

IV. What Are the Exceptions to the Anti-Tying Prohibitions of Section 106?

Section 106 contains several exceptions to its anti-tying prohibitions. Congress also authorized the Board to grant additional exceptions from the statute's prohibitions, by regulation or order, if the Board determines the exception "will not be contrary to the purposes of [section 106]." ³⁷ The exceptions adopted by Congress and the authorization granted to the Board to grant additional exceptions were intended in part to ensure that section 106 did not interfere with the conduct of appropriate traditional banking practices.³⁸

A. Tying Arrangements Involving Traditional Bank Products.

1. Statutory and regulatory exceptions.

Section 106 specifically allows a bank to condition both the availability and price of any bank product (the desired product) on the requirement that the customer obtain a "traditional bank product" (the tied product) from the bank. One of the purposes of this exception was to allow banks and their customers to continue to negotiate their fee arrangements on the basis of the customer's entire banking relationship with the bank.³⁹ The Board has extended this exception by regulation to include situations where the tied product is a traditional bank product offered by an affiliate of the bank, rather than by the bank itself.⁴⁰ Taken together, these exceptions allow a bank to restrict the availability or vary the price of *any* bank product on the condition that the customer also obtain a traditional bank product from the bank or an affiliate of the bank.

Several facts are important in determining whether the traditional bank product exceptions apply in a given situation. First, the exceptions are available only if the *tied* product is a traditional bank product. The availability of the exceptions, however, does *not* depend on the type of *desired* product involved; the desired product may or may not be a traditional bank product.

Second, the exceptions apply only if the tied product is a *defined* traditional bank product. The statute defines a traditional bank product to be a "loan, discount, deposit, or trust service."⁴¹ The statute also defines a "trust service" to mean any service customarily performed by a bank trust department.⁴² Products that fall within the scope of these terms include, among other things, the following:

- All types of extensions of credit, including loans, lines of credit, and backup lines of credit;⁴³
- Letters of credit and financial guarantees;
- Lease transactions that are the functional equivalent of an extension of credit;⁴⁴
- Credit derivatives where the bank or affiliate is the seller of credit protection;
- Acquiring, brokering, arranging, syndicating and servicing loans or other extensions of credit;
- All forms of deposit accounts, including demand, negotiable order of withdrawal ("NOW"), savings and time deposit accounts;
- Safe deposit box services;
- Escrow services;
- Payment and settlement services, including check clearing, check guaranty, ACH, wire transfer, and debit card services;
- Payroll services;
- Traveler's check and money order services;
- Cash management services;⁴⁵
- Services provided as trustee or guardian, or as executor or administrator of an estate;
- Discretionary asset management services provided as fiduciary;⁴⁶
- Custody services (including securities lending services); and

⁴¹ 12 U.S.C. 1972(1)(A).

⁴² *Id.* at section 1971. A product that meets this "trust service" standard is a traditional bank product even if the bank or affiliate providing the product does not have, or does not provide the product through, a trust department.

⁴³ An "extension of credit" for this purpose does not include underwriting, privately placing or brokering debt securities.

⁴⁴ "CEBA leases" that are entered into by banks pursuant to 12 U.S.C. 24 (Tenth) are *not* considered to be the functional equivalent of an extension of credit.

⁴⁵ The term "cash management services" refers generally to the payment and collection services that are provided to customers to speed collection of receivables, control payments and efficiently manage deposit balances. Cash management services may include one or more of the traditional bank products listed separately above, such as deposit, payment and lockbox services.

⁴⁶ A bank has discretionary authority over an account for these purposes if the bank, acting in a fiduciary capacity, has sole or shared authority (whether or not that authority is exercised) to determine what assets to purchase or sell on behalf of the account. See 12 CFR 9.2(i).

- Paying agent, transfer agent and registrar services.

Thus, for example, the traditional bank product exceptions permit a bank to condition the availability or price of a particular loan on a requirement that the customer maintain a specified amount of deposits with the bank or its affiliates. Similarly, a bank may inform a customer that it will lend (or continue lending) to the customer only if the customer obtains cash management services from the bank or its affiliates. In both cases, the bank's actions are permissible because the tied products (deposits and cash management services) are traditional bank products.

A bank, however, may *not* require a customer seeking an auto loan from the bank to purchase automobile insurance from the bank or from an insurance agency affiliate of the bank. Although the desired product (an auto loan) in this case is a traditional bank product, the tied product (automobile insurance) is not and, accordingly, the traditional bank product exceptions are not available for this transaction.

2. Mixed-product arrangements.

As discussed above, section 106 does not prohibit a bank from conditioning the grant of a loan to a customer on a requirement that the customer also obtain one or more traditional bank products, or a specified amount of traditional bank products, from the bank or its affiliates. In some cases, however, a bank may wish to provide a customer the freedom to choose whether to satisfy a condition imposed by the bank through the purchase of one or more traditional bank products or other "non-traditional" products (a "mixed-product arrangement").⁴⁷ Allowing a bank to offer the customer the *option* of satisfying a condition by purchasing either traditional bank products or non-traditional products can provide benefits to the customer (by increasing the choices available to the customer) *without* requiring the customer to purchase any non-traditional product from the bank or an affiliate in violation of section 106.⁴⁸

⁴⁷ As used in this discussion, a mixed-product arrangement involves a choice among traditional bank products and non-traditional products. The term does not apply to arrangements that involve only traditional bank products (which, as discussed in Part IV.A.1., are permissible under section 106) or arrangements that involve only non-traditional products (which, as discussed throughout this statement, may be prohibited by section 106).

⁴⁸ The Board previously has noted that the addition of non-traditional products to a menu of traditional bank products offered a customer may, in some circumstances, increase customer choice in a manner consistent with the purposes and intent of section 106. See 60 FR 20186, 20187-88, April 25, 1995. Indeed, this rationale formed the basis of the safe harbor that the Board adopted in 1995, as

³⁷ 12 U.S.C. 1972(1). The exceptions that the Board has adopted by regulation are set forth at section 225.7(b) of the Board's Regulation Y (12 CFR 225.7(b)). Regulation Y expressly permits the Board to terminate the eligibility of a bank to operate under any exception set forth in section 225.7(b) if the Board finds the activities conducted by the bank under the exception result in anti-competitive practices. 12 CFR 225.7(c).

³⁸ See 116 Cong. Rec. S15708 (daily ed. Sept. 16, 1970) (Statement of Sen. Bennett); see also Senate Report at 5535.

³⁹ See *id.*

⁴⁰ See 12 CFR 225.7(b)(1)(i).