

the facts and circumstances surrounding the transaction indicate that the borrower, in substance, was the U.S. incorporated affiliate and not the foreign company. The safe harbor also would *not* protect tying arrangements where the customer itself is a U.S. incorporated subsidiary of a foreign company.

### 3. *Transactions outside a "safe harbor"*

The combined-balance discount and foreign transaction provisions discussed above are regulatory safe harbors. Accordingly, some combined-balance discount programs that are outside the regulatory safe harbor still may not be covered by section 106 because the arrangement does not satisfy the essential elements of a prohibited tying arrangement under section 106 or qualifies for another statutory or regulatory exception from section 106. In addition, some tying arrangements that are outside the foreign transaction safe harbor still may not be covered by section 106 because the transactions involved are so foreign in nature that they do not raise the competitive concerns that section 106 was designed to address.

### V. *What Is a "Bank" for Purposes of Section 106?*

Section 106 applies, by its terms, to any depository institution that meets the definition of "bank" in section 2(c) of the Bank Holding Company Act (BHC Act), including a grandfathered "nonbank bank" that is controlled by a company under section 4(f) of the BHC Act.<sup>63</sup> The statute also applies to any depository institution that is described in section 2(c)(2)(D), (F), (G), (H), (I) or (J) of the BHC Act and, thus, excluded from the definition of "bank" under the BHC Act.<sup>64</sup> As a result, virtually every type of institution that is chartered as a bank, including every "insured bank" (as defined in section 3 of the Federal Deposit Insurance Act), is subject to section 106.<sup>65</sup> This is true whether or not the covered depository institution is owned or controlled by a bank holding company registered under the BHC Act.

Section 106 also applies to any U.S. branch, agency, or commercial lending company of a foreign bank (as those terms are defined in section 8 of the International Banking Act).<sup>66</sup> In addition, although affiliates of a bank

generally are not subject to section 106, the BHC Act specifically provides that an affiliate of an institution controlled pursuant to section 4(f) or described in section 2(c)(2)(D), (F), (G), (H), (I), or (J) of the BHC Act is subject to the anti-tying prohibitions of section 106 in connection with any transaction involving the products of both the affiliate and the institution as if the affiliate were a bank and the institution were an affiliate.<sup>67</sup>

Section 106 also applies to most, but not all, subsidiaries of banks. In particular, section 106 applies to all subsidiaries of a bank—other than a financial subsidiary—in exactly the same manner as the statute applies to the bank itself. A financial subsidiary of a national bank or a state member bank, however, is treated as an affiliate of the bank, and not as a subsidiary of the bank, for purposes of the statute.<sup>68</sup>

This statement uses the term "bank" to refer to all entities that are subject to section 106. As noted above, savings associations are subject to anti-tying restrictions that are virtually identical to those applicable to banks under section 106.<sup>69</sup>

### VI. *What Is an "Affiliate" for Purposes of Section 106?*

Section 106 prohibits a bank from requiring that a customer obtain any additional product from, or provide any additional product to, "a bank holding company of such bank, or \* \* \* any other subsidiary of such bank holding company."<sup>70</sup> For purposes of these restrictions, any company that controls a bank that is subject to section 106 is treated as a bank holding company (even if the company is not a bank holding company under the BHC Act), and any subsidiary of such a company is treated as a subsidiary of a bank holding company.<sup>71</sup> In addition, for purposes of section 106, any *natural person* that controls a bank that is

subject to section 106 is treated as a "bank holding company" of the bank, and any other company controlled by such a natural person is treated as a subsidiary of the "bank holding company" of such bank.<sup>72</sup>

To reflect the scope of section 106, the term "affiliate" as used in this statement with respect to a bank means any company or natural person that controls the bank, and any company that is controlled by such company or person (other than the bank itself).

As noted previously, section 106 generally does not apply to tying arrangements imposed by an affiliate of a bank. However, a bank may not participate in a transaction in which an affiliate has nominally imposed a condition on a customer that the bank is prohibited from directly imposing under section 106 if the affiliate was acting on behalf of, as agent for, or in conjunction with the bank. For example, a bank should not have a pre-arrangement or understanding with an affiliate to fund a syndicated loan for which the affiliate acts as syndicate manager if the affiliate has conditioned the availability (or price) of its syndication services on a requirement that the customer obtain securities underwriting services from the affiliate. Similarly, if an affiliate of a bank has conditioned the availability (or price) of a bridge loan on a requirement that the customer hire the bank's securities affiliate as an underwriter for the company's follow-on bond offering, the bank should not have an arrangement or understanding with the affiliate at the time the bridge loan is made to purchase the loan (or a participation in the loan) from the affiliate.

### VII. *What Internal Controls Should Banks Have to Ensure Compliance With the Anti-Tying Prohibitions of Section 106?*

The board of directors and senior management of a bank are responsible for ensuring that the bank establishes and maintains an effective system of internal controls that, among other things, provides reasonable assurances that the bank complies with applicable laws and regulations, including the anti-tying prohibitions of section 106. An effective system of internal controls and a management environment that emphasizes compliance not only helps an organization operate in an efficient and safe and sound manner, but also helps mitigate the legal and reputational risks that may arise from actual or perceived violations of the anti-tying prohibitions of section 106.

<sup>63</sup> See 12 U.S.C. 1971 and 1841(c)(1).

<sup>64</sup> 12 U.S.C. 1843(f)(9) and (h)(1). These institutions include limited-purpose trust companies, credit card banks, Edge Act and Agreement corporations, and industrial loan companies and similar institutions.

<sup>65</sup> See 12 U.S.C. 1813.

<sup>66</sup> See 12 U.S.C. 3106.

<sup>67</sup> See 12 U.S.C. 1843(f)(9)(B) and (h)(2).

<sup>68</sup> See 12 U.S.C. 1971; 12 CFR 208.73(e). Tying arrangements imposed by a financial subsidiary of a bank, like tying arrangements imposed by any other affiliate of a bank, remain subject to the general antitrust laws.

<sup>69</sup> See 12 U.S.C. 1464(q).

<sup>70</sup> See 12 U.S.C. 1972(1)(B) and (D). The exclusive dealing prohibition in section 106(1)(E) similarly prohibits a bank from requiring that a customer not obtain an additional product from a competitor of the "bank holding company of such bank, or any subsidiary of such bank holding company." *Id.* at 1972(1)(E).

<sup>71</sup> See 12 U.S.C. 1843(f)(9) and (h)(1). A company that controls a bank (as defined under section 2(c) of the BHC Act) and that is not considered a bank holding company by reason of section 2(a)(5) of the BHC Act, however, is not considered a bank holding company for purposes of section 106 and, thus, is not considered an affiliate of the bank for purposes of this statement.

<sup>72</sup> See 12 U.S.C. 1971.