

anti-tying prohibitions of section 106 and that the bank complies with the statute. Part VII of this statement discusses the types of policies, procedures and systems that should help banks comply with the anti-tying restrictions of section 106.

Bank customers that believe they have been the object of a tying arrangement prohibited by section 106 are encouraged to contact the appropriate Federal banking agency for the bank involved. These agencies are the Office of the Comptroller of the Currency for national banks, the Board for state-chartered banks that are members of the Federal Reserve System ("state member banks"), and the Federal Deposit Insurance Corporation for state-chartered banks that are not members of the Federal Reserve System ("state non-member banks").

Savings associations are subject to anti-tying restrictions under the Home Owners' Loan Act (HOLA) that are virtually identical to those applicable to banks under section 106.¹⁹ Customers of a savings association that believe the savings association has violated the anti-tying restrictions of the HOLA should contact the Office of Thrift Supervision.

III. What Are the Essential Elements of an Impermissible Tying Arrangement Under Section 106?

Congress modeled section 106 on the anti-tying principles developed under the general antitrust laws (the Sherman and Clayton Acts), which apply to all companies, including banks and their affiliates, that act in interstate commerce. As a general matter, a tying arrangement violates the Sherman and Clayton Acts if:

- (1) The arrangement involves two or more separate products;
- (2) The seller forces a customer seeking to purchase one of the products (the "desired product") also to purchase the other product;
- (3) The seller has sufficient economic power in the market for the desired product to enable it to restrain trade in the market for the other product;
- (4) The arrangement has anti-competitive effects in the market for the other product; and
- (5) The arrangement affects a "not insubstantial" amount of interstate commerce.²⁰

¹⁹ See 12 U.S.C. 1464(q); *Integon Life Insurance Corp. v. Browning*, 989 F.2d 1143, 1149 (11th Cir. 1993).

²⁰ See *Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980); *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407 (11th Cir. 1987); see also 9 Phillip Areeda, *Antitrust Law* at ¶1702 (1991). A tying arrangement may be found to be *per se* illegal

Although tying arrangements by banks are subject to the general antitrust laws, Congress determined to subject tying arrangements by a bank to a stricter standard. As a general matter, there are only two essential elements that must be shown to establish that a tying arrangement by a bank violates section 106:

(1) The arrangement must involve two or more separate products: the customer's desired product(s) and one or more separate tied products; and

(2) The bank must force the customer to obtain (or provide) the tied product(s) from (or to) the bank or an affiliate in order to obtain the customer's desired product(s) from the bank.²¹

This Part III discusses the essential elements of any prohibited tying arrangement under section 106.²² Part IV discusses the statutory and regulatory exceptions to these general rules, as well as special issues that arise in applying these exceptions.

A. Arrangement Must Involve Two Products—a Desired Product and a Tied Product.

In order for a tying arrangement to exist under section 106, the arrangement must involve two or more separate products. A bank does not violate section 106 by requiring a customer to obtain (or provide) two or more aspects

under the general antitrust laws without any showing of anti-competitive effects in the market for the other product if the seller has sufficiently strong economic power in the market for the desired product. See *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). In these cases, the courts essentially assume that the tying arrangement, combined with the seller's strong economic position in the market for the desired product, has or will produce anti-competitive effects. *Id.* at 16, n. 25.

In conventional antitrust parlance, the desired product is known as the "tying product," because it is customers' desire to obtain it that allows a producer to tie other, possibly unwanted products—the tied products—to it. In the interest of clarity, this statement uses the term "desired product" instead of "tying product."

²¹ Legislative history indicates that economic power, anti-competitive effects, and effects on interstate commerce are not necessary elements of a section 106 claim. See S. Rep. No. 1084, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.A.N. 5519, 5558 ("Senate Report") (Supplementary views of Sen. Brooke); Senate Report at 5547 (Supplementary views of Senators Bennett, Tower, Percy and Packwood); see also *Integon Life Insurance Corp. v. Browning*, 989 F.2d 1143 (11th Cir. 1993); *Amerifirst Properties, Inc. v. FDIC*, 880 F.2d 821 (5th Cir. 1989); 62 FR 9290, 9313, Feb. 28, 1997; 59 FR 65473, Dec. 20, 1994.

²² The exclusive dealing prohibition in section 106 (12 U.S.C. 1972(1)(E)) also prohibits a bank from requiring that a customer refrain from obtaining another product from a competitor of the bank or of an affiliate in order to obtain the customer's desired product. Although exclusive dealing arrangements are not specifically discussed in this Part III, the elements discussed in this Part III are equally applicable to exclusive dealing arrangements prohibited by section 106.

of a single product from (or to) the bank or an affiliate, or by conditioning the availability or varying the price of a product on the basis of the characteristics or terms of that product.²³ For example, a bank does not violate section 106 by requiring—

- A prospective borrower to provide the bank specified collateral in order to obtain the loan or to obtain the loan at a favorable interest rate; or

- An existing borrower to post additional collateral, accept a higher interest rate, or provide updated or additional financial information as a condition of renewal of the loan.

In such circumstances, the bank's conditions relate to the single product sought by the customer (a loan) and do not involve separate, distinguishable products.²⁴

In applying section 106, it is useful to identify which of the separate products is the "tied product" and which is the "desired product." The "tied product" is the product that the customer is required to obtain (or provide) in order to have access to or get a price discount on the "desired product." Section 106 is premised on the notion that the "desired product" is the product the customer really seeks.

To illustrate, suppose a customer seeks a mortgage loan (the desired product) from a bank. Section 106 prohibits a bank from requiring that the customer purchase homeowners insurance (the tied product) from the bank or an affiliate of the bank as a condition to granting the customer the mortgage loan or a discount on the loan. However, as discussed in Part IV, some exceptions from the statute's prohibitions are available where the tied product is a traditional bank product (that is a loan, discount, deposit or trust service). The Board notes that certain types of derivative products, such as interest rate and foreign exchange swaps, often are sold by banks and purchased by customers in connection with lending transactions. The Board

²³ As a general matter, two products are separate and distinct for purposes of section 106 only if there is sufficient consumer demand for each of the products individually that it would be efficient for a firm to provide the two products separately. See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462 (1992); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 19 (1984). Determining whether sufficient consumer demand exists for the two products separately often is a highly fact-intensive inquiry that depends on the nature and character of the products and markets involved. See 2 Joseph P. Bauer and William H. Page, *Kintner Federal Antitrust Law* 13.17 (2002).

²⁴ A tying arrangement, however, may exist where a bank imposes a condition that involves two separate products of the same type (e.g., two separate insurance products).