

banks, professional associations representing customers of banks, competitors of banks, and banking organizations and their trade associations concerning the scope, effectiveness and impact of the anti-tying restrictions of section 106 and related issues. In addition, the Board has received inquiries from banks, competitors of banks, customers of banks and a member of Congress regarding section 106 and its application to specific situations.

In light of these events, the complexities associated with section 106, and the increasing importance of section 106 in the wake of the Gramm-Leach-Bliley Act,⁹ the Board believes it would be useful and appropriate at this time to publish, and seek public comment on, an official interpretation of section 106 and supervisory guidance for banks concerning section 106. In supervising compliance by banking organizations with section 106 and this interpretation, the Board will take into account whether the manner of applying section 106 or the Board's interpretation in the context of a particular practice was unclear before this document was issued.

Outline of the Proposed Interpretation and Supervisory Guidance

The proposed statement explains the Board's interpretation of section 106. The statement also sets forth the principles that the Board will apply in enforcing the statute and in assessing the anti-tying policies, procedures and systems of banks during the supervisory process. The Board has consulted extensively with the Office of the Comptroller of the Currency in developing the interpretation and supervisory guidance.

The statement is divided into several parts. The first six parts (Parts I–VI) are a proposed Board interpretation of section 106. These parts describe the types of bank conduct that are prohibited by section 106 (Part II), explain the essential elements of a tying arrangement prohibited by section 106 (Part III), and describe the statutory and regulatory exceptions to the anti-tying prohibitions of section 106 (Part IV). The remainder of these six parts provide an introduction to the statement (Part I) and discuss the scope of the terms “bank” and “affiliate” for purposes of section 106 and the statement (Parts V and VI).

The final part of the statement (Part VII) discusses the policies, procedures and systems that should help banks ensure and monitor their compliance

with section 106. This section is guidance that the Board proposes to follow in its supervision of banking organizations going forward.

The interpretation discusses a wide variety of issues related to section 106. Among other matters, the Board's interpretation addresses (i) the scope of the statutory and regulatory traditional bank product exceptions, including the types of products that would qualify as a traditional bank product (*i.e.*, a “loan, discount, deposit, or trust service”) for purposes of the exceptions; (ii) the permissibility under section 106 of relationship banking programs that involve both traditional bank products and other products (referred to in the interpretation and guidance as “mixed-product arrangements”); and (iii) whether tying arrangements voluntarily sought or demanded by a customer are permissible under 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. These examples, which are included for illustrative purposes, are based solely on the facts stated in the example. Because the determination of whether a violation of section 106 has occurred is fact specific, these examples by themselves do not represent a finding that any past action by a particular bank violated the statute.

The Board seeks comment on all aspects of the proposed interpretation and supervisory guidance. In addition, the Board asks commenters to identify and discuss any section 106 interpretive or compliance issues that are not addressed in the statement but that, in the view of commenters, would be of sufficient importance and general interest to address either in the Board's interpretation or supervisory guidance.

The proposed interpretation and related supervisory guidance follows.

Interpretation of the Anti-tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970 and Related Supervisory Guidance

I. Introduction

The anti-tying provisions of section 106 of the Bank Holding Company Act Amendments of 1970 (“section 106” or the “anti-tying prohibitions”) prohibit certain forms of tying by banks.¹⁰ The statute is intended to prevent banks from using their ability to offer bank products, credit in particular, in a coercive manner to gain a competitive advantage in markets for other products

and services. Although section 106 sets forth an absolute bar to certain forms of tying by banks, the statute permits other types of tying and permits the Board to grant additional exceptions to its prohibitions. Violations of section 106 may be addressed by the bank's appropriate Federal banking agency through an enforcement action, by the Department of Justice through a request for an injunction, or by a customer or other person injured by the illegal tying arrangement through a request for an injunction or an action for damages.¹¹

This statement explains the Board's interpretation of the prohibitions of, and statutory and regulatory exceptions to, section 106. This statement also reflects the principles and factors that the Board will apply in conducting anti-tying reviews at banking organizations and enforcing section 106. In addition, Part VII of this statement includes supervisory guidance outlining the types of anti-tying policies, procedures and systems that the Board believes will help banks ensure compliance with section 106.

Banks and their affiliates also are subject to the tying restrictions contained in the Sherman Act and the Clayton Act that apply to all persons acting in interstate commerce.¹² This statement does not address the applicability of these general antitrust laws, which are within the jurisdiction of the Department of Justice. This statement also does not address the treatment of arrangements involving customers and banks and their affiliates under other Federal or state laws, including sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c, 371c–1) and the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*).

II. What Conduct Is Prohibited by Section 106?

Section 106 prohibits a bank from extending credit, leasing or selling any property or furnishing any service, or fixing or varying the consideration for any of the foregoing, on the condition or requirement that the customer do any of the following:

1. Obtain some additional credit, property or service from the bank, *other than* a loan, discount, deposit or trust service;
2. Provide some additional credit, property or service to the bank, *other than* those related to and usually provided in connection with a loan, discount, deposit or trust service;

¹¹ 12 U.S.C. 1972, 1973, 1975 and 1976.

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

⁹ Pub. L. No. 106–102, 113 Stat. 1338 (1999).

¹⁰ 12 U.S.C. 1972(1).