

Accordingly, where a bank offers a customer a mixed-product arrangement, further analysis may be necessary to determine whether the offer constitutes a tying arrangement prohibited by section 106. If the customer that is offered the mixed-product arrangement has a meaningful option to satisfy the bank's condition solely through the purchase of the traditional bank products included in the arrangement, then the bank's offer would not, in fact, require the customer to purchase any non-traditional product from the bank or its affiliates in violation of section 106.<sup>49</sup> In these circumstances, the customer has been provided a meaningful choice in determining whether to satisfy the bank's condition through the purchase of traditional bank products or non-traditional products, and the bank's inclusion of non-traditional products within the range of tied products may be viewed as giving the customer additional flexibility in determining how it may choose to satisfy a condition that the bank is permitted by law to impose.

If, on the other hand, the customer does not have a meaningful option to satisfy the bank's condition solely through the purchase of the traditional bank products included in the arrangement, then the arrangement violates section 106 because the arrangement effectively requires the customer to purchase one or more non-traditional products in order to obtain the customer's desired product or a discount on the desired product. A mixed-product arrangement also would violate section 106 if the facts indicate that the bank did not provide the customer the freedom to choose to satisfy the bank's condition solely through the purchase of one or more of the traditional bank products included in the mixed-product arrangement.<sup>50</sup>

To illustrate a mixed-product arrangement, assume Company, a large manufacturing concern with an investment-grade credit rating, has a

backup credit facility with Bank that will shortly come up for renewal. Assume also that Bank and its affiliates periodically review the overall profitability of their combined business relationships with their large corporate customers to determine whether the profitability of the customers' aggregate business relationships with Bank and its affiliates meets the internal profitability threshold (the "hurdle rate") established by Bank and its affiliates for that customer or type of customer. In accordance with this policy, Bank conducts a review of the overall profitability of Company's relationships with Bank and its affiliates and determines that the profitability of Company's existing relationships with Bank and its affiliates (*i.e.*, the credit facility with Bank) does not meet the hurdle rate.

In light of this review, Bank informs Company that Bank will not renew Company's credit facility unless Company commits to provide Bank or its affiliates sufficient additional business to allow Company's overall relationships with Bank and its affiliates to meet the hurdle rate. Bank does *not* tie renewal of the credit to the purchase by Company of any *specific* product or package of products from Bank or its affiliates. Rather, Bank informs Company that Company is free to choose from among all of the products offered by Bank and its affiliates in determining how Company may seek to meet the hurdle rate. Bank and its affiliates offer a wide variety of products, including deposits, trust services, cash management services and several other traditional bank products as well as bond underwriting services and several other non-traditional products.

Bank's actions would be permissible under section 106 if, for example, Company could reasonably obtain sufficient cash management services from Bank to permit Company to meet the hurdle rate. In such circumstances, Company would have a meaningful option to satisfy the hurdle rate solely through the purchase of one or more of the traditional bank products that are offered by Bank and its affiliates (cash management services in this example),<sup>51</sup> and Bank's actions would not effectively require Company to purchase any non-traditional product in order to obtain renewal of the credit facility. This is true regardless of the product(s), if any,

that Company ultimately chooses to obtain from Bank or its affiliates.

On the other hand, Bank's actions would violate section 106 if, for example, Company could satisfy the hurdle rate only by obtaining insurance, securities underwriting or strategic advisory services from Bank or an affiliate of Bank. In such circumstances, Company would not have a meaningful option to satisfy the hurdle rate solely through the purchase of one or more of the traditional bank products that are offered by Bank and its affiliates.

As the foregoing illustrates, the determination of whether a mixed-product arrangement comports with section 106 often will depend on the nature and characteristics of the arrangement itself and the customers to whom the arrangement is offered. Part VII of this statement discusses the types of policies, procedures and systems, including internal audit and recordkeeping systems, that should help banks offering mixed-product arrangements ensure that these arrangements are structured and offered in a manner consistent with section 106. The Board will review these policies, procedures and systems during the supervisory process as part of its examination and review of bank anti-tying policies, procedures and systems.

## B. Reciprocity Exceptions

The reciprocity restrictions of section 106 generally prohibit a bank from conditioning the availability or price of a product (the desired product) on a requirement that the customer *provide* another product (the tied product) to the bank or an affiliate.<sup>52</sup> Section 106, however, contains an exception for situations where the tied product is to be provided to the bank and is "related to and usually provided in connection with a loan, discount, deposit, or trust service" (a "usually connected product").<sup>53</sup> The Board has extended this exception by regulation to include situations where a bank requires the customer to provide a usually connected product to an *affiliate* of the bank, rather than to the bank itself.<sup>54</sup> 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 provide a usually connected product to the bank or an affiliate of the bank.

Both the statutory and regulatory reciprocity exceptions are intended to ensure that section 106 does not restrict appropriate traditional banking

an exception to section 106, for certain types of combined-balance discount programs. *Id.* This safe harbor is discussed further in Part IV.D.

<sup>49</sup> *Cf. Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1416–17 (11th Cir. 1987) (a tying arrangement does not exist under the Sherman Act if the buyer had "meaningful freedom of choice" in deciding whether or not to purchase allegedly tied product from the seller); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 991 (4th Cir. 1990) (tying arrangement does not exist if customer had the option to purchase, or not purchase, the allegedly tied product).

<sup>50</sup> Thus, a bank would violate section 106 if it ostensibly offered a customer a mixed-product arrangement, but informed the customer that the customer could satisfy the bank's condition only by purchasing one or more of the non-traditional products included in the arrangement.

<sup>51</sup> Company would have a meaningful option even though Company had a long-standing cash management arrangement with another financial institution so long as Company may legally transfer its cash management business to Bank and Bank is able to satisfy Company's cash management needs.

<sup>52</sup> 12 U.S.C. 1972(1)(C) and (D).

<sup>53</sup> *Id.* at 1972(1)(C).

<sup>54</sup> See 12 CFR 225.7(b)(1)(ii).