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Submitted by email to: regs.comments@federalreserve.gov

September 30, 2003

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Docket No. OP-1158

Dear Ms. Johnson:

Bank One appreciates the opportunity to provide comments on the proposed interpretation and supervisory guidance concerning the anti-tying restrictions of section 106 of the Bank Holding Company Act Amendments of 1970, issued by the Board of Governors of the Federal Reserve System (the "Board") on August 25, 2003 (the "Proposal"). Bank One has also participated in comment letters that will be submitted by the ABA Securities Association, the Financial Services Roundtable and The Clearing House; we endorse the comments made in those letters.

The Proposal correctly acknowledges that there are many complexities associated with section 106, and that a determination of whether a violation of section 106 has occurred "requires a careful analysis of the facts and circumstances associated with a particular transaction". The Proposal correctly points out that a violation occurs only if a bank has imposed a condition or requirement on a customer that violates section 106. Section 106 is not violated if the bank engages in cross-marketing activities, "whether suggestive or aggressive", without imposing an illegal condition or requirement.

Bank One supports the Board's desire to provide guidance, particularly with respect to relationship banking, in order to provide greater certainty for banks with respect to the manner in

which relationship banking is conducted. Bank One's principal concern with the Proposal is that certain aspects of the Proposal (as discussed herein) may have the result of increasing, rather than reducing, a bank's litigation and compliance risks related to compliance with section 106.

Our comments and suggestions are designed to ensure that the Proposal provides a reasonably objective way for banks to comply with Section 106 through appropriate policies, procedures and systems without substantially increasing costs of compliance and risk of adverse litigation.

Relationship Banking and Mixed-Product Arrangements

Relationship banking is a well-established practice whereby a bank seeks to build mutually beneficial relationship with its customers. The customer benefits by receiving greater attention from the bank and the ability to obtain multiple products and services without going through additional credit examinations. The bank benefits by developing deeper knowledge of its customers' financial needs and by selling multiple products and services to customers it knows. If the bank is unable to develop a sufficiently profitable customer relationship, it may make an assessment to exit the relationship. Many recent papers have demonstrated that relationship banking and illegal tying are two distinct concepts[1/]. Given the demonstrated positive attributes of relationship banking for customers and banks, we suggest the Board use the full extent of its discretionary authority under section 106 to encourage relationship banking and ensure that section 106 is not interpreted to prohibit activities connected with relationship banking.

Bank One generally agrees with the Board's guidance with respect to mixed-product arrangements. However, Bank One disagrees with the Proposal to the extent that it may require an analysis of each customer's ability to satisfy the condition or requirement by purchasing only traditional bank products. The Proposal makes several references in Part IV.A.2 and Part VII.B to "the customer", which raise the implication that the bank can only form a good faith belief by considering the ability of each individual customer to satisfy a condition or requirement by purchasing only traditional bank products. The last part of footnote 51 is particularly troubling since it appears to require an assessment not just of the customer's overall needs but also the customer's legal ability to transfer business and the bank's ability to satisfy the customer's needs.

Bank One has the following suggestions for improving the Proposal with respect to mixed-product arrangements. First, the Proposal should make clear that a bank is presumed to be in compliance with Section 106 if the bank has determined, on the basis of internal profitability models, customer profiles or other reasonable criteria, that customers can meet a condition or requirement by selecting only traditional bank products. For example, a bank may have models

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[1/] See, "Today's Credit Markets, Relationship Banking, and Tying, Office of the Comptroller of the Currency, September, 2003.

showing that customers with sales of $10 million to $50 million are likely to use certain cash management or other traditional bank products in an average volume that will meet a profitability target that the bank has set with the customer. These models, together with the policies, procedures and systems referred to in Part VII of the Proposal, should be presumptive evidence of the bank's good faith determination without any need for the bank to demonstrate that it made the analysis for a specific customer. Within this structure, the Proposal should make clear that a bank only violates section 106 if it can be proved that the bank, with respect to a particular customer and transaction, imposed an illegal condition or requirement, or that the bank knew that the choices it offered were so illusory that an illegal tie is clear. We are particularly concerned that the Proposal not result in shifting the evidentiary burden from a customer having to prove a tying violation, to a bank having to prove that its mixed-product arrangement does not violate section 106.

Second, the Proposal correctly acknowledges that in order for a violation of section 106 to be established, a bank "must force the customer to obtain…the tied product(s)…in order to obtain the customer's desired product(s)". With respect to sophisticated customers that have multi-product needs and the ability to obtain products and services from a variety of financial institutions, the element of force is non-existent. Accordingly, Bank One suggests that the Board create a presumption that a bank has met the meaningful option requirement when it offers mixed-product arrangements to sophisticated customers. We suggest that this test should apply to customers with annual sales in excess of $50 million.

Third, Part II of the Proposal contains a statement that "section 106 does not prohibit a bank from declining to provide credit…so long as the bank's decision is not based on the customer's failure to satisfy a condition or requirement prohibited by section 106." Certain examples are given that primarily cover a customer's financial position. We suggest the Proposal contain a clearer statement that if a customer does not meet the bank's profitability or other standards, the bank may make a business decision to exit the customer relationship.

Fourth, the Proposal correctly points out that an illegal tie does not exist if the customer insists on a condition or requirement from the bank or requests the bank to provide a bundled product arrangement. In fact, such arrangements can provide significant benefits to customers and should be encouraged. The Proposal is unclear as to the extent to which the bank may negotiate the terms of the arrangement once the customer has initiated its request. We suggest that the Proposal include a clear statement that a bank may negotiate the terms of the arrangement with the customer without violating section 106 and , if the terms are not fully agreed by both parties, the bank may separately price components of the mixed-product arrangement, or withdraw from the bidding.

Traditional Bank Products

The Proposal requests comments as to the products that fall within the scope of a "loan, discount, deposit, or trust service", and in particular requests comments on how interest rate swaps, foreign exchange swaps and other derivative products should be treated under section 106.

Bank One suggests that the full range of derivative products and foreign exchange products should be exempt from the restrictions of section 106. Such products are very frequently offered in connection with lending transactions and, in such circumstances, should not be viewed as separate products under section 106.

For example, a customer may wish to obtain fixed rate financing and will ask the bank to provide such financing at the most competitive rate. The bank may be able to provide the financing at lowest cost by making a floating rate loan and then "swapping" the floating rate for a fixed rate. If the bank cannot tie these parts together the bank may have both customer and counterparty risk and the customer may have to obtain credit from two institutions. Foreign exchange swaps present similar issues. A customer may want to do an asset securitization covering receivables in one currency; the debt may be placed most cheaply with investors in another currency; a foreign exchange swap would be the mechanism for completing the structure. In circumstances in which a swap or other derivative is connected with a lending transaction, either contemporaneously with the loan or otherwise, the Board should be able to conclude that the arrangement does not involve two separate products, but rather a single complex financial structure. As a result, the customer will benefit from the bank being able to price and provide the entire structure as a single integrated product.

Even in circumstances in which derivatives and foreign exchange are not related to particular lending transactions, we suggest they have become so integral to modern banking services that they should be treated as traditional bank products. We believe the Board could determine that derivatives and foreign exchange are sufficiently related generally to loans and/or deposits that they meet the section 106 requirement for an exemption. If, however, the Board concludes that derivatives and foreign exchange are not sufficiently related to loans or deposits to qualify as traditional banking products, we suggest that the Board use its discretionary authority under section 106 to exempt derivatives and foreign exchange from the section 106 restrictions on the basis that they have become common banking products.

Bank One appreciates the opportunity to comment on the Proposal. Should you have any questions, please contact the undersigned at (312) 732-5298.

Sincerely,

Jim Roselle