

indicate that the bank will not provide the customer the desired product unless the customer obtains (or provides) another product from (or to) the bank or an affiliate do raise issues under section 106.

Importantly, a prohibited tying arrangement does not exist if the bank offers the customer the opportunity to obtain the customer's desired product (or a discount on the desired product) from the bank separately from the allegedly tied product. That is, if the customer was offered the option of obtaining the customer's desired product or discount from the bank *without* also obtaining (or providing) the allegedly tied product from (or to) the bank or an affiliate, then the customer was not *required* to obtain (or provide) the other product to obtain the desired product or discount. In such circumstances, no "tie" would exist between the two products for purposes of section 106.<sup>32</sup>

2. *Condition or requirement was imposed or forced on the customer by the bank.*

Even if a condition or requirement exists tying the customer's desired product to another product, a violation of section 106 may occur only if the condition or requirement was imposed or forced on the customer by the bank.<sup>33</sup> In this regard, section 106 was intended to prohibit banks from using their ability to offer bank products, and credit in particular, as leverage to force a customer to purchase (or provide) another product from (or to) the bank or an affiliate.<sup>34</sup> It was *not* the purpose of the statute to prohibit bank customers from using their own bargaining power to obtain a package of desired products from a bank and its affiliates or a price discount on those products. Similarly, it

was not the purpose of the statute to prohibit customers from *voluntarily* seeking and obtaining multiple products that the customer desires from a bank or its affiliates.<sup>35</sup>

Accordingly, if a condition or requirement exists, further inquiry may be necessary to determine whether the condition or requirement was imposed or forced on the customer by the bank. If the condition or requirement resulted from coercion by the bank, then the condition or requirement violates section 106, unless an exemption is available for the transaction.<sup>36</sup> Prohibited coercive actions may be explicit or implicit. In some cases, a bank's coercive behavior may be clear from the agreement or conversations between the bank and the customer. In other cases, coercion may be implicit and reasonably inferred from the facts and circumstances surrounding the transaction.

On the other hand, if a condition or requirement was voluntarily sought or imposed by the customer, then the arrangement results from the free choice of the customer and no violation of section 106 has occurred. Thus, for example, a violation of section 106 does not occur if a large corporate customer of a bank demands that the bank provide the customer one product (such as a loan) in order for the bank or its affiliates to obtain other business from the customer (such as bond underwriting business), and the bank agrees to the customer's condition. In such circumstances, it is the *customer*

that is using its business as leverage to obtain the products it desires—an action that does not implicate the purposes or proscriptions of section 106. Likewise, a violation of section 106 does not occur if a customer seeking to engage in a multi-faceted corporate transaction voluntarily solicits a bid from a bank and its securities affiliate for a package of products related to the transaction (such as a bridge loan, strategic advisory services, and bond underwriting services) and the bank and the securities affiliate offer to provide the customer all of the requested products.

### 3. *Factual inquiry required.*

As the foregoing illustrates, the specific facts and circumstances surrounding the bank-customer relationship often will be critical in determining whether a prohibited condition or requirement existed and whether the condition or requirement was imposed or forced on the customer by the bank or was volunteered or sought by the customer. Typically, the terms of the bank's offer to the customer or the agreement entered into between the bank and the customer will provide the best evidence of whether the customer was required to purchase (or provide) an additional product as a condition of obtaining the customer's desired product. The timing and sequence of the offers, purchases or other transactions between the customer and the bank or its affiliates that form the basis of the alleged tying arrangement, and the nature of the condition or requirement itself, also may be particularly relevant in determining whether the customer was required to obtain (or provide) the tied product in order to obtain the desired product.

Other information that may be useful in determining whether a condition or requirement exists and, if so, whether the bank coerced the customer into accepting the condition or requirement include any correspondence and conversations between the bank and the customer concerning the transaction; the marketing or other materials presented to the customer by the bank or an affiliate; the bank's course of dealings with the customer and other similarly situated customers; the banking organization's policies and procedures; the customer's course of dealings with the bank and other financial institutions; the financial resources and level of sophistication of the customer; and whether the customer was represented by legal counsel or other advisors.

<sup>32</sup> See *John Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1304 (8th Cir. 1997); *Stefiuk v. First Union Nat'l Bank*, 61 F. Supp. 2d 1294, 1299 (S.D. Fla. 1999), *aff'd without opinion* 207 F.3d 664 (11th Cir. 2000); *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F. Supp. 542, 553 (S.D.N.Y. 1985).

<sup>33</sup> See 116 Cong. Rec. S15708 (daily ed. Sept. 16, 1970) ("The bill as amended would require that a condition or requirement imposed by the bank must be demonstrated in order to prove that a violation of [section 106] has occurred.") (Statement of Sen. Bennett).

<sup>34</sup> See Conference Report at 5569 ("Section 106 of the bill, which has become known as the anti-tie-in section, will largely prevent coercive tie-ins and reciprocity."); 116 Cong. Rec. S20647 (daily ed. Dec. 18, 1970) (Statement of Sen. Brooke) (violation of section 106 occurs "where the totality of the circumstances indicates that the customer has not voluntarily entered into the transaction, but rather has been induced into doing so through coercion"); 116 Cong. Rec. S15709 (daily ed. Sept. 16, 1970) (attaching letter from Arthur Burns, Chairman of the Board of Governors of the Federal Reserve System, noting that section 106 "would prohibit coercive tie-ins involving banks, bank holding companies, and their subsidiaries").

<sup>35</sup> See Conference Report at 5569; 116 Cong. Rec. S16316 (daily ed. Sept. 23, 1970) (Remarks of Donald I. Baker, Deputy Director of Policy Planning, Antitrust Division, Department of Justice, submitted by Senator Proxmire). The statute's legislative history, for example, indicates that a voluntary tie-in may occur when a customer believes that it stands a better chance of "securing a scarce and important commodity (such as credit) by 'volunteering' to accept other products or services" from the bank or its affiliates. Although the statute's legislative history characterizes this type of voluntary tying as generally being undesirable, it also explicitly states that such voluntary tying is not prohibited by section 106. See Conference Report at 5569. The Board also has noted previously that section 106 prohibits coercive tying arrangements, but does not prohibit voluntary tying. See, e.g., *Mercantile Bancorporation*, 66 Federal Reserve Bulletin 799 (1980); *Barnett Banks, Inc.*, 61 Federal Reserve Bulletin 678 (1975).

<sup>36</sup> The Board recognizes that some courts have held that a tying arrangement may violate section 106 without a showing that the arrangement resulted from any type of coercion by the bank. See, e.g., *Dibidale of Louisiana, Inc. v. American Bank & Trust Company*, 916 F.2d 300 (5th Cir. 1990). After carefully reviewing the language, legislative history and purposes of the statute, the Board believes the better interpretation of section 106 is that a violation may exist only if a bank forces or coerces a customer to obtain (or provide) the tied product as a condition to obtaining the customer's desired product.