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
regs.comments@federalreserve.gov

RE: Docket # OP-1158
Anti-Tying Restrictions of the Bank Holding Company Act Amendments of 1970 – Proposed Interpretation and Supervisory Guidance (the "Proposal")

Dear Ms. Johnson:

Household Bank (SB), N.A. and HSBC Bank USA ("HSBC") appreciate this opportunity to comment on the Proposal issued by the Board of Governors of the Federal Reserve System (the "Board") interpreting and providing guidance on issues relating to the Anti-Tying restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970 ("Section 106"). The Board's timely decision to publish a formal interpretation of Section 106 should provide much needed guidance to the financial services industry, which continues to evolve following the 1999 the passage of the Gramm-Leach-Bliley Act ("GLBA"). While benefiting from GLBA's expansion of the variety of products that a single financial services company may offer, many financial institutions now face a more complex analysis of what types of tying arrangements Section 106 permits.

Section 106 generally prohibits a bank from conditioning the availability or price of one product on a requirement that the customer also obtain another product from the bank or an affiliate. Thus, two elements are required to show that a tying arrangement violates 106 - (i) that the arrangement involves two or more separate products (the customer's desired product and the one or more separate tied product(s)); and (ii) that the bank is requiring the customer to obtain (or provide) the tied product(s) from (or to) the bank or an affiliate in order to obtain the customer's desired product(s) from the bank. This standard, which is significantly more restrictive that the legal standards applied under general antitrust laws, can restrict banks' ability to provide competitive products in the marketplace, to the potential detriment of customers and the industry. Thus, we suggest that the Board consider this impact when publishing its final

interpretations and rules, in order to promote fair competition, which in turn should benefit consumers, commercial banking customers, and financial institutions alike.

The "Traditional Bank Product" Exemption:

Section 106 permits banks to condition the purchase of any product on the purchase of a "traditional bank product," e.g., a loan, discount, deposit, or trust service. 12 USC § 1972(1)(A). The Board has proposed a fairly broad list of products that would fall under this definition, including cash management, trust services, custodial services, payroll services, settlement and wire transfer services, and discretionary asset management. To expand and further clarify the proposed definition, we suggest the following:

- Specifically expand the description of "trust service" to include corporate trustees, fiduciaries under ERISA, mutual fund activities if the bank or an affiliate is the investment adviser to the mutual fund and other investment advisory activities, whether the bank does or does not have investment discretion. Include in definition providing advice in connection with mergers, acquisitions, divestitures, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions.

- Either include "foreign exchange and derivatives" in the definition of traditional bank products or list as a separate exemption.

- Include services that a lender may provide in a "Guaranteed Mortgage Package" offered pursuant to the proposal by the Department of Housing and Urban Development ("HUD") to amend Regulation X (24 CFR § 3500, implementing the Real Estate Settlement Procedures Act of 1974, "RESPA"). The Guaranteed Mortgage Package Amendment ("GMPA") would include a guaranteed package price for a comprehensive package of loan origination and virtually all other settlement services required by the lender to close the mortgage (including without limitation, all application, origination and underwriting services, the appraisal, pest inspection, flood review, title services and insurance, and any other lender required services except hazard insurance, per diem interest, and escrow deposits); a mortgage loan with an interest rate guarantee; and a contract offer to guarantee the price for settlement services and the mortgage interest rate through settlement, if the offer is accepted by the borrower. Including these services (e.g., appraisals, pest inspections, flood review, title services and title insurance) in the definition of "traditional bank product" would help enable banks compete effectively with non-bank lenders to offer a Guaranteed Mortgage Package that qualifies for the safe harbor under Regulation X.

Mixed-Product Arrangements

The Proposal provides that a bank may offer a 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. Publishing this interpretation should provide banks with increased flexibility to offer bundled products, enhancing competition, and benefiting customers. However, we are concerned that the term "meaningful" encourages a transaction-level facts and circumstances type of analysis that may unnecessarily limit the effectiveness of this exemption in some cases. Thus, we suggest the following:

- Include a "safe harbor" for mixed-product arrangements that are provided to individuals with assets in excess of a specified dollar level, the presumption being that these customers have "meaningful" options. According to the Board, the proposed interpretation assumes that "mixed-product" arrangements which include both traditional bank products and non-traditional products are not appropriate for individuals because they "have less bargaining power and may be less sophisticated and, would therefore, be susceptible to subtle pressure by the bank." However, some customers do have the requisite sophistication and bargaining power to benefit from specialized mixed-product arrangements. For example, private banking customers frequently negotiate packages of services with financial institutions.
- Provide a standard that allows financial services companies to determine the appropriate prices for bundled products offered to consumers. Admitting that Section 106 is restrictive, the Board states that, "section 106 limits the ability of banking organizations to provide individual consumers with discounts on packages of bundled products and, thus, pass along the cost savings that may arise from bundled offerings in ways that are both pro-consumer and not anti-competitive." We agree with the Board's conclusion, and suggest that there are mixed-product arrangements that offer meaningful choice to individuals and provide a valuable combined discount or increased return. Thus, banks and consumers could benefit from the Board's clarification that mixed-product arrangements would offer "meaningful choice" if the products are otherwise offered separately at a competitive price and the discount or increased return could also be obtained by purchasing traditional banking products or services.
- Clearly state that a bank may test mixed-product arrangements at the program level before they are offered to the bank's customer base. This will reduce unnecessary burden on recordkeeping and other management and systems procedures.

We appreciate the opportunity to comment on the Proposal. If you have any questions, please feel free to call me at (847) 564-7941.

Sincerely,

Martha Pampel
Associate General Counsel
Federal Regulatory Coordination

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