

A. Anti-Tying Policies, Procedures and Systems

Banks should have policies, procedures and systems in place that are reasonably designed to ensure that the bank complies with the anti-tying prohibitions of section 106. The types of anti-tying policies, procedures and systems appropriate for a particular bank depends on the size of the bank, and the nature, scope and complexity of the bank's activities (including activities conducted in conjunction with affiliates). Banks should review and update their anti-tying policies, procedures and systems periodically to ensure that these policies, procedures and systems reflect any changes in the nature, scope or complexity of the bank's activities or applicable law, regulations or supervisory guidance.

The anti-tying policies and procedures of banks should describe the scope of section 106 and the types of tying arrangements prohibited by the statute. Banks should ensure that the anti-tying prohibitions of section 106 are appropriately reflected or incorporated in the institution's corporate policies and procedures, including the institution's policies and procedures concerning credit approval, new product approval and pricing, and marketing.

Banks also should ensure that appropriate bank personnel receive education and training concerning the anti-tying prohibitions of section 106. The scope and frequency of the education and training provided an individual or department should be tailored to the nature and scope of the person's or department's functions at the bank, with greater focus and resources devoted to those positions or departments that present the greatest legal or reputational risk to the bank. Corporate relationship managers, syndicated lending personnel, persons with authority to approve credit extensions or establish pricing policies for the bank and other personnel that have direct contact with customers for purposes of marketing or selling the bank's products, for example, should receive comprehensive and regular anti-tying training.⁷³

In addition, the policies and procedures of a bank should—

- Permit personnel with questions concerning section 106 or its application to a particular transaction to discuss the issue with an appropriate

representative of the institution's compliance or legal department;

- Include procedures for the receipt, handling and resolution of customer complaints alleging a violation of section 106 by the bank; and
- Prohibit the bank or any employee of the bank from taking adverse action against a customer because the customer submitted a complaint to the bank or a Federal banking agency alleging a violation of section 106 by the bank.

A bank's compliance function should take a lead role in monitoring the bank's compliance with section 106. Appropriate compliance activities may include reviewing periodically the bank's policies and procedures to ensure they are updated as necessary to reflect changes in the bank's business or applicable laws, regulations or supervisory guidance and conducting training sessions for appropriate bank personnel. The compliance function also should review the bank's marketing materials and individual transactions to test the bank's compliance with the anti-tying restrictions of section 106. In performing such tests, compliance personnel typically should review the documentation associated with the transaction and discuss the transaction with the relevant bank personnel involved in the transaction.

Internal audit also plays an important role in ensuring a bank's compliance with the anti-tying restrictions. A bank's internal audit function should periodically review and test the institution's anti-tying policies, procedures and systems in order to confirm that they are working effectively and in the manner intended. The appropriate scope and frequency of these reviews and tests will depend on the size, nature and complexity of the bank's business operations and the effectiveness of the bank's compliance function. Thus, for example, if the bank's compliance function properly conducts transaction testing on a regular basis, the bank's internal audit reviews may focus on reviewing the adequacy of the bank's policies and procedures and validating the compliance function's work. Banks should ensure that the compliance and internal audit personnel responsible for monitoring and assessing the institution's compliance with section 106 are well trained with respect to the anti-tying rules.

B. Internal Control and Recordkeeping Requirements for Banks Offering Mixed-Product Arrangements Outside a Regulatory Safe Harbor

As discussed above, a bank may offer a mixed-product arrangement under

which the bank provides the customer the option of satisfying a condition imposed by the bank through the purchase of traditional bank products or non-traditional products where the customer has a meaningful option to satisfy the condition solely through the purchase of traditional bank products.⁷⁴ Because mixed-product arrangements present special compliance issues under section 106, the anti-tying policies, procedures and systems of a bank offering a mixed-product arrangement play a particularly important role in demonstrating and ensuring that the bank's actions with respect to these arrangements are consistent with section 106. Accordingly, in conducting anti-tying compliance reviews at banking organizations, the Board expects to carefully review the anti-tying policies, procedures and systems used by banks that offer mixed-product arrangements.

A bank's policies, procedures and documentation should reflect how the bank will and does establish a good faith belief that a customer offered a mixed-product arrangement would be able to satisfy the condition associated with the arrangement solely through the purchase of traditional bank products. For example, the bank's policies, procedures and documentation generally should address—

- The factors and types of information that the bank will review in forming a good faith belief that any customer offered a mixed-product arrangement has a meaningful option to satisfy the bank's condition *solely* through the purchase of one or more of the traditional bank products included in the arrangement. Information relevant to this determination may include:

- The range and types of traditional bank products that are offered by the bank and its affiliates and included in the mixed-product arrangement;
- The manner in which traditional bank products and non-traditional products are treated for purposes of determining whether a customer has or would meet the condition associated with the arrangement;⁷⁵

- The types and amounts of traditional bank products typically required or obtained by companies that are comparable in size, credit quality, and nature, scope and complexity of business operations to the customer; and

⁷⁴ See Part IV.A.2.

⁷⁵ In mixed-product arrangements, banks may not weight, discourage the use of, or otherwise treat traditional bank products in a manner that is designed to deprive customers of a meaningful choice.

⁷³ Banks also should review their employee compensation programs in order to ensure that such programs do not provide employees inappropriate incentives to tie products in a manner prohibited by section 106.