September 30, 2003

VIA INTERNET

Board of Governors of the Federal Reserve System
20th and C Streets, N.W.
Washington, DC 20551
Attention: Ms. Jennifer J. Johnson, Secretary

Re: Proposed Interpretation and Supervisory Guidance on Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970; Docket No. OP-1158

Ladies and Gentlemen:

LaSalle Bank Corporation ("LaSalle") appreciates the opportunity to comment on the proposals of the Board of Governors of the Federal Reserve System (the "Board") relating to the Board's interpretation and supervisory guidance on the anti-tying restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970.

LaSalle or its affiliates are members of the New York Clearing House Association LLC (the "NYCH"), the ABA Securities Association ("ABASA") and the Institute of International Bankers ("IIB"). In this regard, LaSalle supports all of the comments made by the NYCH, ABASA and the IIB in their respective comment letters, and urges the Board to consider their suggestions, which are intended to reduce the regulatory burden associated with the Board's guidance without contradicting the purposes of Section 106. In addition, LaSalle would like to elaborate on several of the comments made in the above-referenced comment letters.

LaSalle applauds the Board's efforts to clarify the complex and potentially ambiguous terms of Section 106. Banks will be able to construct better and more efficient anti-tying compliance programs as these ambiguities are eliminated. In particular, LaSalle supports the Board's clarification that:

- Banks may decline to extend credit generally, in the absence of proscribed tying arrangements;
- A bank (and not its affiliates) must impose, directly or indirectly, a tying arrangement for it to be unlawful under Section 106;
- Two separate products – a Desired Product and a Tied Product – must be involved for an unlawful tying arrangement to exist;
- Violations of Section 106 do not occur when the Tied Product is a traditional bank product;
- Coercion by a bank is a required element of unlawful tying under Section 106;
- Voluntary tying arrangements lack the essential coercion element of unlawful tying;

- Cross-marketing activities of banks do not, without more, violate Section 106, even if conducted aggressively;
- Traditional bank products include the many products and services listed in the Board's guidance; and
- Mixed-product arrangements, relationship banking and internal hurdle rates can be used lawfully under Section 106.

LaSalle does believe, however, that the Board may adjust its proposal in a manner that will benefit the public, relieve banks of undue litigation risks and compliance burdens and still promote the purposes of Section 106.

List of Traditional Bank Products

LaSalle believes that several clarifications to the list of traditional bank products should be made. First, foreign exchange services should be added to the list. Consumers and commercial customers have depended on banks to exchange United States currency for foreign currencies for decades, and have similarly depended on banks to offer increasingly complex foreign exchange products and services as the complexity of international markets and transactions has increased. In essence, foreign exchange services are one example of a bank's most basic – and traditional – functions: handling money. It can hardly be disputed that these services fall within the traditional banking functions Congress described as "loan, discount, deposit, or trust service[s]."

Second, interest rate and credit derivatives should be added to the list. Extending credit and charging interest for that service are two more of a bank's most fundamental and traditional functions. It follows that the public has traditionally looked to banks for interest rate- and credit-related products, services and advice. This fact is manifested by banks' integral involvement in developing interest rate- and credit-related risk management and hedging products and services like swaps, caps and collars. Nothing in Section 106 or its legislative history suggests or requires that a "loan" or related "service" as exempted therein consist only of products and services in existence when Section 106 was enacted. In fact, quite the contrary is true, as evidenced by Congress' grant to the Board of the authority to permit exceptions the Board considers to be not contrary to the purposes of Section 106. The Board should recognize interest rate and credit derivatives as loan, discount, deposit, or trust services within the meaning of Section 106.

Third, other derivatives and credit or financial risk management products, including equity, commodity and energy derivatives, should be added to the list. Section 106's enumeration of the "loan, discount, deposit or trust service" exemption can easily and fairly be read to include credit and financial risk management products. Perhaps more fundamentally, banks have advised customers on, and intermediated transactions in these products just as banks have advised customers on, and syndicated transactions in loans and other extensions of credit.

The Board's interpretation recognizes loan syndication services as traditional bank products, and should do the same with other credit and financial risk management products, including equity, commodity and energy derivatives.

As to each of the above-mentioned products, LaSalle believes that the Board should recognize the *product* as qualifying for the exemption, regardless of whether that product is being purchased or sold by the bank in a particular transaction. In addition, to the extent the Board disagrees with LaSalle's view that the above-mentioned products qualify as "loan, discount, deposit, or trust service[s]," the Board can and should exercise its authority to grant exemptions as to such products. For the reasons stated above, it is beyond serious dispute that doing so will "not be contrary to the purposes of [Section 106]." The Board's discretion in this regard is broad, and need not be used as sparingly as it has in the past.

Fourth, the Board should expand the list of examples given to illustrate traditional trust services, in order to clarify that corporate and institutional trust services qualify as traditional bank products. LaSalle suggests adding a bullet point listing "Services provided as personal, corporate or institutional trustee or fiduciary" and deleting the reference to "trustee or" in the bullet point listing "services provided as trustee or guardian . . ."

Mixed-Product-Arrangements

LaSalle supports the Board's efforts to clarify that Section 106 permits banks to offer a diverse menu of services to customers who would otherwise be terminated because they fail to meet the bank's internal profitability requirements. However, the Board's proposed supervisory guidance imposes unnecessary compliance burdens on banks that seek to implement these so-called mixed-product arrangements, and may expose banks to litigation risk arising from customers who seek to take advantage of the burden of proof seemingly imposed upon banks under the Board's proposal.

LaSalle agrees with the Board that banks should be required to develop a good faith belief that customers to whom they offer mixed-product arrangements have a meaningful option to satisfy the bank's profitability condition solely through the purchase of traditional bank products. LaSalle urges the Board to grant banks flexibility in making this determination, including the flexibility to make such a determination as to classes of customers, rather than solely on a customer-by-customer basis.

Moreover, the Board should adopt a presumption recognizing that virtually all commercial enterprises are current or potential consumers of a broad spectrum of traditional bank products, regardless of whether the enterprises presently demand such products at all, or obtain them from other financial institutions. For example, businesses with incoming revenues are, objectively speaking, potential consumers of deposit services, regardless of whether the

business subjectively *wants* deposit services or not. Similarly, businesses with current expenses are prospective users of payment services such as checking accounts and wire transfer services; businesses with multiple revenue sources or material intra-day cash balances are prospective users of cash management services; and businesses with multiple employees are prospective users of employee benefit, pension, profit-sharing and savings plan trust services. Banks should not be required to prove the level of their customers' subjective demand for the traditional banking products on their mixed-product menus because of the obvious compliance burdens and legal risks associated with proving their customers' states of mind.

Nor should banks be required to establish that each customer is able to "legally" transfer its business to the bank, except to the extent the bank is actually aware that such a transfer is *prohibited by law* (and not merely by an existing contractual arrangement binding upon the customer). It is not unlawful for a business customer to terminate, for example, its 401k plan services with one bank and obtain those services from another bank, even if the contract for such services ostensibly prohibits termination. It is rarely, if ever, possible for the outgoing service provider to *legally bar* a customer from changing service providers. The terminating customer may have to pay termination charges or other financial damages to the outgoing service provider, but those charges are only one component in the customer's financial decision pertaining to the service, and financial concerns are only one factor in the customer's overall decision as to which service provider to retain. A bank should not be required to delve into these nuances because of the obvious compliance burdens and litigation risks associated with such an inquiry. Moreover, requiring banks to make such an inquiry would effectively emasculate mixed-product arrangements entirely, depriving customers of the broader array or products from which to choose when facing expulsion from the bank for failing to meet profitability requirements. It is easy to see how a customer might try to counter a bank's permissible coercion by withholding the contractual information necessary for the bank to evaluate its ability to switch providers of traditional bank products. It is equally easy to see that a bank faced with this situation might react by eliminating the non-traditional products from its menu entirely, or by simply terminating its lending relationship with the customer. Both of these reactions would clearly be permissible under Section 106, but would hardly serve the public interest.

For the same reasons, the Board should also be careful not to place the burden of proof on banks in these situations. It is realistic to assume that a customer whose bank has just lawfully given it the choice to either obtain more services from the bank or find a new lender may seek leverage to counter the bank's permissible coercion, or may seek ways to retaliate against the bank. Such a customer should not be handed a favorable litigation presumption in these circumstances, as that will only add to banks' litigation exposure and will likely cause banks to refrain from offering mixed-product arrangements altogether. Recall that a bank that offers only traditional bank products to – or simply terminates – its unprofitable customers in these situations will *not* have the burden of proof to show compliance with Section 106. The public will not be better served by shifting the burden in mixed-product arrangements.

LaSalle appreciates the opportunity to comment on the Board's proposed guidance, and hopes the Board finds its comments useful in framing its final guidelines.

Sincerely,

Willie J. Miller, Jr.
Executive Vice President and Chief Legal Officer

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