

requests comment on how interest rate swaps, foreign exchange swaps, and other derivative products that often are connected with lending transactions should be treated under section 106.

B. Bank—Imposed Condition or requirement.

Section 106 applies only if a bank provides or offers to provide a customer one product (the desired product), or a discount on the desired product, “*on the condition or requirement*” that the customer obtain (or provide) an additional product (the tied product) from (or to) the bank or an affiliate. This element of section 106 was modeled on the tying prohibitions in the general antitrust laws.

Under the general antitrust laws, an illegal tie exists only where the seller forces the customer to purchase the tied product in order for the customer to obtain its desired product.²⁵ Accordingly, a seller engages in an illegal tie under the general antitrust laws only if it requires the customer to purchase the tied product to obtain the customer’s desired product.²⁶ Moreover, the evidence must demonstrate that the seller imposed the arrangement on the customer through some type of coercion.²⁷ Thus, the courts have held that a seller’s bundled sale of multiple

products to a customer does not violate the general antitrust laws if the customer *voluntarily* decided to purchase the package of products from the seller.²⁸ In such circumstances, the seller has not coerced or forced the buyer to purchase any product from the seller.

The language and legislative history of section 106 indicate that this distinction between an arrangement imposed by the seller and one voluntarily sought by the customer also is embedded in section 106.²⁹ Accordingly, section 106 applies only if each of two requirements are met: (1) A condition or requirement exists that ties the customer’s desired product to another product; and (2) this condition or requirement was imposed or forced on the customer by the bank.³⁰

1. Existence of a condition or requirement.

First, a violation of section 106 may occur only when a customer is *required* to obtain an additional product from, or provide an additional product to, the bank or an affiliate in order to obtain the customer’s desired product or a discount on the desired product.³¹ It is

the existence of such a requirement that forms the heart of an illegal tying arrangement. Absent a requirement that the customer obtain a separate product from, or provide a separate product to, the bank or an affiliate, there is no “tie” between the customer’s desired product and another product.

Thus, for example, a bank would violate section 106 if the bank informs a customer seeking only a loan from the bank that the bank will make the loan only if the customer commits to hire the bank’s securities affiliate to underwrite an upcoming bond offering for the customer. In this example, the bank has conditioned the availability of credit to the customer on a requirement that the customer obtain another product (bond underwriting services) from an affiliate of the bank.

Section 106, however, does not prohibit a customer from deciding on its own to award some of its business to a bank or an affiliate as a reward for the bank previously providing credit or other products to the customer. Using the example in the previous paragraph, if the bank made the loan to the customer *without* conditioning it on a requirement that the customer obtain one or more additional products from the bank or an affiliate, then no tie actionable under section 106 would exist if the customer later voluntarily decides to award some of its securities underwriting business to the bank’s securities affiliate.

In addition, section 106 does not prohibit a bank from granting credit or providing any other product to a customer based solely on a *desire* or *hope* (but not a requirement) that the customer will obtain additional products from the bank or its affiliates in the future. This is true even if the bank conveys to the customer this desire or hope for additional business. Section 106 also does *not* prohibit a bank from cross-marketing the full range of products offered by the bank or its affiliates to a customer or encouraging an existing customer to purchase additional products offered by the bank or its affiliates. Cross-marketing and cross-selling activities, whether suggestive or aggressive, are part of the nature of ordinary business dealings and do not, in and of themselves, represent a violation of section 106. However, bank actions that go beyond cross-marketing or cross-selling and that

²⁵ See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953) (“The common core of . . . unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant ‘tying’ product”)(emphasis added); see also *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421 (9th Cir. 1995), cert. denied 517 U.S. 1115 (1996); *Thompson v. Multi-List, Inc.*, 934 F.2d 1566, 1577–78 (11th Cir. 1991), reh’g en banc denied 946 F.2d 906 (1991); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56–57 (2d Cir. 1980); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1327 (5th Cir. 1976); *American Manufacturers Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), cert. denied 404 U.S. 1063 (1972).

²⁶ See, e.g., *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5–6 (1958) (“a tying arrangement may be defined as an agreement by one party to sell one product *only on the condition* that the buyer also purchases a different (or tied) product”) (emphasis supplied); *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1415–17 (11th Cir. 1987); 9 Phillip Areeda, *Antitrust Law* at ¶1752 (1991) (“There is no tie for any antitrust purpose unless the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one.”)

²⁷ See, e.g., *Thompson v. Multi-List, Inc.*, 934 F.2d 1566, 1577–78 (11th Cir. 1991), reh’g en banc denied 946 F.2d 906 (1991); *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1415 & 1418–19 (11th Cir. 1987); *Unijax, Inc. v. Champion Int’l, Inc.*, 683 F.2d 678, 685 (2d Cir. 1982) (“Actual coercion by the seller that in fact forces the buyer to purchase the tied product is an indispensable element of a tying violation.”); *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir.) (“actual coercion is an indispensable element of a tie-in charge”), cert. denied 454 U.S. 860 (1981).

²⁸ See, e.g., *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1417 (11th Cir. 1987) (“two products are not tied as a matter of antitrust law if the buyer voluntarily purchases the tied product”); *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 754 (9th Cir. 1982) (“Where a company is simply sold what it wishes to buy, there can be no tying problem.”); *Dunkin Donuts of America, Inc. v. Dunkin Donuts, Inc.*, 531 F.2d 1211, 1224 (3d Cir.), cert. denied 429 U.S. 823 (1976) (“a voluntary purchase of two products is simply not a tie-in”); *Capital Temporaries, Inc. v. Olsten Corporation*, 506 F.2d 658, 662 (2d Cir. 1974) (“We do not think that there can be any question that no tying arrangement can possibly exist unless the person aggrieved can establish that he has been required to purchase something which he does not want to take.”)

²⁹ See Conf. Rep. No. 1747, 91st Cong., 2d Sess., reprinted in 1970 U.S.C.C.A.N. 5561, 5569 (“Conference Report”).

³⁰ As discussed in Part IV, exceptions to section 106 allow a bank to impose a condition on a customer in certain circumstances where the tied product is a traditional bank product. In addition, as discussed in Part IV, arrangements that allow the customer the option to satisfy a condition imposed by the bank through the purchase of traditional bank products or other products do not force a customer to purchase a non-traditional product in violation of section 106 if the customer has a meaningful choice of satisfying the condition solely through the purchase of traditional bank products.

³¹ See Conference Report at 5580 (Section 106 “prohibits any subsidiary bank from providing any credit, property or service for a customer on the condition that he must obtain from, or provide to, the holding company or any other subsidiary thereof some additional credit, property or service.”); Senate Report at 5535 (“The purpose of [the anti-tying provisions] is to prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or services they desire.”); see also *Integon Life Insurance Corp. v.*

Browning, 989 F.2d 1143 (11th Cir. 1993); *Tose v. First Pennsylvania Bank*, 648 F.2d 879 (3rd Cir. 1981), cert. denied 454 U.S. 893 (1981); *Duryea v. Third Northwestern National Bank*, 606 F.2d 823 (8th Cir. 1979); *Stefiuk v. First Union*, 61 F. Supp.2d 1294 (S.D. Fla. 1999), *aff’d without opinion* 207 F.3d 664 (11th Cir. 2000).