

**FEDERAL RESERVE BANK  
OF NEW YORK**

[ Circular No. 10755 ]  
[ January 11, 1995 ]

**BANK HOLDING COMPANIES**

**Amendments to Anti-Tying Provisions of Regulation Y**

*Effective January 23, 1995*

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

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

The Federal Reserve Board has announced adoption of final amendments to the anti-tying provisions of Regulation Y (Bank Holding Companies and Change in Bank Control).

The amendments are effective January 23, 1995.

The amendments permit a bank holding company or its nonbank subsidiary to offer a discount on its product or service on condition that a customer obtain any other product or service from that company or from any of its nonbank affiliates. Thus, the final rule generally removes Board-imposed restrictions on tying when no bank is involved in the arrangement and the products are separately available for purchase by the customer.

Enclosed — for depository institutions, bank holding companies, and others who maintain sets of the Board's regulations — is the text of the amendments to Regulation Y, as published in the *Federal Register*. Additional copies can be obtained by calling the Circulars Division (Tel. No. 212-720-5215 or 5216). Questions on this matter may be directed to our Banking Applications Department (Tel. No. 212-720-5861).

WILLIAM J. McDONOUGH,  
*President.*

# Rules and Regulations

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## FEDERAL RESERVE SYSTEM

### 12 CFR Part 225

[Regulation Y; Docket No. R-0843]

#### Revisions Regarding Tying Restrictions

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

**ACTION:** Final rule.

**SUMMARY:** The Board is adopting a final rule amending the anti-tying provisions of Regulation Y to permit a bank holding company or its nonbank subsidiary to offer a discount on its product or service on condition that a customer obtain any other product or service from that company or from any of its nonbank affiliates. Thus, the final rule would generally remove Board-imposed restrictions on tying when no bank is involved in the arrangement and the products are separately available for purchase by the customer. The Board believes that the amendment will relieve bank holding companies of a competitive disadvantage, promote efficiency in the delivery of services, and provide benefits for consumers.

**EFFECTIVE DATE:** January 23, 1995.

**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 Cyrnak, 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. 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 a 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 a customer purchases another product from the bank or from any of its affiliates. Although section 106 applies only when a bank offers the tying product, the Board in 1971 extended section 106 to products offered by bank holding companies and their nonbank subsidiaries. 12 CFR 225.7(a).

On July 27, 1994, the Board proposed an amendment to conform the anti-tying provisions of Regulation Y more closely to section 106 and its focus on banks. 59 FR 39709 (August 4, 1994). The proposed amendment would permit bank holding companies and their nonbank subsidiaries to offer discounts on packaged products when: (1) Both the tying and tied products are offered by bank holding companies or their nonbank subsidiaries—in other words, when no affiliated bank was involved in the arrangement; and (2) both the tying and tied products are separately available for purchase at competitive prices. If the package arrangement included a product offered by an affiliated bank, the proposed amendment would not apply (although the arrangement might qualify for another exception adopted by the Board).

#### General Summary of Comments

The Board received 31 comments on its proposal. Those commenting included 17 banking organizations, eight trade associations, and five Reserve Banks. Commenters overwhelmingly supported the proposed amendment. One banking trade association opposed the Board's proposal because it believed that a blanket exception could have anti-competitive effects in small towns. This commenter recommended that the Board act on exemption requests on a case-by-case basis.

#### Discussion

The Board is adopting the amendment substantially as proposed. It is important to note that the amendment is

not an exception to section 106, which applies only when a bank offers the tying product—that is, when a bank is varying the consideration or conditioning the availability of a product in order to create an incentive for the customer to purchase another product.<sup>1</sup> The amendment will apply only when nonbanks offer all of the packaged products—a case that would otherwise be covered by the Board's extension of section 106 to tying within a bank holding company organization.

The amendment will not permit the types of anti-competitive practices that the Board's regulatory extension was designed to prevent. Neither bank holding companies nor their nonbanking subsidiaries generally appear to possess sufficient market power in the products that they offer to impair competition.<sup>2</sup> Moreover, bank holding companies and their nonbank subsidiaries will continue to be restricted by the antitrust laws—the same restrictions that bind their nonbank holding company competitors—and the Board will retain the authority to terminate or modify any arrangement that resulted in anti-competitive practices. Section 106 will continue to restrict tying by banks, and Regulation Y will continue to restrict tying by a nonbank when the tied product is offered by an affiliated bank. Finally, the amendment will rescind Regulation Y's restrictions on tying between nonbanks only where discounting is involved and the products are separately available.

The final rule is further justified by the competitive environment in which bank holding companies and their nonbank subsidiaries operate

<sup>1</sup> The purpose of section 106 was to prevent banks from using their market power over certain products to gain an unfair competitive advantage in other products. See, e.g., S. Rep. No. 1084, 91st Cong., 2d Sess., 16 (1970). Although banks, like their nonbank competitors, already were subject to general antitrust prohibitions on tying, Congress concluded that special restrictions were necessary given the unique role of banks in the economy. Section 106's restrictions on banks are broader than those of the antitrust laws, as no proof of economic power in the tying product or anti-competitive effects in the tied product market are required for a violation to occur.

<sup>2</sup> For example, the "laundry list" activities in which bank holding companies and their nonbanking subsidiaries are permitted to engage are generally conducted in competitive national or regional markets that are characterized by large numbers of actual or potential competitors and low barriers to entry. See 12 CFR 225.25.

nationwide. The amendment will relieve bank holding companies of a competitive disadvantage, promote efficiency in the delivery of services, and provide benefits for consumers. In particular, the amendment will provide customers with greater choices and potentially lower costs by allowing bank holding companies to offer the same types of discounts that their competitors already offer.

#### Other Issues

The Board sought public comment on several particulars of the proposed amendment, including: (1) The Board's requirement that all products offered in a package arrangement be separately available for purchase; (2) that these products be separately available "at competitive prices"; and (3) the Board's clarification that its authority to revoke an exception that is resulting in anti-competitive practices includes authority to halt such practices at an individual institution.

Commenters were split on the proposed requirement that all products in a package arrangement be separately available for purchase, with five in favor and seven opposed. The requirement of separate availability, like the requirement that the arrangement involve a discount, effectively prevents a bank holding company from conditioning the availability of one product on the purchase of another. In a competitive market, a company should be unable to profit from such an arrangement—as customers are free to purchase the desired, tying product from a competitor without having to purchase the less desired, tied product. Although, as noted, the markets for products offered by bank holding company affiliates are generally competitive, there may be a few markets that are less competitive, and the discounting and separate availability restrictions would therefore act as a further safeguard to protect against anti-competitive practices in such markets. Accordingly, these requirements will be retained.<sup>3</sup>

Commenters generally opposed the addition of a clarifying phrase providing that products be separately available "at competitive prices," with four in favor and seven opposed. The purpose of this clarification was to prevent evasion of the separate availability and discounting

<sup>3</sup> The proposed rule contained specific language emphasizing that all products in a package arrangement must be separately available for purchase by the customer. Because all anti-tying exceptions granted by the Board already are subject to this requirement, this language has been deleted in the final rule to avoid redundancy. See 12 CFR 225.7(c)(1).

requirements. Such an evasion could occur by establishing the price of a product so far above its package price that customers would effectively be required to purchase the package in order to obtain the product. The effect would be the same as an explicit conditioning of the availability of the product, as described above.

Commenters expressed concern about the difficulties of determining what constitutes a competitive price, particularly in products that are unusual or unique. Because of these concerns, the Board has not adopted this clarification but will continue to interpret "separately available" to mean available at a price that would generally attract customers and therefore leaves customers desiring a product a meaningful choice between purchasing the product alone or through a package.

Commenters did not object to the Board's retained authority to revoke an exception that is resulting in anti-competitive practices or the Board's ability to halt such practices at an individual institution. The Board has retained such authority in the final rule.

#### Additional Relief Requested by the Commenters

Several commenters suggested that the Board grant additional relief from the tying restrictions of section 106 and Regulation Y. In particular, nine commenters recommended that the Board completely repeal the extension of section 106 to bank holding companies and their nonbank subsidiaries. Commenters also suggested that the Board extend the proposed amendment to allow a nonbank subsidiary of a bank holding company to offer a discount on a product or service to a customer who purchases a product or service from a bank affiliate.

Seven commenters recommended revisions to the regulatory traditional bank product exception recently adopted by the Board.<sup>4</sup> The commenters requested that the Board extend the regulatory traditional bank product exception beyond cases where only traditional bank products are part of the

<sup>4</sup> See 12 CFR 225.7(b)(1). Section 106 contains an explicit exception (the "statutory traditional bank product exception") that permits a bank to tie any product or service to a loan, discount, deposit, or trust service (a traditional bank product) offered by that bank. The regulatory traditional bank product exception partially extends the statutory traditional bank product exception by permitting a bank or any of its affiliates to vary the consideration for a traditional bank product on condition that the customer obtain another traditional bank product from an affiliate. In other words, a bank may offer a customer a discount on one product (e.g., a deposit account) if the customer obtains another product (e.g., a loan) from an affiliate, so long as both products are traditional bank products.

package. These commenters noted that the statutory traditional bank product exception permits a bank to tie any product (not just a traditional bank product) to a traditional bank product, and suggested that the same exception should apply to ties between affiliates. Finally, several commenters requested that the Board clarify the treatment of operating subsidiaries of banks under section 106 and further expand the definition of traditional bank products.

The Board continues to analyze all of these issues and will consider these proposals, and others, after the recent amendments have been implemented.

#### 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.

#### Regulatory Flexibility Act

It is hereby certified that this 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, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, the Board amends 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 is revised to read as follows:

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

2. In § 225.7, a new paragraph (b)(3) is added and paragraph (c)(2) is revised to read as follows:

#### § 225.7 Tying restrictions.

\* \* \* \* \*

(b) \* \* \*

(3) *Discounts on tie-in arrangements not involving banks.* A bank holding company or any nonbank subsidiary thereof may vary the consideration for any extension of credit, lease or sale of property of any kind, or service, on the condition or requirement that the customer obtain some additional credit, property, or service from itself or a nonbank affiliate.

(c) \* \* \*

(2) Any exception granted pursuant to this section shall terminate upon a finding by the Board that the arrangement is resulting in anti-competitive practices. The eligibility of a bank holding company or bank or nonbank subsidiary thereof to operate under any exception granted pursuant to this section shall terminate upon a finding by the Board that its exercise of this authority is resulting in anti-competitive practices.

\* \* \* \* \*

By order of the Board of Governors of the Federal Reserve System, December 14, 1994.

**William W. Wiles,**

*Secretary of the Board.*

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