

practices. Thus, for example, the exceptions permit a bank to condition the availability of secured credit on a requirement that the customer obtain insurance, for the benefit of the bank, that protects the value of the bank's security interest in the collateral securing the loan.⁵⁵ Similarly, the exceptions permit a bank to take a wide variety of steps to protect the bank's financial interest in its credit relationships, such as, for example, requiring the affiliated parties of a troubled borrower to pay down their loans with the bank prior to renewing or advancing additional credit to the troubled borrower or requiring the owners of a corporate borrower to provide a personal guarantee of the corporation's debt to the bank.

Facts that may be relevant in determining whether a bank's demand that a customer provide an additional product is usual and appropriate and, thus, permissible under the exceptions include the relationship between the tied product and the desired product; whether the practice protects the value of the bank's credit or other exposures to the customer and associated parties; whether the practice is usual in the banking industry in connection with the type of product involved; and whether the condition was imposed by the bank principally to reduce competition or allow it to compete unfairly in the market for the tied product. The Board notes, however, that a reciprocity arrangement involving a loan or other product does not violate section 106 simply because the arrangement is not frequently imposed in banking transactions. Contractual agreements between banks and their customers, and loan agreements in particular, often are tailored to account for the characteristics of the individual customer and the specific transaction at issue. Accordingly, even though a particular reciprocal arrangement is uncommon, it still may reflect an appropriate banking practice in light of the facts and circumstances surrounding the transaction.⁵⁶

⁵⁵ The bank, however, may not require that the customer obtain the insurance from the bank or an affiliate of the bank.

⁵⁶ For example, as one court has noted, debtors in "serious financial straits, working with their creditors, [often] enter into numerous types of transactions that protect the creditors' investments while permitting the debtors' businesses to continue. The complexity of the transactions and special needs of the parties involved determine the type of arrangement that will be made to secure the joint aims of the debtor and creditor. Due to the complicated circumstances of many bailout cases, the specific banking transactions utilized may appear uncommon, yet, in the milieu of bailouts, they constitute appropriate banking practices. As such, they do not violate [section 106]." See

C. Exclusive Dealing Exception

The statute's exclusive dealing restriction generally prohibits a bank from conditioning the availability or price of a bank product (the desired product) on a requirement that the customer *not obtain* another product (the tied product) from a competitor of the bank or a competitor of an affiliate of the bank.⁵⁷ This restriction, for example, prohibits a bank that has a securities affiliate engaged in bond underwriting activities from threatening a corporate customer that the bank will terminate the bank's credit relationships with the customer if the customer uses the bond underwriting services of a competitor of the bank's securities affiliate.

Section 106 contains an exception to its exclusive dealing restriction for situations where the condition was reasonably imposed by the bank in a credit transaction to ensure the soundness of the credit.⁵⁸ This exception, like the statutory reciprocity exception, was intended to preserve the ability of banks to take appropriate steps to protect their credit extensions to customers.

This exception, for example, permits a bank, when consistent with appropriate banking standards, to condition the availability of a loan to a customer on the requirement that the customer not borrow from other sources (or pledge any collateral securing the loan to other entities) during the term of the loan.⁵⁹ Similarly, this exception would permit a bank to condition the availability of floating-rate credit on a requirement that the prospective borrower hedge its floating-rate exposure by purchasing a fixed-to-floating interest rate swap, and limiting the permitted swap counterparties to those with a certain minimum credit rating. Although this condition may prevent the borrower from obtaining the swap from some less creditworthy competitors of the bank, the condition would appear to be reasonably designed to enhance the collectibility of the credit.

D. Regulatory Safe Harbors

1. Combined-balance discount safe harbor.

The Board has granted a regulatory safe harbor for combined-balance discount packages, provided that they

Continental Bank of Pennsylvania v. Barclay Riding Academy, Inc., 93 N.J. 153, 459 A.2d 1163, cert. denied 464 U.S. 994 (1983).

⁵⁷ 12 U.S.C. 1972(1)(E).

⁵⁸ *Id.*

⁵⁹ See 116 Cong. Rec. S15708 (daily ed. Sep. 16, 1970) (Statement of Sen. Bennett).

are structured in a way that does not, as a practical matter, obligate customers to purchase non-traditional products in order to obtain the discount.⁶⁰ This safe harbor allows a bank to vary the consideration for a product or package of products based on a customer's maintaining a combined minimum balance in certain products specified by the bank if three conditions are met: the bank offers deposits; all deposits are eligible to be counted toward the minimum balance; and deposits count at least as much as nondeposit products toward the minimum balance.⁶¹ Although the products included in the combined-balance discount program must be specified by the bank, the products may be offered by the bank or by an affiliate of the bank.

2. Foreign transaction safe harbor.

The Board also has granted a regulatory safe harbor for bank transactions with foreign persons.⁶² The foreign transaction safe harbor provides that the anti-tying prohibitions of section 106 do not apply to transactions between a bank and a customer if: (i) The customer is a company that is incorporated, chartered, or otherwise organized outside the United States and has its principal place of business outside the United States (a "foreign company"); or (ii) the customer is an individual who is a citizen of a country other than the United States and is not resident in the United States.

The foreign transaction safe harbor would generally be available for a loan transaction entered into by a bank with a foreign company even if the loan is partially guaranteed by a U.S. incorporated affiliate of the foreign company, or the foreign company directs the bank to disburse a portion of the loan proceeds to a U.S. incorporated affiliate of the foreign company that is not a party to the loan agreement. Such a loan transaction with a foreign company, however, would *not* qualify for the foreign transaction safe harbor if

⁶⁰ 12 CFR 225.7(b)(2).

⁶¹ The Board recently issued an interpretive letter clarifying that any financial product, including insurance products, may be included in a combined-balance discount program and explaining the permissible methods for weighting insurance products within a combined-balance discount program. See Letter dated May 16, 2001, from J. Virgil Mattingly, Jr., General Counsel of the Board, to Carl Howard. The Board also recently issued a letter indicating that, for purposes of applying the regulatory safe harbor for combined-balance discount programs, the term "customer" may include separate individuals who are all members of the same immediate family (as defined in 12 CFR 225.41(b)(3)) and who all reside at the same address. See Letter dated November 26, 2002, from J. Virgil Mattingly, Jr., General Counsel of the Board, to Oliver I. Ireland.

⁶² 12 CFR 225.7(b)(3).