bank Holding Company Act Amendments of 1970, section 106 applies to a bank whether or not the bank is owned or controlled by a bank holding company.

² Section 106 also generally prohibits a bank from conditioning the availability or price of one product on a requirement that the customer (i) *provide* another product to the bank or an affiliate of the bank or (ii) *not obtain* another product from a competitor of the bank or a competitor of an affiliate of the bank. 12 U.S.C. 1972(1)(C), (D) and (E). The arrangements prohibited by section 106 are collectively referred to as "tying arrangements."

³ 12 U.S.C. 1843(c)(8).

⁴ See S. Rep. No. 1084, 91st Cong., 2d Sess. (1970).

⁵ In 1971, the Board by regulation extended the anti-tying restrictions of section 106 to bank holding companies and their nonbank subsidiaries. In 1997, however, the Board rescinded this

regulatory extension of the statute. See 62 FR 9290, Feb. 28, 1997.

⁶ 15 U.S.C. 1 *et seq.*; 15 U.S.C. 12 *et seq.*

⁷ See 12 U.S.C. 1972(1)(A); 12 CFR 225.7(b)(1).

⁸ See, e.g., Federal Reserve Board Bank Holding Company Supervision Manual 3500.0; Office of the Comptroller of the Currency Insurance Activities Handbook, Federal Prohibitions on Tying (June 2002); Office of the Comptroller of the Currency Bulletin 95-20 (April 14, 1995).