

**FEDERAL RESERVE BANK  
OF NEW YORK**

[ Circular No. **10737** ]  
November 7, 1994 ]

**BANK HOLDING COMPANIES**

**Proposed Exception to the Anti-Tying Restrictions of Regulation Y**

*Comments Invited by December 9*

*To All Bank Holding Companies, and Others  
Concerned, in the Second Federal Reserve District:*

Following is the text of a statement issued by the Board of Governors of the Federal Reserve System:

The Federal Reserve Board has requested public comment on a proposed exception to the anti-tying restrictions of the Bank Holding Company Act and the Board's Regulation Y.

Comment is requested by December 9, 1994.

The proposal would establish a "safe harbor" permitting a bank to offer a discount on any product or package of products if a customer maintains a combined balance in deposits and other products specified by the bank.

Printed on the following pages is the text of the proposal, as published in the *Federal Register* of October 26. Comments thereon should be submitted by December 9, 1994, and may be sent to the Board, as indicated in the notice, or to our Banking Applications Department.

WILLIAM J. McDONOUGH,  
*President.*



# Proposed Rules

Federal Register

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 225

[Regulation Y; Docket No. R-0851]

### Revisions Regarding Tying Restrictions

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Board is seeking public comment on a proposed exception to the anti-tying restrictions of section 106 of the Bank Holding Company Act Amendments of 1970 and the Board's Regulation Y. The proposed amendment would establish a "safe harbor" permitting a bank to offer a discount on any product or package of products if a customer maintains a combined minimum balance in deposits and other products specified by the bank.

**DATES:** Comments must be submitted on or before December 9, 1994.

**ADDRESSES:** Comments should refer to Docket No. R-0851, and may be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551. Comments also may be delivered to room B-2222 of the Eccles Building between 8:45 a.m. and 5:15 p.m. weekdays, or to the guard station in the Eccles Building courtyard on 20th Street, N.W. (between Constitution Avenue and C Street) at any time. Comments may be inspected in room MP-500 between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in 12 CFR 261.8 of the Board's rules regarding availability of information.

#### FOR FURTHER INFORMATION CONTACT:

Gregory A. Baer, Managing Senior Counsel (202/452-3236), or David S. Simon, Attorney (202/452-3611), Legal Division; or Anthony Cymak, Economist, (202/452-2917), Division of Research and Statistics, Board of Governors of the Federal Reserve System. For the hearing impaired only, Telecommunication Device for the Deaf

(TDD), Dorothea Thompson (202/452-3544).

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972) generally prohibits a bank from tying a product or service to another product or service offered by the bank or by any of its affiliates.<sup>1</sup> A bank engages in a tie for purposes of section 106 by: (1) offering a discount on a product or service (the "tying product") on the condition that the customer obtain some additional product or service (the "tied product") from the bank or from any of its affiliates; or (2) allowing the purchase of a product or service only if the customer purchases another product or service from the bank or from any of its affiliates. Violations of section 106 can be addressed by the Board through an enforcement action, by the Department of Justice through a request for an injunction, or by a customer or other party through an action for damages. 12 U.S.C. 1972, 1973, and 1975.

Section 106 contains an explicit exception (the "statutory traditional bank product exception") that permits a bank to tie a product or service to a loan, discount, deposit, or trust service offered by that bank. The Board has recently extended this exception by providing that a bank or any of its affiliates also may vary the consideration for a traditional bank product on condition that the customer obtain another traditional bank product from an affiliate (the "regulatory traditional bank product exception").<sup>2</sup>

Section 106 authorizes the Board to grant exceptions to its restrictions by regulation or order. On October 19, 1994, the Board granted an exemption permitting the subsidiary banks of Fleet Financial Group, Inc., Providence, Rhode Island (Fleet) to offer a discount on the monthly service fee charged for the "Fleet One Account" to a customer who maintains a combined minimum balance of \$10,000 in one or more products selected by the customer from a menu of eligible Fleet products. The

Board decided that, to the extent that Fleet's combined-balance discount was prohibited by section 106, an exemption was warranted given the public benefits and absence of anti-competitive concerns generated by the arrangement.

The Fleet One Account provides a customer, for a \$14 monthly fee, discounts and premiums on various Fleet services, such as free checking and lower installment loan rates. Under the Board's order, Fleet may waive the \$14 fee for any customer who maintains a \$10,000 combined balance among the following eligible products: (1) deposits and certain loans at the Fleet bank at which the customer establishes the Fleet One Account;<sup>3</sup> (2) credit card balances at a Fleet bank; (3) investment securities held at Fleet's brokerage subsidiary and (4) shares held in a family of mutual funds advised by a Fleet subsidiary. All products offered as part of these arrangements are separately available to customers at competitive prices.

#### Proposed Rule

The Board is proposing to use its statutory authority to grant a regulatory exception to section 106 for combined-balance discount arrangements akin to that offered by Fleet. The Board is proposing the exception in order to provide certainty as to the general permissibility of combined-balance discounts, and because it believes that such discounts are pro-consumer and not anti-competitive.

#### Applicability of Section 106

The combined-balance discount offered by Fleet appears to be covered by section 106, which prohibits a bank from offering a discount on a product or service on the condition that the customer obtain some additional product or service from the bank or from any of its affiliates. Although the discount on the Fleet One Account fee is not conditioned on any particular product being purchased, the customer is required to purchase some product or products from the menu of eligible products in order to receive the discount.<sup>4</sup> Furthermore, the packaging

<sup>3</sup> These products include: checking, savings, cash reserve and sweep accounts; certificates of deposit; installment and home equity lines of credit and certain loans.

<sup>4</sup> Coverage of combined-balance discounts also appears to be consistent with the purposes of section 106. Section 106 was enacted because of

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<sup>1</sup> Although section 106 applies only when a bank offers the tying product, the Board in 1971 extended the same restrictions to bank holding companies and their nonbank subsidiaries. See 12 CFR 225.7(a).

<sup>2</sup> See 12 CFR 225.7(b)(2).



of some of those products in the form proposed by Fleet does not appear to qualify for the statutory or regulatory traditional bank product exception.<sup>5</sup>

In addition, although the discount plan offered by Fleet is structured so as to avoid any anti-competitive effects, the Board notes that in other cases the number and attractiveness of traditional bank products offered in such an arrangement could be substantially less than those offered by Fleet, and the effect of the tie to non-traditional products that much stronger. In addition, there is the potential for such discount plans to be manipulated in order to have the same effect as a classic tie—that is, structured so that the customer is effectively required to purchase one product in order to receive, or to receive a discount on, another product.

#### Exception

In deciding to permit Fleet to offer the Fleet One Account, the Board concluded that the combined-balance discount on the Fleet One Account was consistent with the type of banking relationships that section 106 recognized were important to preserve.<sup>6</sup> Section 106 preserves such relationships through the statutory traditional bank product exception, which permits a bank to tie a product or service to a loan, discount, deposit, or trust service offered by that bank. The legislative history of section 106 notes that this exception was intended to preserve a customer's ability to negotiate the price of multiple banking services with the bank on the basis of the customer's entire relationship with the bank. The proposed exception serves the same purpose.

Moreover, under the statutory and regulatory traditional bank product exceptions, a bank already could offer a combined-balance discount on an

account where all the products in the arrangement were traditional bank products (loans, discounts, deposits, and trust services). Granting an exception for a combined-balance discount would simply permit the bank to increase customer choice by adding a customer's securities brokerage account or other non-traditional products to the menu of traditional products that count toward the minimum balance.

For these reasons, the Board is proposing to establish, through a regulatory exception, a safe harbor for arrangements offering benefits similar to those in Fleet. The proposed safe harbor is not only consistent with the statute's goal of preserving traditional banking relationships, but also its concerns about anti-competitive behavior. The proposal requires that the offering bank offer deposits and that all such deposits be considered in determining whether the customer has reached the minimum balance required to waive the relevant fee. Furthermore, all products offered as part of the arrangement would be required to be separately available for purchase at competitive prices.<sup>7</sup> Because a customer could qualify for a combined-balance discount based solely on deposit balances and because the bank would be required to offer customers all products involved in the arrangement separately and at competitive prices, a customer would not have an incentive to establish a brokerage account, or obtain any other product, that the customer did not want in order to obtain the discount. For this reason, the Board does not believe that the proposed rule would allow coercive or anticompetitive practices, or otherwise contravene the purposes of section 106.<sup>8</sup>

Finally, the Board believes that the proposed rule would benefit the public. Bank customers would be presented with lower costs.

#### Paperwork Reduction Act

No collections of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) are contained in the proposed rule.

<sup>7</sup> The Board's anti-tying regulation currently conditions all regulatory exceptions on all products involved in the tying arrangement being separately available for purchase, and that condition would apply to the proposed exception. The Board has sought comment on an amendment to this condition providing that products be separately available for purchase "at competitive prices." 59 FR 39709 (August 4, 1994).

<sup>8</sup> Under antitrust precedent, concerns over tying arrangements are substantially reduced where the buyer is free to take either product by itself even though the seller also may offer the two items as a unit at a single price.

#### Regulatory Flexibility Act

It is hereby certified that this proposed rule, if adopted as a final rule, will not have a significant economic impact on a substantial number of small entities that would be subject to the regulation.

#### List of Subjects in 12 CFR Part 225

Administrative practice and procedure, Banks, Banking, Holding companies, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR Part 225 as set forth below:

#### PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for 12 CFR part 225 continues to read as follows:

**Authority:** 12 U.S.C. 1817(j)(13), 1818, 1831i, 1831p-1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3907, 3909, 3310, and 3331-3351.

2. In section 225.7, as proposed to be amended at 59 FR 39711, August 4, 1994, a new paragraph (b)(4) is added to read as follows:

#### § 225.7 Tying restrictions.

\* \* \* \* \*

(b) \* \* \*

(4) *Safe harbor for combined-balance discounts.* A bank may vary the consideration for any product or package of products offered by the bank or its affiliates based on a customer maintaining a combined minimum balance in certain products specified by the bank ("eligible products"), provided that:

(i) The bank offers deposits, and all such deposits are eligible products; and

(ii) Balances in all eligible products count equally toward the minimum balance.

\* \* \* \* \*

By order of the Board of Governors of the Federal Reserve System, October 20, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

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Congress's concern that banks would use their power over credit to gain a competitive advantage in other markets. Ordinarily, a tying arrangement involves an attempt to gain a competitive advantage in one product market, but the fact that a bank is attempting to gain a smaller advantage in a larger number of product markets raises similar concerns.

<sup>5</sup> Under the Board's regulations, a bank or nonbank could offer a discount on brokerage services on condition that a customer purchase a traditional bank product from the bank or company offering the brokerage services or from an affiliate. However, no exception allows the reverse case, where discounts on bank products are being used to induce customers to purchase brokerage services.

<sup>6</sup> The Board also granted Fleet an exemption allowing Fleet banks to condition the Fleet One Account on a customer's obtaining two products from Fleet, but the Board is not proposing to make this exemption broadly available through regulation. Rather, the Board has concluded that such exemptions should be granted on a case-by-case basis.