ECONOMIC POWER AND THE BANK TYING PROVISIONS

Submitted to the Board of Governors of the Federal Reserve System

by

Bank of America Corporation,
Citigroup Inc.,
Deutsche Bank AG,
J.P. Morgan Chase & Co., and
UBS AG

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This paper addresses the criteria that must be met for a tying arrangement[1] involving a bank to violate Section 106(b)(1) of the Bank Holding Company Act Amendments of 1970 (the "BHC Act Amendments").[2] Section 106(b)(1) provides:

> A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement -- (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service; [or] (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company. . . .[3]

The bank tying provisions are derived from the general antitrust laws, specifically Section 1 of the Sherman Act and Section 3 of the Clayton Act. It is well established under antitrust principles that a "tie-in" can only exist where (i) two separate products or services are involved, (ii) the sale or agreement to sell one product or service is conditioned on the purchase of another, (iii) the seller has sufficient economic power[4] in the market for the tying product to enable it to restrain trade in the market for the tied product, and (iv) a not insubstantial amount of

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[1] A tying arrangement exists when a seller (*e.g.*, a bank) sells, or varies the price of, one product or service (the "tying product") on the condition or requirement that the customer purchase another product or service (the "tied product") from the seller or its affiliate.

[2] 12 U.S.C. § 1972(1) ("Section 106(b)(1)"). Section 106(b)(1) of the BHC Act Amendments is sometimes referred to as "Section 106" and "Section 1972." The BHC Act Amendments were enacted on December 31, 1970.

[3] These provisions are herein referred to as the "bank tying provisions" and such conduct is herein referred to as a "bank tie-in."

[4] The terms "economic power" and "market power" are used interchangeably herein.

interstate commerce in the tied product is affected.[5] If there is a tie-in -- which by definition first requires a showing of economic power in the tying-product market -- it is then subject to a *per se* analysis, which means that the need to prove that the practice has an anti-competitive effect in the tied-product market is eliminated.[6] The essential element of this *per se* analysis, however, is the existence of a tie-in which itself requires proof of economic power in the tying-product market.

This paper concludes that a bank likewise must have economic power in the tying-product market to violate the bank tying provisions. This paper is organized as follows:

> Part A, beginning on page 7, discusses the impact of categorizing tying conduct as "illegal *per se*" under the general antitrust laws, including the fact that *per se* categorization does not eliminate the need to prove economic power in the tying-product market;
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> Part B, beginning on page 13, reviews the treatment under the general antitrust laws of tying arrangements leading up to, contemporaneously with and since the enactment of Section 106(b)(1), including the fact that at all times proof of a seller's economic power in the tying-product market has been required;
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> Part C, beginning on page 22, discusses the well-accepted conclusion that Section 106(b)(1) is an antitrust statute;
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> Part D, beginning on page 24, reviews in detail the full legislative history of Section 106(b)(1), which evidences that economic power in the tying-product market is required to violate the bank tying provisions;
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> Part E, beginning on page 46, addresses the coercion requirement under Section 106(b)(1), and concludes that such requirement under Section 106(b)(1) is the same as under the general antitrust laws and that economic power is a necessary condition for coercion;

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5 *See, e.g.*, ABA Section of Antitrust Law, *Antitrust Law Developments* 179 (5th ed. 2002).

6 Whether tying arrangements should be subject to *per se* analysis at all is subject to increasing skepticism in antitrust jurisprudence, and courts, including the United States Supreme Court (the "Supreme Court"), have been inclined to examine the full market effect of challenged arrangements without eliminating any element of proof. *Id.* at 178-79. *See* note 20 below.

Part F, beginning on page 58, analyzes certain United States Court of Appeals opinions with respect to the economic power issue;

Part G, beginning on page 72, analyzes the treatment certain courts have given Section 106(b)(1), requiring that a bank tie-in must be an "anti-competitive practice" to violate the bank tying provisions;

Part H, beginning on page 76, analyzes certain statements of the Board of Governors of the Federal Reserve System (the "Federal Reserve Board" or the "Board") regarding Section 106(b)(1);

Part I, beginning on page 80, compares the language of Section 106(b)(1), Section 1 of the Sherman Act and Section 3 of the Clayton Act;

Part J, beginning on page 82, examines tying arrangements that were the focus of Section 106(b)(1) and concludes that such arrangements would be illegal under the economic power analysis;

Part K, beginning on page 85, examines the provisions of Section 106(e) and Section 106(f) of the BHC Act Amendments and concludes that these provisions provide further support for the economic power requirement;

Part L, beginning on page 87, discusses "level playing field" considerations that resulted from the enactment of the Gramm-Leach-Bliley Act of 1999; and

Part M, beginning on page 88, restates the conclusion of this paper.

A summary of the analysis that leads to the conclusion of this paper is set out immediately below, followed by a discussion of the *contra* position.

Summary of analysis. Section 106(b)(1) is an antitrust statute designed "to prohibit anti-competitive practices which *require* bank customers to accept . . . some other service or product . . . in order to obtain the bank product or service they desire" (quoting with emphasis added S. Rep. No. 91-1084 of the Senate Committee on Banking and Currency). Under the bank tying provisions, "a condition or requirement *imposed* by the bank must be demonstrated in order to prove that a violation of the section has occurred" (quoting with emphasis added Senator Wallace Bennett upon introducing an amendment to the bank tie-in legislation, which was approved, that replaced the words "condition, agreement, or understanding" with the words "condition or requirement"). The Federal Reserve Board

recognized that the bank tying legislation "would prohibit *coercive* tie-ins" (quoting with emphasis added a letter from Board Chairman Arthur Burns to the Chairman of the Senate Committee on Banking and Currency). The Federal Reserve Board has recently stated that the bank tying provisions apply only to coercive tie-ins, and therefore a bank may violate such provisions only if the bank forces or coerces a customer to obtain (or provide) the tied product as a condition to obtain the tying (or desired) product. The Federal Reserve Board has also concluded that this coercion requirement under the bank tying provisions is the same as under the general antitrust laws. A bank cannot possibly *require, impose* or *coerce* a tying arrangement unless the bank has economic power in the tying-product market. The plain meaning of the "condition or requirement" language of the bank tying provisions makes clear that a bank must have economic power in the tying-product market to violate the bank tying provisions.

The language of the tying provisions of the general antitrust laws, like the language of the bank tying provisions, is general, broad and sweeping. Such language of Section 1 of the Sherman Act and Section 3 of the Clayton Act has not been read literally by the courts. The Supreme Court has concluded that a tying arrangement can exist, and therefore can be treated as illegal *per se* under the Sherman Act and the Clayton Act, only if several criteria are met, including that the seller has economic power in the tying-product market. The Supreme Court has concluded that such economic power is the "essential" characteristic of an illegal tying arrangement under this *per se* rule. These criteria are not specified in the statutory provisions; they have been read into the general antitrust laws by the courts as a matter of economic logic, commercial necessity and common sense.

At the time legislation was introduced in Congress to address bank tie-ins, there was some doubt under the general antitrust laws as to whether "credit" could be a tying

"product." In April 1969, less than one month after such legislation was first introduced, the Supreme Court handed down its decision in *Fortner Enterprises v. United States Steel Corp.* ("*Fortner I*")[7] in which the Court held that credit could be a tying product. As a result of the *Fortner I* decision, the Antitrust Division of the Department of Justice stated to Congress that the need for bank tie-in legislation "may have been reduced. . . ." The Assistant Attorney General for Antitrust stated to Congress: "I have no objection to such an express prohibition. But I do not think it is essential." The Assistant Attorney General further stated to Congress that the proposed bank tie-in legislation "is in general terms analogous to existing antitrust law" and specifically that "[t]o be illegal as a tie-in . . . there must be a showing that 'the seller can exert some power over some of the buyers in the market. . . .'" He made it clear that because such arrangements are illegal *per se*, there does not have to be a showing that an anti-competitive effect resulted from the tie-in. The Assistant Attorney General never suggested that *per se* treatment eliminated the need to show economic power in the tying-product market. Clearly, the bank tying provisions would not "in general terms [be] analogous to existing antitrust law" if bank tie-ins are illegal without proof of economic power in the tying-product market.

The Federal Reserve Board understood in 1970 "that under present antitrust laws, [coercive tying] practices are prohibited where the bank has sufficient market power to force tie-ins on unwilling customers" and the Board did not believe that the bank tying legislation, if enacted, "would materially alter existing law" (quoting a letter from the Federal Reserve Board to Senator Edward Brooke). Board Chairman Arthur Burns stated to Congress his belief that bank tie-ins were already illegal and concluded: "I don't see that much would be accomplished

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[7] 394 U.S. 495 (1969).

by adding a provision with respect to tie-ins." Clearly, the bank tying provisions would "materially alter existing law" if bank tie-ins are illegal without proof of economic power in the tying-product market.

In the bank tying provisions, Congress imposed on bank tie-ins the *per se* rule that is applied to tying arrangements under the general antitrust laws, and, consistent with antitrust tying jurisprudence, economic power in the tying-product market is a prerequisite for a tying arrangement to be illegal *per se*. This conclusion is fully and firmly supported by an understanding of the treatment of tying arrangements under the general antitrust laws and by a complete and careful reading of the very long legislative history of the BHC Act Amendments.

The *contra* position. Certain courts have stated that under the bank tying provisions, unlike under the general antitrust laws, a plaintiff does not have to establish the economic power of a bank in the tying-product market.[8] The Federal Reserve Board has also stated that "a plaintiff in [an] action under section 106 need not show that . . . the seller has market power in the market for the tying product. . . ."[9] Such statements are imprecise or

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8 *See* Part F below.

9 62 Fed. Reg. 9290, 9313 (Feb. 28, 1997). *See* Part H below.

This statement that a Section 106 plaintiff need not show that the seller has market power in the market for the tying product is inconsistent with the statement of the Federal Reserve Board to Congress in 1970 that the bank tying provisions would *not* materially alter the then-existing general antitrust laws (*see* the text accompanying notes 90 and 91 below), which required then and continues to require that the seller have market power in the market for the tying product. *See* Part B below.

The Federal Reserve Board further stated that a plaintiff in an action under Section 106 need not show that "the tying arrangement has had an anti-competitive effect in the market for the tied product" or that "the tying arrangement has had a substantial effect on interstate commerce." 62 Fed. Reg. at 9313. The statement that a Section 106 plaintiff need not show that the tying arrangement has had an anti-competitive effect in the market for the tied product is consistent with the general antitrust laws and with the legislative

incorrect statements of the law and may merely reflect, as discussed in Part B below, the relatively low level of a plaintiff's burden of proof to demonstrate economic power under general antitrust law tie-in decisions leading up to and contemporaneously with the enactment of the BHC Act Amendments, including *Fortner I*.

As discussed in detail in this paper, Congress did not eliminate in the bank tying provisions the requirement that the plaintiff prove that the bank had economic power in the tying-product market. Indeed, the "condition or requirement" language of the bank tying provisions makes clear that a bank must have economic power in the tying-product market to violate such provisions since the imposition of a condition or requirement would only be possible if a bank has such economic power.

A. Categorizing tying conduct as "illegal *per se*" does not eliminate the need to demonstrate economic power in the tying-product market. An understanding of the treatment of tying arrangements under the general antitrust laws is required to understand the scope and requirements of the bank tying provisions of the BHC Act Amendments. The statutory foundation for addressing tying arrangements under the general antitrust laws consists of Section 1 of the Sherman Act, enacted in 1890,[10] and Section 3 of the Clayton Act, enacted in 1914.[11] Section 1 of the Sherman Act provides:

history of the BHC Act Amendments. *See* Parts A and D below. With regard to the statement that a Section 106 plaintiff need not show that the tying arrangement has had a substantial effect on interstate commerce, it is noted that the general antitrust laws require that the tying arrangement affect a not insubstantial volume of commerce in the tied product. *See* Part A below.

[10] 15 U.S.C. § 1.

[11] 15 U.S.C. § 14.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 3 of the Clayton Act provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States. . ., or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 3 of the Clayton Act, unlike Section 1 of the Sherman Act, specifically addresses tying arrangements. Section 3 of the Clayton Act is limited by its terms to transactions involving goods or other commodities; transactions involving services, real estate or other noncommodities, including credit, are covered by Section 1 of the Sherman Act.

The language of the Sherman Act and the Clayton Act, which is general, broad and sweeping, has been given life, commercial application and meaning by decisions of the courts, most particularly the Supreme Court.[12] The above-quoted statutory provisions of the Acts have not been read literally by the courts. Read literally, Section 1 of the Sherman Act would render illegal every contract entered into by private parties. Consequently, courts have limited the scope of Section 1 of the Sherman Act by reading into it a reasonableness standard;

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[12] One antitrust scholar has stated: "As with the Sherman Act, the Clayton Act delegated to the courts the task of giving meaning to the statutory words in light of judicially formulated antitrust policy." 9 Phillip E. Areeda, *Antitrust Law* ¶ 1719b, at 254 (1991). For an in-depth discussion of the evolution and development of the interpretation and application by the courts of the Sherman Act and the Clayton Act with respect to tying arrangements, *see* Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 Minn. L. Rev. 1013 (1985).

courts construe Section 1 of the Sherman Act to prohibit only restraints that "unreasonably" restrict competition.[13] Although the language of the Section 1 of the Sherman Act and Section 3 of the Clayton Act is different, the courts interpret the two Acts as applying a single substantive standard with respect to tying arrangements.[14]

As stated at the outset of this paper, a tying arrangement will be held to be a *per se* violation of Section 1 of the Sherman Act and/or Section 3 of the Clayton Act if *all* of the following criteria are met: (i) two separate products or services are involved; (ii) the sale or agreement to sell one product or service is conditioned on the purchase of another; (iii) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product; and (iv) a not insubstantial amount of interstate commerce in the tied product is affected.[15] Some courts have stated that under the *per se* rule a plaintiff does not have to prove that the tying arrangement had an adverse effect on competition in the tied-product market while other courts have stated that proof of such anti-competitive effect is required.[16]

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[13] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

[14] 9 Phillip E. Areeda, *Antitrust Law* ¶ 1719b, at 254 ("Although their words differ, the two statutes apply a single substantive standard."). *See also Fortner I*, 394 U.S. at 521 (Fortas, J., dissenting, but not on this point) (In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), the Supreme Court "in effect, applied the same standards to tying arrangements under the Sherman Act as under the Clayton Act, on the theory that the anticompetitive effect of a tie-in was such as to make the difference in language in the two statutes immaterial.").

[15] *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12-18 (1984); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1574 (11th Cir. 1991), *reh'g en banc denied*, 946 F.2d 906 (1991), *cert. denied*, 506 U.S. 903 (1992); *Mozart Co. v. Mercedes-Benz*, 833 F.2d 1342, 1345 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); ABA Section of Antitrust Law, *Antitrust Law Developments* at 179.

[16] *See United States v. Microsoft Corp.*, 253 F.3d 34, 84-97 (D.C. Cir.) (*en banc*), *cert. denied*, 534 U.S. 952 (2001). *Compare, e.g., Amey Inc. v. Gulf Abstract & Title, Inc.*,

This paper concludes that the better analysis is that the *per se* rule eliminates the need to prove that a tie-in had an anti-competitive effect in the tied-product market.

In *Jefferson Parish Hospital*, the majority opinion of the Supreme Court, responding to the conclusion of the minority opinion that the *per se* tie-in rule should be abandoned, stated that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'"[17] The majority opinion, however, stated: "Per se condemnation -- condemnation without inquiry into actual market conditions -- is only appropriate if the existence of forcing is probable. . . . Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify per se condemnation."[18]

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758 F.2d 1486, 1503 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986) (proof of anti-competitive effect in the tied-product market is not required under the *per se* rule), *with, e.g., Commodore Plaza v. Saul J. Morgan Enters.*, 746 F.2d 671 (11th Cir.), *cert. denied*, 467 U.S. 1241 (1984) (proof of such anti-competitive effect is required under the *per se* rule). One antitrust scholar has concluded that requiring proof of such anti-competitive effect under the *per se* rule "conflicts with the per se rule, which requires no effects beyond a non-trivial commerce volume. . . ." 9 Phillip E. Areeda, *Antitrust Law* ¶ 1722a, at 286. This scholar added: "The Supreme Court certainly understood that, as have most of the courts speaking of thresholds. . . ." *Id.* The Supreme Court's most recent tying decision, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), did not refer to any requirement of proof of anti-competitive effect in the tied-product market. The discussion in notes 83 and 94 below and in the accompanying text makes clear that in 1969 and 1970 the Justice Department did not view proof of anti-competitive effect in the tied-product market as being a requirement under the *per se* rule.

17 *Jefferson Parish Hospital*, 466 U.S. at 9. *See* note 20 below.

18 *Jefferson Parish Hospital*, 466 U.S. at 15-16. In *Jefferson Parish Hospital*, the Supreme Court identified three examples when application of the *per se* rule is appropriate: (1) when the seller has a patent or similar legal monopoly over the tying product; (2) when the seller's share of the market for the tying product is high; and (3) when the tying product is unique. *Id.* at 16-17.

One commentator has stated that the *per se* rule as it applies to tying arrangements "is a most peculiar per se rule: It appears to exclude only attention to harmful effects (beyond a not insubstantial dollar volume of commerce), for the [Supreme] Court demand[s] proof of power in the tying product . . . and [does] not preclude proof that an otherwise unlawful tie might serve legitimate functions."[19] In practice under the *per se* rule as it applies to tying arrangements, "a tie has been illegal only if the seller is shown to have 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. . . .' Without 'control or dominance over the tying product,' the seller could not use the tying product as 'an effectual weapon to pressure buyers into taking the tied item' so that

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[19] 9 Phillip E. Areeda, *Antitrust Law* ¶ 1701c, at 27. Another commentator has stated: "The *per se* rule against tie-ins is sometimes called a 'soft core' *per se* rule because the plaintiff must define a relevant market and show that the defendant has a certain amount of market power." Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 8.3 n.12 (1985). Two other commentators have stated: "[T]he use of the per se label with respect to tying arrangements is somewhat misleading. The analysis of tying arrangements is considerably more complex than that employed in the typical price-fixing or horizontal market allocation case." William M. Hannay and William A. Montgomery, *Tying Arrangements: Practice Under Federal Antitrust, Patent and Banking Law* A-7 (2002). One court has stated:

> The [per se] rule in tying cases is not, however, like other, truly per se rules in antitrust law. For example, naked horizontal price fixing is condemned with no inquiry at all into market structure or the activity's actual effect or possible justifications. The rationale for true per se rules is that the challenged conduct has so little chance of being economically beneficial and so great a likelihood of being economically harmful that inquiry into market structure and real world effect is not worth the cost. The "per se" rule against tying goes only halfway, however: the inquiry into tying product market structure . . . is still required, but if the defendant is found to have market power there, the plaintiff is, in theory, relieved of proving actual harm to competition and of rebutting justifications for the tie-in.

Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 477 (3d Cir.), *cert. denied*, 506 U.S. 868 (1992).

any restraint of trade would be 'insignificant.' The [Supreme] Court has never been willing to say of tying arrangements, as it has of price-fixing, division of markets and other agreements subject to *per se* analysis, that they are always illegal, without proof of market power or anticompetitive effect."[20]

Although tying claims under the general antitrust laws have typically been brought under the *per se* rule, the Supreme Court has made it clear that a plaintiff that is unable to meet the requirements of the *per se* rule may still prove a violation under a more expansive "rule of reason" analysis.[21] In *Jefferson Parish Hospital*, the Supreme Court found that the defendant did not have sufficient economic power in the market for the tying product to force unwanted purchases of the tied product and thus concluded that the *per se* rule was inapplicable to the tying arrangement; the Court then analyzed the arrangement under the "rule of reason" to determine whether there was any actual adverse effect on competition in the tied-product market, which the Court did not find.[22] Under the rule of reason, the plaintiff must prove, "on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general principles of the Sherman Act have been violated."[23] The plaintiff must establish under

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[20] Quoting *Jefferson Parish Hospital*, 466 U.S. at 34 (concurring opinion), which quotes *Northern Pacific Railway Co.*, 356 U.S. at 6. This opinion, while concurring in the judgment of the majority of the Supreme Court, concluded that "[t]he time has therefore come to abandon the '*per se*' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have." *Jefferson Parish Hospital*, 466 U.S. at 35 (concurring opinion).

[21] *See Fortner I*, 394 U.S. at 500; *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 612 n.1 (1977) ("*Fortner II*"); *Jefferson Parish Hospital*, 466 U.S. at 29-31. *See also* note 87 below.

[22] *Jefferson Parish Hospital*, 466 U.S. at 31.

[23] *Fortner I*, 394 U.S. at 500.

the rule of reason that the tying arrangement "unreasonably restrained competition" and "had an actual adverse effect on competition" in the tied-product market.[24]

B. A seller must have economic power in the tying-product market for a tie-in to be illegal *per se*. The requirement under the general antitrust laws that a seller have economic power in the tying-product market for a tying arrangement to be illegal under the *per se* rule ("illegal *per se*") is well-established in the Supreme Court's jurisprudence.[25] The Supreme Court has stated:

> The common core of the adjudicated unlawful tying arrangement is the forced purchase of a second distinct commodity with a desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market.[26]
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> [Tie-ins deny] competitors free access to the market for the tied product, not because the party imposing the tying requirement has a better product or a lower price, but because of his *power or leverage* in another market.[27]

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24 *Jefferson Parish Hospital*, 466 U.S. at 29, 31.

25 In Department of Justice, Antitrust Division, *Vertical Restraint Guidelines*, 50 Fed. Reg. 6272-73 (1985) (the "*Vertical Restraint Guidelines*"), the Department of Justice has listed as the Supreme Court's first requirement for an unlawful tying arrangement that "[t]he seller has market power in the tying market. . . ." *Id.* at ¶ 5.2.

26 *Times-Picayune Publishing Co.*, 345 U.S. 594, 614 (1953).

27 *Northern Pacific Railway Co.*, 356 U.S. at 6 (emphasis added). At the outset of his two-volume treatment of tying arrangements in his multi-volume treatise on antitrust law, Phillip Areeda writes: "The original, continuing, and most fundamental concern about tying is 'leverage.' . . . 'Leverage' is loosely defined . . . as a supplier's power to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product." 9 Phillip E. Areeda, *Antitrust Law* ¶ 1700d, at 6 (quoting *Jefferson Parish Hospital*, 466 U.S. at 14 n.20). The term "leverage" is synonymous with economic power. *See Jefferson Parish Hospital*, 466 U.S. at 14 n.20 ("This type of market power has sometimes been referred to as 'leverage.'"). Phillip Areeda writes further: "[T]he rationale for requiring proof of power over the tying product must be that no 'tie-in' can occur or cause any detrimental effect -- least of all the historically feared 'leveraged' extension of power to the tied market -- without it." 10 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 1734a, at 39 (1996). "[P]ower is a precondition that must be satisfied before detriments, if any, can flow from

> [Tie-ins] are unreasonable in and of themselves whenever a party has sufficient *economic power* with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected.[28]

> Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.[29]

> [T]he vice of tying arrangements lies in the *use of economic power* in one market to restrict competition on the merits in another. . . .[30]

> A tie-in contract may have . . . undesirable effects when the seller, by virtue of his position in the market for the tying product, has *economic leverage* sufficient to induce his customers to take the tied product along with the tying product.[31]

> [T]he proper focus of concern is whether the seller has the *power to . . . impose* burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.[32]

> There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the

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an illegal tie." *Id.* at ¶ 1734b5, at 46. Judge Frank Easterbrook, who sits on the Seventh Circuit Court of Appeals (but who was not on the panel in *Davis v. First National Bank of Westville* discussed in Parts F and G below), has stated: "Firms that lack [market] power cannot injure competition no matter how hard they try." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 20-21 (1984).

[28] *Northern Pacific Railway Co.*, 356 U.S. at 6 (emphasis added), citing *International Salt Co. v. United States*, 332 U.S. 392 (1947) (in *International Salt*, the Supreme Court utilized the *per se* rule in concluding that the subject tying arrangement violated both Section 1 of the Sherman Act and Section 3 of the Clayton Act), and quoted in *Fortner I*, 394 U.S. at 499, and in *United States v. Loew's*, 371 U.S. 38, 45 (1962).

[29] *Northern Pacific Railway Co.*, 356 U.S. at 6.

[30] *Id.* at 11 (emphasis added).

[31] *Loew's*, 371 U.S. at 45 (emphasis added).

[32] *Fortner I*, 394 U.S. at 504 (emphasis added).

> *use of power* over one product to attain power over another, or otherwise to distort the freedom of trade and competition in the second product.[33]

More recently, in *Jefferson Parish Hospital*, the Supreme Court stated:

> Our cases have concluded that *the essential characteristic of an invalid tying arrangement* lies in the seller's *exploitation of its control* over the tying product *to force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.[34]

The Supreme Court stated that "[a]ccordingly, we have condemned tying arrangements when the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market."[35] The Supreme Court concluded: "*Only if* [buyers] are forced to purchase [seller's] services as a result of the [seller's] *market power* would the arrangement have anticompetitive consequences."[36]

In the Supreme Court's most recent tying decision, *Eastman Kodak Co. v. Image Technical Services, Inc.*,[37] the Supreme Court stated that a tying arrangement is unlawful "if the seller has 'appreciable economic power' in the tying product market. . . ."[38] The Supreme Court in *Kodak* defined market power as "the power 'to force a purchaser to do something that he would not do in a competitive market.'"[39]

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33 *Id.* at 512 (White, J., dissenting, but not on this point) (emphasis added; footnotes omitted).

34 *Jefferson Parish Hospital*, 466 U.S. at 12 (emphasis added). *See also* 10 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 1734a, at 39 ("Power over the tying product is thus a prerequisite for per se condemnation. . . .").

35 *Jefferson Parish Hospital*, 466 U.S. at 13-14.

36 *Id.* at 25 (emphasis added).

37 504 U.S. 451 (1992).

38 *Id.* at 462, quoting *Fortner I*, 394 U.S. at 503.

39 *Eastman Kodak Co.*, 504 U.S. at 464, quoting *Jefferson Parish Hospital*, 466 U.S. at 14.

If the seller does not have market power in the tying-product market, a tying arrangement cannot have anti-competitive consequences.[40] The concurring opinion in *Jefferson Parish Hospital* well summarized the analysis:

> [Tying] poses no threat of economic harm[] unless the two markets in question [the tying-product market and the tied-product market] and the nature of the two products tied satisfy three threshold criteria.

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40 *See* Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 8.3 ("[P]ackage sale by a seller without market power must be efficiency creating or else the seller could not successfully sell its product this way."); 10 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 1734d, at 54 ("[W]ithout power in the first [tying] market, no harm to competition in the tied market can occur." Phillip Areeda has concluded that this is the case both when some sellers offer the tying product separately or when all sellers offer the tying product and the tied product together only. In the latter case, "it remains true (apart from monopoly) that no individual firm has power over price. Such universal tying generates no concern in competitive markets." *Id.* at 53. In such case, "[n]o seller of the tying product can charge more than the competitive price for it. Nor -- absent an express cartel -- can all the sellers together do so, for they are too numerous for tacit price coordination." *Id.* Phillip Areeda reasoned:

> When all the perfectly competitive producers of *A* package it with *B*, the *B* market must also be perfectly competitive. Hence none of the long- or short-run evils associated with foreclosure of the tied market can occur. Nor can these ties exploit customers, for defendants have no power to exploit in a perfectly competitive market.
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> * * *
>
> However, were it feasible to satisfy them, some producer could expand its sales of product *A* by offering it separately and would have every incentive to do so in this perfectly competitive market. Hence it must be that demand for product *A* separately at the price that customers are willing to pay provides insufficient revenue to make it profitable for any producer to offer that product separately.
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> * * *
>
> [W]e can see not only that power is completely absent in our hypothetical but also that the character of the market dictates the postulated absence of consumer choice.

Id. at 54 (footnotes omitted).

> First, *the seller must have power in the tying product market. Absent such power tying cannot conceivably have any adverse impact in the tied-product market*, and can only be pro-competitive in the tying product market. If the seller of flour has no market power over flour, it will gain none by insisting that its buyers take some sugar as well.[41]

In *Fortner I*, the Supreme Court stated that tie-ins are "unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."[42] The Supreme Court stated that when such prerequisites are met, "no specific showing of unreasonable competitive effect is required."[43] The Supreme Court's decision in *Fortner I*, which was considered to be the relevant standard under the general antitrust laws by Congress at the time of the enactment of Section 106(b)(1) of the BHC Act Amendments, has been described as "the zenith of the [Supreme] Court's attempt to reduce the plaintiff's burden of proof on market power."[44] Indeed, in his dissenting opinion in

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[41] *Jefferson Parish Hospital*, 466 U.S. at 37-38 (concurring opinion) (emphasis added; footnotes omitted). In *Standard Oil Co. of California v. United States*, 337 U.S. 293, 306 (1949), the Supreme Court reasoned that in a tie-in arrangement "*only* [the seller's] control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter [the arrangement]." (Emphasis added.)

The other two threshold criteria identified in the concurring opinion in *Jefferson Parish Hospital* are that there must be a substantial threat that the tying seller will acquire market power in the tied-product market, and that there must be a coherent economic basis for treating the tying and tied products as distinct. *Jefferson Parish Hospital*, 466 U.S. at 38-39 (concurring opinion).

[42] *Fortner I*, 394 U.S. at 499, citing *International Salt*. *See also Northern Pacific Railway Co.*, 356 U.S. at 11 (it is enough if there is "sufficient economic power to impose an appreciable restraint on free competition in the tied product").

[43] *Fortner I*, 394 U.S. at 498.

[44] Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 Minn. L. Rev. at 1045. *See also* Benjamin J. Klebaner, *Credit Tie-Ins: Where Banks Stand After the Fortner Decisions*, 95 Banking L.J. 419, 442 (1978) ("The 1969 *Fortner I*

Fortner I, Justice White stated that "the logic of the majority's opinion does away in practice with the requirement of showing market power in the tying market while retaining that requirement in form. . . ."[45] Justice White deplored the "complete evisceration of the requirement that market power in the tying product be shown before a tie-in becomes illegal under § 1 [of the Sherman Act]."[46]

In *Fortner I*, the standard set forth by the Supreme Court for determining the existence of market power was "whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market."[47] However, the Supreme Court stated that a seller's "unique economic advantages over his competitors" can be reflected in "uniquely and unusually advantageous terms," thereby permitting an *inference* of market power in the tying-product market.[48]

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majority opinion was viewed by some as illustrative of the post-World War II trend toward decreasing the threshold amount of economic power requisite to finding a violation."); Donald A. Leonard, *Unfair Competition Under Section 106 of the Bank Holding Company Act: An Economic and Legal Overview of "Conditional Transactions,"* 94 Banking L.J. 773, 784 (1977) ("The *Fortner* [*I*] case illustrates the evolving trend of the [Supreme] Court over the years toward reducing the amount of economic power which need be shown over the tying product.").

45 *Fortner I*, 394 U.S. at 511 (White, J., dissenting).

46 *Id.* at 518.

47 *Id.* at 504.

48 *Id.* at 505. The Supreme Court quoted (*id.* at 503) from its decision in *Loew's*, 371 U.S. at 42 (1962): "Even absent a showing of market dominance, the crucial economic power may be *inferred* from the tying product's desirability to consumers or from uniqueness in its attributes." (Emphasis added.) *See also* 10 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 1738f2, at 109, which states that "the Supreme Court was ready to infer power from the ties themselves or perhaps from above-market prices for the tied product in *Northern Pacific* and *Fortner I*. . . ." As discussed in the text below, "[s]uch inferences became obsolete once the Supreme Court came in *Fortner II* and *Jefferson Parish Hospital* to

Since the Supreme Court's decision in *Fortner I*, however, the prevailing economic analysis has recognized that tying arrangements do not have the automatic negative impact that was once assumed. Indeed, in *NCAA v. Board of Regents of the University of Oklahoma*,[49] the Supreme Court stated: "[W]hile the Court has spoken of a '*per se*' rule against tying arrangements, it has also recognized that tying may have pro-competitive justifications that make it inappropriate to condemn without considerable market analysis."[50]

As a result of this improved understanding of tying arrangements, the market power showing that a plaintiff must make under the general antitrust laws has become considerably more demanding since the decision of the Supreme Court in *Fortner I*. In 1977, in *Fortner II*, the Supreme Court required a showing that the seller has the power to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.[51] The only "kind of uniqueness" that was relevant to the Supreme Court's analysis in *Fortner II* was that where "the seller has some advantage not shared by his competitors in the market for the tying product" that gives the seller the power, within the market for the tying product, "to raise prices or to require purchasers to accept burdensome terms that

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demand genuine proof of power in the market for the tying product as a prerequisite to 'per se' condemnation." *Id.* at ¶ 1739a, at 114 (footnote omitted).

49 468 U.S. 85 (1984).

50 *Id.* at 104. *See also Vertical Restraint Guidelines* at ¶ 5.1 ("Tying arrangements often serve pro-competitive or competitively neutral purposes."); 9 Phillip E. Areeda, *Antitrust Law* ¶¶ 1703-1718, at 32-253; Herbert Hovenkamp, *Economics and Federal Antitrust Law* §§ 8.1-8.10.

51 *Fortner II*, 429 U.S. at 620. One antitrust scholar has stated that "rulings about power during the period when the power requirement was merely nominal -- from *International Salt* in 1947 -- must be approached with caution after 1977, when the nominal requirement became a real one under *Fortner II*." 10 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 1731d, at 5-6 (footnotes omitted).

could not be exacted in a completely competitive market."[52] As discussed above, in *Jefferson Parish Hospital*, the Supreme Court held that the *per se* rule for tying cases under the general antitrust laws requires a plaintiff to show that the defendant had sufficient market power in the tying-product market to force the plaintiff to purchase the tied product; only when forcing is probable is *per se* condemnation appropriate.[53] The Supreme Court stated: "When the seller's share of the market is high, or when the seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate."[54] In *Jefferson Parish Hospital*, the Supreme Court held that because the defendant only had a 30 percent market share, it lacked the "kind of dominant market position" to trigger the *per se* rule and therefore "further inquiry into actual competitive conditions" was necessary under the rule of reason.[55]

One noted antitrust scholar, in summarizing the development of the market power showing for tying arrangements under the *per se* rule, has stated that

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52 *Fortner II*, 429 U.S. at 620 (footnote omitted).

53 *Jefferson Parish Hospital*, 466 U.S. at 15-16. *See also Allen-Myland, Inc. v. International Business Machines Corp.*, 33 F.3d 194, 201 (3d Cir.), *cert. denied*, 513 U.S. 1066 (1994), where the Third Circuit Court of Appeals, citing *Jefferson Parish Hospital*, stated: "If the defendant is found to have sufficient market power, then the tie may be a 'per se' violation of the Sherman Act."

54 *Jefferson Parish Hospital*, 466 U.S. at 17.

55 *Id.* at 26-27. *See also, e.g., Greene County Memorial Park v. Behn Funeral Homes, Inc.*, 797 F. Supp. 1276, 1287 (W.D. Pa. 1992), *aff'd*, 993 F.2d 876 (3d Cir. 1993), *cert. denied*, 510 U.S. 866 (1993) (market share of from 33 percent through 43 percent in the tying-product market is insufficient to establish a tying claim as a *per se* violation). In ABA Section of Antitrust Law, *Antitrust Law Developments* at 196, it is stated: "Since *Jefferson Parish*, no court has inferred the requisite market power from a market share below 30 percent."

> *International Salt* [1947], which promulgated per se illegality for tying, seemed indifferent to whether the defendant had power in the market for the tying product. The [Supreme] Court did explicitly require power over the tying product in *Northern Pacific* [1958], although that requirement was not taken seriously until the late 1970s. Beginning with *Fortner II* [1977] and continuing in *Jefferson Parish* [1984] and *Kodak* [1992] the Supreme Court insisted that the plaintiff prove such power.[56]

This scholar further stated that from the 1940s through the 1960s the Supreme Court was largely indifferent to proof of power in the tying-product market, ignoring it in *International Salt*,[57] and, although using the power language,[58] accepting very little proof of power in *Northern Pacific*,[59] *Loew's*[60] and *Fortner I*; the Supreme Court changed the course of tying law in *Fortner II* and *Jefferson Parish Hospital*.[61]

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56 10 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 1733a, at 15-16 (footnotes omitted).

57 Without further analysis, the Supreme Court concluded in *International Salt* that "the tendency of the [tying] arrangement to accomplishment of monopoly seems obvious." 332 U.S. at 396.

58 *See* the text accompanying notes 27-33 above. One court stated in 1985: "[I]ncreasingly, the *per se* rule has yielded to a redefinition of market power and more searching market analysis. Plaintiffs insist that the law has remained unchanged. Perhaps that it is so when we look only to verbal formulations. In that sense, all continue to worship at the same altar. The beliefs of the worshipers have, however, perceptively changed." *Martino v. McDonald's System, Inc.*, 625 F. Supp. 356, 360 (N.D. Ill. 1985).

59 In *Northern Pacific*, the Supreme Court stated that "the defendant possessed substantial economic power by virtue of its extensive landholdings," that "common sense makes evident that this particular land was often prized" and that the "very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power. . . ." 356 U.S. at 7-8.

60 In *Loew's*, the Supreme Court stated that "the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." 371 U.S. at 45. The Court added: "[I]t should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market." *Id.* at 45 n.4. After the Supreme Court's decision in *Loew's*, one commentator stated that the "next logical step appeared to be the de facto elimination of the market

C. Section 106 is an antitrust statute. The Federal Reserve Board has recently stated that "Congress modeled section 106 on the anti-tying principles developed under the general antitrust laws (the Sherman and Clayton Acts). . . ."[62] Section 106(b)(1) is "intended to provide specific statutory assurance that the use of the economic power of a bank will not lead to a lessening of competition or unfair competitive practices."[63] Section 106(b)(1) is designed "to prohibit anti-competitive practices. . . ."[64] One Senator stated that the provisions of proposed legislation that were ultimately enacted as Section 106(b)(1) are an "explicit statement of the present status of antitrust policy as it applies to banks."[65]

The Seventh Circuit Court of Appeals has stated that Section 106(b)(1) proscribes "arrangements that traditionally have been targets of the antitrust laws because of their potentially anticompetitive effects."[66] The Eighth Circuit Court of Appeals has stated that the

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power criterion. . . ." Milton Handler, *Antitrust: 1969*, 55 Cornell L. Rev. 161, 163 (1970).

61 10 Phillip E. Areeda *et al.*, *Antitrust Law* 1733g, at 38.

62 Federal Reserve Board, *Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970 (Proposed interpretation and supervisory guidance with request for comment)*, 68 Fed. Reg. 52024, 52027 (Aug. 29, 2003) (the "*Proposed Interpretation*").

63 Quoting S. Rep. No. 91-1084 (1970) (the "*Senate Report*"), at 3.

64 Quoting the *Senate Report* at 17. *See also Continental Bank of Pennsylvania v. Barclay Riding Academy, Inc.*, 93 N.J. 153, 167, *cert. denied*, 464 U.S. 994 (1983) (Practices "are violative of the Act [Section 106(b)(1)] only if they are anti-competitive.").

65 116 *Cong. Rec.* S15701 (daily ed. Sept. 16, 1970) (statement of Sen. Gary Hart). Senator Hart stated further that such provisions are an "explicit congressional definition of antitrust policy in this area." *Id.*

66 *Davis v. First National Bank of Westville*, 868 F.2d 206, 208 (7th Cir.), *cert. denied*, 493 U.S. 816 (1984).

anti-tying restrictions of the Home Owners' Loan Act,[67] which are applicable to savings associations and "are virtually identical to those applicable to banks under Section 106[,]"[68] "are antitrust restraints specific to the field of commercial banking and therefore must be applied in a manner consistent with Sherman Act and Clayton Act principles."[69] Another court has stated that Section 106(b)(1) "is not a general regulatory provision. . . ."[70]

The conclusion that Section 106(b)(1) is an antitrust statute is further supported by the provisions of Section 106(c) of the BHC Act Amendments,[71] which provide that the Department of Justice may institute proceedings in equity to prevent and restrain violations of Section 106, and by the provisions of Section 106(e) of the BHC Act Amendments,[72] which provide that any person injured in its business or property by reason of a violation of Section 106(b)(1) may bring a civil action for damages and shall be entitled to recover three times the amount of the damages ("treble damages") and the cost of the suit. These are the same enforcement procedures and remedies as under the Sherman Act and the Clayton Act.[73] One

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[67] 12 U.S.C. § 1464(q).

[68] Quoting the *Proposed Interpretation*, 68 Fed. Reg. at 52027.

[69] *Rayman v. American Charter Federal Savings & Loan Assn.*, 75 F.3d 349, 356 (8th Cir. 1996).

[70] *Freidco of Wilmington, Delaware, Ltd. v. Farmers Bank of the State of Delaware*, 499 F. Supp. 995 (D. Del. 1980).

[71] 12 U.S.C. § 1973.

[72] 12 U.S.C. § 1975.

[73] Under Section 4 of the Sherman Act (15 U.S.C. § 4), the Department of Justice, acting through the Antitrust Division, has exclusive federal governmental authority to enforce the Sherman Act, and under Section 15 of the Clayton Act (15 U.S.C. § 25), the Department of Justice has authority to enforce the Clayton Act. Section 4 of the Clayton

antitrust scholar has stated: "Few legal rules are more firmly rooted in history than treble damages recovery for victims of antitrust violations."[74]

Clearly, Section 106(b)(1) is an antitrust statute that addresses the same anti-competitive practices that are addressed by Section 1 of the Sherman Act and Section 3 of the Clayton Act. Section 106(b)(1) does not address concerns outside the competitive sphere, such as concerns regarding inequitable or unfair practices, consumer protection, interest rates and other loan terms, unsafe and unsound banking practices, or concerns raised in other regulatory contexts.[75] Other laws, for example Sections 23A and 23B of the Federal Reserve Act, as amended, address such other concerns.

D. The full legislative history of Section 106(b)(1) evidences that economic power in the tying-product market is required to violate the bank tying provisions. In passing the bank tying provisions of Section 106(b)(1) of the BHC Act Amendments, Congress did not eliminate the requirement that a bank have economic power in the tying-product market. Indeed, the "condition or requirement" language of the bank tying provisions makes clear that a

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Act (15 U.S.C. § 15(a)) provides for such treble damages for violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act.

74 Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 15.6.

75 One commentator has stated:

> [T]he consumer protection concerns raised by tie-ins involve significantly different issues than those raised by potentially anticompetitive ties. Different explanations of tying practices are involved; different evidence is needed to test the various explanations; and different legal remedies are likely to be appropriate if a problem is found to exist.

Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 Boston U.L. Rev. 661, 700 (1982).

bank must have economic power in the tying-product market to violate such provisions since the imposition of a condition or requirement would only be possible if a bank has such economic power. In the bank tying provisions, Congress imposed on bank tie-ins the *per se* rule that is applied to tying arrangements under the general antitrust laws, which as discussed in Part B above requires that economic power in the tying-product market be established for a tying arrangement to be illegal *per se*. Thus, once an arrangement is found to be a tie-in, which requires a finding that the bank has economic power in the tying-product market, the tie-in is then treated as a *per se* violation such that the *effect* of such an arrangement is deemed to be anti-competitive without further proof. This conclusion is fully and firmly supported by a complete and careful reading of the very long legislative history of the BHC Act Amendments, which is discussed in detail below.

On February 17, 1969, H.R. 6778 was introduced in the United States House of Representatives (the "House"). This first version of H.R. 6778 provided:

> SEC. 22. (a)(1) The prohibitions of this subsection apply to any transaction
>
> (A) whose effect may be to substantially lessen competition or tend to create a monopoly in any type of credit or property transactions or in any type of services,[76] and
>
> (B) which is engaged in by an insured bank, a bank holding company, or any subsidiary of a bank holding company, all of which are referred to hereinafter in this subsection as institutions.
>
> (2) An institution to whose transactions the prohibitions of this subsection apply may not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition, agreement, or understanding

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[76] The language of Section 22(a)(1)(A) of this first version of H.R. 6778 is identical for the purpose of this discussion to the "substantially lessen competition" language in Section 3 of the Clayton Act.

> (A) that the customer shall obtain some other credit, property, or service from the institution itself or, if the institution is a bank holding company or subsidiary of a bank holding company, from either that company or any subsidiary of that company; or
>
> (B) that the customer shall not obtain credit, property, or services from a competitor of the institution itself or, if the institution is a bank holding company or a subsidiary of a bank holding company, from a competitor of either that company or any subsidiary of that company.[77]

In introducing this bill, Representative Wright Patman stated that among the important issues involved in the proposed legislation is "[w]hether additional antitrust safeguards such as prohibitions against tie-in arrangements . . . should apply to all insured banks, only to bank holding companies, or not be enacted into law at all."[78]

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77 H.R. 6778, 91st Cong., 1st Sess. 6-7, Sec. 22(a) (Feb. 17, 1969). These provisions were subsequently deleted from H.R. 6778 (the provisions of this first version of H.R. 6778 were deleted in their entirety by the House Committee on Banking and Currency which substituted a new text in H.R. 6778, 91st Cong., 1st Sess. (July 23, 1969)), and H.R. 6778 as passed by the House on November 5, 1969, and sent to the United States Senate (the "Senate") contained no provision addressing coercive bank tie-ins. *See* H.R. 6778, 91st Cong., 1st Sess. (Nov. 6, 1969); H.R. Rep. No. 91-387, at 17-18 (1969) (the "*House Report*") (referring to the deletion of "new antitrust provisions"). The Senate Committee on Banking and Currency replaced all the provisions of H.R. 6778 as passed by the House with new provisions, including provisions that addressed coercive bank tie-ins. *See* H.R. 6778, 91st Cong., 2d Sess. (Aug. 10, 1970). Such provisions in the Senate version of H.R. 6778 were amended on the Senate floor and ultimately were enacted as Section 106(b)(1) of the BHC Act Amendments.

The provisions of Section 106(b)(1) as enacted are very similar to the above-quoted provisions of Section 22(a)(2) of the first version of H.R. 6778. The only differences as they relate to this discussion are that Section 22(a)(1)(A) of the first version of H.R. 6778 included the "substantially lessen competition" language whereas Section 106(b)(1) does not include this language, and Section 22(a)(1)(B) included bank holding companies and nonbank affiliates thereof as tying-product parties whereas Section 106(b)(1) only includes banks as tying-product parties.

78 *Bank Holding Company Act Amendments: Hearings on H.R. 6778 Before the House Comm. on Banking and Currency*, 91st Cong., 1st Sess. (1969) (the "*House Hearings*"), at 3 (Apr. 15, 1969 proceedings).

On March 24, 1969, H.R. 9385 was introduced in the House. This bill, which was referred to as the "Administration Bill," provided:

> SEC. 3. (a) No bank holding company or subsidiary of a bank holding company may in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition, agreement, or understanding --
>
> > (A) that the customer shall obtain some other credit, property, or service from the bank holding company or subsidiary of the bank holding company; or
> >
> > (B) that the customer shall not obtain credit, property, or services from a competitor of the bank holding company or subsidiary of the bank holding company.[79]

At the time H.R. 9385 and the first version of H.R. 6778 were introduced, there was some doubt under the general antitrust laws as to whether "credit" could be a tying "product" because it was not clear that market power over credit -- which is not a good or other commodity subject to Section 3 of the Clayton Act -- could support a tie-in charge.[80] Accordingly, H.R. 9385 and the first version of H.R. 6778 included the above-quoted provisions with respect to credit extended by (and other products and services of) banks and their affiliates. On April 7, 1969, less than one month after the introduction of H.R. 9385, the Supreme Court

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79 H.R. 9385, 91st Cong., 1st Sess. 12-13, Sec. 3(a) (March 24, 1969). On the same day, an identical bill, S. 1664, was introduced in the Senate. S. 1664, 91st Cong., 1st Sess. (March 24, 1969). The provisions of Section 106(b)(1) as enacted are very similar to these provisions of Section 3(a) of both H.R. 9385 and S. 1664. The only difference as it relates to this discussion is that Section 3(a) of these Administration Bills would include bank holding companies and nonbank affiliates thereof as tying-product parties whereas Section 106(b)(1) only includes banks as tying-product parties.

80 *See House Hearings* at 95 (quoted in the text accompanying note 82 below) (Apr. 17, 1969 proceedings); *One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, S. 1211, S. 1664, S. 3823, and H.R. 6778 Before the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. (1970) (the "*Senate Hearings*"), at 260 (letter dated June 8, 1970) (quoted in the text accompanying note 88 below).

handed down its *Fortner I* decision in which the Court held that credit could be a tying product under Section 1 of the Sherman Act (the Court otherwise applied the same substantive standards of Section 3 of the Clayton Act). Given the Supreme Court's holding in *Fortner I*, the Department of Justice recognized that "both the administration bill and the antitrust law [as it then existed after *Fortner I*] would provide remedies against express tie-ins involving banking services. See *Fortner Enterprises, Inc. v. United States Steel Corp.,* Oct. Term 1968, No. 306 (decided April 7, 1969)."[81] Assistant Attorney General Richard McLaren, the head of the Antitrust Division of the Department of Justice, stated:

> Now let me turn to tie-ins between credit and other services which might be offered by a bank holding company. Both the administration bill [H.R. 9385] and H.R. 6778 contain provisions which would outlaw express tie-ins between the products offered by a bank holding company or its affiliates. The need for such a provision may have been reduced by the Supreme Court's very recent decision in *Fortner Enterprises, Inc. v. U.S. Steel Corp.* There the Court made clear that the Sherman Act would reach tie-ins between financing and some other product. . . . Prior to the *Fortner* decision, there was some doubt as to whether *market power in the supply of money* -- which is entirely fungible -- could support a tying charge. The law is now clear beyond doubt.[82]

In a written response to questions from Representative Patman regarding H.R. 9385 and the first version of H.R. 6778, Assistant Attorney General McLaren made the following statements:

> [Question] 7. Isn't insurance an obvious ti-in [sic] (in the *Fortner* decision sense) to bank credit?
>
> [Answer] To be illegal as a tie-in an agreement must involve two distinct products or services, in which obtaining one (the "tying" item) is conditioned on taking the other (the "tied" item). *In addition, there must be a showing that "the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market."*

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[81] *House Hearings* at 93 n.1 (Apr. 17, 1969 proceedings).

[82] *Id.* at 95 (emphasis added; citation omitted) (Apr. 17, 1969 proceedings).

(*Fortner v. U.S. Steel*, Slip Opinion, pp. 7-8.) Therefore, it would be illegal under *Fortner* for a bank *with such power over credit* to condition the grant of credit on the purchase of insurance.

* * *

[Question] 10. Therefore, the question of whether credit can be illegally used in a tie-in arrangement is still a controversial one in terms of the coverage of present law. In view of the above, you didn't mean to imply in your formal statement of last Thursday that there was no need for a tie-in provision in this legislation, either in the version of the Administration proposal [H.R. 9385] or in H.R. 6778?

[Answer] No. What I said was that "(t)he need for such a provision may have been reduced" by the *Fortner* decision. Even though the Court was closely divided on the issues in the case, all the Justices apparently agreed on the basic point that money or credit may be a tying market. This point is very unlikely to be reversed.

[Question] 11. Don't you believe that the serious dangers of tie-ins in connection with the extension of credit by bank holding companies is such that Congress should explicitly prohibit them in the banking laws?

[Answer] *I have no objection to such an express prohibition. But I do not think it is essential.*

* * *

[Question] 20. What is the difference between the Administration's proposal for prohibiting tie-in arrangements and the anti tie-in provisions of H.R. 6778?

[Answer] H.R. 6778 requires a showing that the "effect [of the tie-in] may be to substantially lessen competition or tend to create a monopoly in any type of credit or property transactions or in any type of services. . . ." Tie-ins of credit meeting this standard would be covered by the *Fortner* decision, which makes clear that tie-ins are illegal *per se* without proof of injury to competition.[83] The

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83 As discussed in Part B above (*see* the text accompanying notes 42 and 43 above), in *Fortner I*, the Supreme Court held that "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected," a tie-in arrangement is illegal *per se* and "no specific showing of unreasonable competitive effect is required." *Fortner I*, 394 U.S. at 498-499. The dissenting opinion in *Kodak* described the Supreme Court's *per se* rule condemning tying arrangements as follows: "Where the conditions precedent to application of the rule are met, *i.e.*, where the tying arrangement is backed up by the defendant's market power in the 'tying' product, the arrangement is adjudged in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, without *any* inquiry into the practice's actual effect on competition and consumer welfare."

Kodak, 504 U.S. at 487 (Scalia, J., dissenting, but not on this point) (emphasis in original). *See also Northern Pacific Railway Co.*, 356 U.S. at 5-6; *International Salt*, 332 U.S. at 396. It is this "proof of injury to competition" language that the Administration Bill would specifically exclude from the bank tie-in statutory provisions.

As discussed in Part A above, the general antitrust laws regarding tie-ins derive from the Supreme Court's application of Section 1 of the Sherman Act and Section 3 of the Clayton Act. Section 3 of the Clayton Act prohibits a tying condition "where the effect of . . . such condition . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." For the purpose of this discussion, such language of Section 3 of the Clayton Act is identical to the language of Section 22(a)(1)(A) of the first version of H.R. 6778 (*see* note 76 above and the accompanying text). It would appear from this statutory language of Section 3 of the Clayton Act that an element of a plaintiff's tie-in case under the Clayton Act would be a showing that the effect of the tying arrangement has been to "substantially lessen competition" in the tied-product market. The Federal Reserve Board, at an early stage of the legislative history of the BHC Act Amendments, and others believed that such a showing of anti-competitive effect would be required under Section 3 of the Clayton Act as well as under the provisions of Section 22(a)(1)(A) of the first version of H.R. 6778 (the "Patman Bill"). *See, e.g., House Hearings* at 200 (Apr. 18, 1969 proceedings), where Board Chairman William McChesney Martin, Jr., stated: "We prefer the language of H.R. 6778 [the Patman Bill] to that of H.R. 9385 [the Administration Bill] on this point, since H.R. 6778 would retain the traditional tests of anticompetitive effects. . . ." *See also Senate Hearings* at 890 (included in May 27, 1970 proceedings), where a paper prepared by an economics professor stated that "passage of the Administration provision would make tie-ins a per se offense. . . ," and (in a footnote to such statement, citing the above-quoted statement of Board Chairman Martin), stated that "[t]he Board of Governors (rightly) prefer the Clayton Act approach of Rep. Patman's bill." *Id.* at 890 n.63. It is important to understand that such reading of Section 3 of the Clayton Act is incorrect; the "substantially lessen competition" language of Section 3 of the Clayton Act has been read out of the statute. *See* William M. Hannay and William A. Montgomery, *Tying Arrangements: Practice Under Federal Antitrust, Patent and Banking Law* at A-3 n.5 ("The 'substantially lessen competition' language of § 3 [of the Clayton Act] has been effectively eliminated. . . ."), A-23. This explains Assistant Attorney General McLaren's statement that tie-ins meeting the "substantially lessen competition" standard included in the first version of H.R. 6778 (the Patman Bill) would be covered by the *Fortner I* decision. This conclusion is confirmed in the Assistant Attorney General's response to Question 21 (quoted in the text below) in which he stated that the "injury to competition" (*i.e.*, the "substantially lessen competition") criteria "are not essential elements to an antitrust case against a tie-in." As discussed in note 14 above and the accompanying text, the courts interpret Section 1 of the Sherman Act and Section 3 of the Clayton Act as applying a single substantive standard with respect to tying arrangements. In the *Proposed Interpretation*, the Federal Reserve Board has recognized that the showing of anti-competitive effects is not a requirement under the *per se* test of the general antitrust laws. 68 Fed. Reg. at 52027 n.20.

Administration Bill would eliminate the need to show an adverse effect on competition resulting from the tie-in and thus make the Government's or plaintiff's case easier to establish.[[84]]

[Question] 21. The Administration bill omits certain antitrust criteria that must be met before a violation of this provision can be found. Is that correct?

[Answer] The Administration Bill omits the "injury to competition" criteria contained in H.R. 6778; but these criteria are not essential elements to an antitrust case against a tie-in. See answer to Question 20.

[Question] 22. Is the omission of these criteria intentional or was it a drafting error?

[Answer] See answers to Questions 20-21. The omission was intended.

* * *

[Question] 24. But isn't it correct that there is one very significant difference between the Administration proposals and those found in H.R. 6778? That significant difference is that the Patman bill applies the anti tie-in provisions to all 14,000 insured banks in the United States, while the Administration bill applies these criteria only to bank holding companies and their subsidiaries?

[Answer] That is correct. However, I wonder how significant this is, in the light of the *Fortner* decision.

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[84] Assistant Attorney General McLaren, at a later point in the legislative history of the bank tying provisions, stated the following reason for making such a case easier to establish:

> While we believe that the antitrust laws are applicable in this area, a serious question remains as to the extent to which they can practically eliminate such practices in view of our limited enforcement resources. As a practical matter, many tie-in arrangements involving banks are so limited in their scope or involve such small amounts that they do not seem to justify the expensive and time-consuming efforts of full scale antitrust investigation and trial, particularly in view of the fact that the complex legal issues involved may result in decisions of limited precedential value. The proposed section would greatly simplify the issue in tying cases, and would create an effective enforcement program in this area.

Letter dated June 26, 1970 to Sen. Brooke, *reprinted in Senate Report* at 48. By applying the *per se* rule to bank tie-ins, the need to show an actual adverse effect on competition resulting from a bank tie-in would be eliminated, thereby making the Government's or the plaintiff's case easier to establish.

[Question] 25. Isn't the provision of the Administration proposal discriminatory in that it only applies to holding company banks and does not cover illegal tie-ins carried on by nonholding company banks and nonoperating subsidiaries?

[Answer] See answer to Question 24.

[Question] 26. Why shouldn't such tie-in arrangements be illegal when carried on by all insured banks rather than holding companies?

[Answer] See answer to Question 24.[85]

This response by the Department of Justice makes clear that neither H.R. 9385 (the Administration Bill) nor the first version of H.R. 6778 (the Patman Bill) omitted or eliminated from the "antitrust criteria that must be met before a violation of [the respective] provision can be found" (quoting Assistant Attorney General McLaren) the requirement that a bank have economic power in the tying-product market. The bank tie-in provisions of H.R. 9385 and of the version of H.R. 6778 that were ultimately enacted are identical as they relate to this discussion. Accordingly, it is clear that in the view of the Department of Justice, for a violation of the bank tying provisions to be proven, there must be a showing that "the seller can exert some power over some of the buyers in the market" (quoting Assistant Attorney General McLaren) but there does not have to be a showing that an anti-competitive effect resulted from the bank tie-in. Thus, the Department of Justice read the bank tie-in provisions of H.R. 9385 and

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85 *House Hearings* at 484-85, 487 (emphasis added) (included in Apr. 24, 1969 proceedings). Assistant Attorney General McLaren's responses to Questions 24-26 evidence that he considered Section 3(a) of H.R. 9385 (the Administration Bill) to apply the same antitrust tying criteria that are applied under Section 1 of the Sherman Act. Once it was made clear by the *Fortner I* decision that credit could be a tying product under Section 1 of the Sherman Act, a specific tie-in provision such as that in Section 3(a) of H.R. 9385 or in the other proposed legislation was not essential (*see* Mr. McLaren's response to Question 11) and thus it was insignificant whether such a provision covered all 14,000 insured banks in the United States or covered only banks that were subsidiaries of bank holding companies (which in 1969-1970 was a much smaller number of banks).

of the version of H.R. 6778 that were ultimately enacted to establish that bank tie-ins are subject to the conventional antitrust *per se* tie-in analysis.

Over one year later, on May 11, 1970, S. 3823 was introduced in the Senate by Senator Edward Brooke. This bill provided:

> SEC. 4. (b) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition, agreement, or understanding --
>
> > (1) that the customer shall obtain some other credit, property, or service from a bank holding company of such bank or from any subsidiary of such bank holding company;
> >
> > (2) that the customer provide some other credit, property, or service to the bank holding company of such bank or to any subsidiary of such bank holding company; or
> >
> > (3) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, bank holding company of such bank, or any subsidiary of such bank holding company.
>
> The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this section.[86]

The Department of Justice was asked by Senator Brooke to compare S. 3823 and the Administration Bill (S. 1664, which as stated above was identical to H.R. 9385). Assistant Attorney General McLaren responded:

> While the Supreme Court decision in *Fortner Enterprises v. United States Steel*, 394 U.S. 495 (1969) did not go so far as to hold tie-ins involving money and credit illegal *per se,*[[87]] it answered the most important conceptual question

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[86] S. 3823, 91st Cong., 2d Sess. 6, Sec. 4(b) (May 11, 1970). For the purposes that relate to this discussion, the provisions of Section 106(b)(1) as enacted are virtually identical to these provisions of Section 4(b) of S. 3823.

[87] *See also* the text accompanying note 94 below. Assistant Attorney General McLaren had earlier stated to the House Committee on Banking and Currency that the *Fortner I* decision "makes clear that [credit] tie-ins are illegal *per se* without proof of injury to competition." *House Hearings* at 487 (quoted in the text accompanying note 83 above). *Fortner I* did not make credit tie-ins illegal *per se* and this later statement of the Assistant

involved in that litigation: namely, that credit could indeed be a tying product. Both S. 3823 and S. 1664 would make such tie-ins illegal regardless of any showing of adverse impact on competitiveness or other restraint of trade.[88]

Under both S. 3823 and S. 1664, bank tie-ins would be subject to the *per se* rule under which such tie-ins would be illegal without any showing of "adverse impact on competitiveness or other restraint of trade" (*i.e.*, anti-competitive effect). If the intent of these bills was to eliminate in the bank context the well-established, "essential"[89] requirement under the general antitrust laws that the seller of the tying product must have economic power in the tying-product market, then the bills would have materially altered in the bank context the then-existing general antitrust laws.

It is clear that the Federal Reserve Board did not believe that the above-quoted provisions of S. 3823 (which for the purposes of this discussion are the same as the above-quoted provisions of H.R. 9385, which are identical to the provisions of S. 1664) would materially alter in the bank context the then-existing antitrust laws. In a written response to questions to the

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Attorney General to the Senate Committee on Banking and Currency is the correct statement. The Supreme Court in *Fortner I* stated that a credit tie-in arrangement could be either illegal *per se* or illegal under the rule of reason if the prerequisites of *per se* illegality were not met (the prerequisites of *per se* illegality are set out in the text accompanying note 15 above and in the first paragraph of note 83 above). The Supreme Court concluded in *Fortner I*, however, that "it is clear that petitioner raised questions of fact which, if proved at trial, would bring this tying arrangement within the scope of the *per se* doctrine." *Fortner I*, 394 U.S. at 498-501. In *Fortner II*, the Supreme Court stated that the plaintiff "has not pursued the suggestion in *Fortner I* that it might be able to prove a . . . violation under the rule-of-reason standard. Thus . . . only the economic-power issue is before us" under the *per se* rule. *Fortner II*, 429 U.S. at 611-12. The Court concluded in *Fortner II* that the plaintiff did not have "the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation." *Id.* at 622.

88 *Senate Hearings* at 260 (letter dated June 8, 1970, included in May 18, 1970 proceedings).

89 Quoting *Jefferson Parish Hospital*, 466 U.S. at 12.

Federal Reserve Board from Senator Brooke, Vice Chairman of the Board J.L. Robertson, on behalf of the Board, stated:

> In dealing directly with potential abuses, S. 3823 would also prohibit banks from engaging in coercive tying practices. *The Board understands that under present antitrust laws, such practices are prohibited where the bank has sufficient market power to force tie-ins on unwilling customers. . . .* While the Board has no objection to provisions explicitly prohibiting banks from engaging in coercive tying practices, *we do not believe such provisions would materially alter existing law.*[90]

In this connection, Board Chairman Arthur Burns stated:

> . . . I believe that tie-ins are definitely illegal now.
>
> I don't see that much would be accomplished by adding a provision with respect to tie-ins. However, I also see no objection to it.[91]

It is recognized that in his Supplementary Views included in the *Senate Report* (which accompanied the version of H.R. 6778 that was reported to the Senate by the Senate Committee on Banking and Currency on August 10, 1970), Senator Brooke stated that

> tying arrangements involving a bank are made unlawful by this section without any showing of specific adverse effects on competition or other restraints of trade and *without any showing of some degree of bank dominance or control over the tying product or service.* Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of this section are applicable regardless of the amount of commerce involved.[92]

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90 *Senate Hearings* at 136-37 (emphasis added) (letter dated June 1, 1970).

91 *Senate Hearings* at 148-49 (May 17, 1970 proceedings).

92 *Senate Report* at 45 (Supplementary Views of Sen. Brooke) (emphasis added). Senator Brooke's view that the bank tie-in provision is applicable "regardless of the amount of commerce involved" is not consistent with the application of the *per se* tie-in rule under the general antitrust laws (which as discussed in Part A above requires that the tying arrangement affect a not insubstantial volume of commerce in the tied product).

Indeed, Senator Brooke's view has been cited numerous times.[93] His view is correct with respect to the statement that the bank tie-in provision does not require "any showing of specific adverse effects on competition or other restraints on trade." This view is entirely consistent with the application of the *per se* test to tying arrangements under the general antitrust laws. Senator Brooke's view is incorrect, however, with respect to the statement that the bank tie-in provision does not require "any showing of some degree of bank dominance or control over the tying product or service." This view is entirely inconsistent with the application of the *per se* test to tying arrangements under the general antitrust laws.

Senator Brooke included at the end of his Supplementary Views a letter addressed to him dated June 26, 1970 from Assistant Attorney General McLaren, which stated:

> The proposed new section . . . would make tie-in arrangements unlawful, thereby eliminating the burden of proving specific adverse impacts on competition or restraints of trade. In so doing, the proposed new section would go beyond the *Fortner* decision, which did not go so far as to hold tie-ins involving credit illegal per se.[94]

This statement of Assistant Attorney General McLaren does not mean that the burden of proving the economic power of the bank in the tying-product market was eliminated by the proposed new section. In stating that "tie-ins involving credit [are] illegal per se," Mr. McLaren did not mean that such tie-ins can have no economic justification whatsoever and that such tie-ins are therefore

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93 *See* Parts F and G below. This view is also reflected in the 1997 statement cited in note 9 above.

94 *Senate Report* at 48. As discussed in notes 83 and 87 above, in those instances in which a tying arrangement is found to be illegal *per se* under the general antitrust laws, the Assistant Attorney General believed that no specific showing of anti-competitive effect is required (whereas a showing of anti-competitive effect is required for a tying arrangement that is analyzed under the rule of reason).

illegal without proof of market power.[95] Rather, Mr. McLaren only meant that credit tie-ins are to be analyzed under the *per se* rule, which does not require proof of specific adverse effects or impacts on competition or restraints of trade[96] but *does* require proof of economic power in the market for the tying product or service.

In a letter from Assistant Attorney General McLaren to the Chairman of the Senate Committee on Banking and Currency, which was included in the *Congressional Record* on September 16, 1970, Mr. McLaren stated that the bank tie-in provision included in H.R. 6778 as reported to the Senate by the Senate Committee on Banking and Currency on August 10, 1970 (which is the same provision referred to in Senator Brooke's Supplementary Views),

> *is in general terms analogous to existing antitrust law, imposing an absolute prohibition on tie-ins, without proof of actual competitive injury*. Its purpose is to prevent bank customers from being required to accept unwanted products or services as a condition of obtaining bank services that they desire.[97]

The statements of Assistant Attorney General McLaren and others that the bank tie-in provision imposes an "absolute prohibition on tie-ins" does not mean that bank tie-ins can have no economic justification whatsoever and therefore are always illegal without proof of economic power in the tying-product market. Such a reading would not "in general terms [be] analogous to existing antitrust law." Without such economic power, no tie-in can occur; therefore, for a tie-

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[95] *See* notes 19-20 above and the accompanying text. The concurring opinion in *Jefferson Parish Hospital* stated: "Some of our earlier cases did indeed declare that tying arrangements serve 'hardly any purpose beyond the suppression of competition.' However, this declaration was not taken literally even by the cases that purported to rely on it." *Jefferson Parish Hospital*, 466 U.S. at 34 (concurring opinion) (citation omitted).

[96] *See* the discussion in Part A and in note 83 above.

[97] 116 *Cong. Rec.* S15708 (daily ed. Sept. 16, 1970) (emphasis added). Senator Wallace Bennett also referred to the bank tie-in provision as an "absolute tie-in prohibition. . . ." *Id.* at S15714 (statement of Sen. Bennett).

in to occur that is absolutely prohibited by the bank tying provisions, a bank must have economic power in the tying-product market.[98]

Senator Brooke's misunderstanding of the application of the bank tie-in provision is further evidenced by the following statement that he made during the Senate floor debates: "The burden of proof under existing antitrust law is much greater [than under the bank tie-in provision]."[99] This statement is entirely inconsistent with the above-quoted statement of Assistant Attorney General McLaren (whom Senator Brooke described as "the chief antitrust enforcement officer of the Government"[100]) that the bank tie-in provision "is in general terms analogous to existing antitrust law."

There is no disagreement that Congress, in "imposing an absolute prohibition on [bank] tie-ins," did not intend to require that plaintiffs prove specific adverse effects on competition. But it would defy all logic, reason and common sense to conclude that Congress eliminated the economic power requirement in a statutory provision that, in the words of the Senate Committee on Banking and Currency, is designed

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98 *See, e.g.*, 10 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 1734a, at 39, which states: "Hence the rationale for requiring proof of power over the tying product must be that no 'tie-in' can occur . . . without it." "[W]ithout power there can be no effective tie." *Id.*

99 116 *Cong. Rec.* S15715 (daily ed. Sept. 16, 1970) (statement of Sen. Brooke). It is noted that Senator Charles Goodell stated during the Senate floor debates: "Violations [of the bank tie-in provision] would amount to per se violations of law, for the section does not permit a defendent [sic] to raise the reasonableness of the transactions in his defense. All that the Government or civil plaintiff would have to prove is the existence of the transaction in order to prove the violation of law." *Id.* at S15714 (statement of Sen. Goodell). This statement could be read to mean (a) that the *per se* rule in the tying context automatically condemns a tying arrangement without proof of economic power in the tying-product market, which would be an incorrect analysis, or (b) that such economic power must be proven to exist in order to prove that the tie-in itself exists, which would be the correct analysis.

100 *Id.* at S15710 (statement of Sen. Brooke).

> to prohibit anti-competitive practices which *require* bank customers to accept . . . some other service or product . . . in order to obtain the bank product or service they desire.[101]

It is well accepted that the bank tying provisions apply only to *coercive* tie-ins.[102] A bank could not possibly *require* or *coerce* a customer to accept unwanted tied products or services unless the bank had economic power in the tying-product market.[103]

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[101] *Senate Report* at 17 (emphasis added). Assistant Attorney General McLaren repeated this statutory purpose in the quote accompanying note 97 above. Senator Brooke himself cited and quoted this statutory purpose in the Senate floor debates. 116 *Cong. Rec.* S15711 (daily ed. Sept. 16, 1970) (statement of Sen. Brooke).

[102] *See, e.g.,* the *Proposed Interpretation*, 68 Fed. Reg. at 52028-29, where the Federal Reserve Board has concluded that the provisions of Section 106 apply only to coercive tie-ins, and therefore a bank may violate Section 106 only if the bank forces or coerces a customer to obtain (or provide) the tied product as a condition to obtaining the customer's desired product (the tying product). As discussed in Part E below, in the *Proposed Interpretation* the Federal Reserve Board has also concluded, correctly, that the coercion requirement under Section 106 is the same as under the provisions of the general antitrust laws that address illegal tying arrangements -- Section 1 of the Sherman Act and Section 3 of the Clayton Act.

See also 116 *Cong. Reg.* S15709 (letter dated Sept. 14, 1970 from Board Chairman Arthur Burns to the Chairman of the Senate Committee on Banking and Currency) (the bank tie-in provision of H.R. 6778, "as reported [to the Senate], would prohibit coercive tie-ins. . . ."); Conf. Rep. No. 91-1747 (1970) (the "*Conference Report*"), at 18 ("Section 106 of the bill, which has come to be known as the anti-tie-in section, will largely prevent coercive tie-ins. . . ."). *See also* the text accompanying note 90 above. Throughout the long legislative process that led to the enactment of the BHC Act Amendments, Assistant Attorney General McLaren maintained the position that coercive tie-ins would be addressed by a specific provision in the proposed legislation -- which provision was enacted as Section 106(b)(1) of the BHC Act Amendments -- and that the danger of voluntary tie-ins would be addressed by the Federal Reserve Board in the context of acting on applications of bank holding companies to engage in nonbanking activities under another specific provision in the proposed legislation -- which provision was enacted as Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended by the BHC Act Amendments (12 U.S.C. § 1843(c)(8); "Section 4(c)(8)"). *See, e.g., House Hearings* at 485 (Apr. 25, 1969 proceedings); *Senate Hearings* at 269-270 (May 18, 1970 proceedings).

It is important to recognize that in analyzing the danger of voluntary tie-ins in the context of Section 4(c)(8) applications, the premise of the Federal Reserve Board's analysis is

The Supplementary Views of Senators Wallace Bennett, John Tower, Charles Percy and Bob Packwood included in the *Senate Report* state:

> There are certain provisions in this bill [as reported to the Senate] which alarm us and which should be drastically changed if an equitable law is to be passed and if we are to avoid a major detrimental impact on the banking system of the United States.
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that in the absence of significant economic power in the tying-product market there can be no danger of voluntary tie-ins. *See, e.g.*, *J.P. Morgan & Co. Inc.*, 68 Fed. Res. Bull. 514, 517 (1982) ("[V]oluntary tying can only take place when a firm possesses significant market power."); *Citicorp*, 67 Fed. Res. Bull. 443, 445-46 (1981); *Mercantile Bancorporation*, 66 Fed. Res. Bull. 799, 800 (1980); *The Alabama Financial Group, Inc.*, 60 Fed. Res. Bull. 596, 602-603 (1974). There is no reasonable basis for such economic power to be a necessary element in the voluntary tie-in analysis under Section 4(c)(8) but not to be a necessary element in the coercive tie-in analysis under Section 106(b)(1).

In *Integon Life Insurance Corp. v. Browning*, 989 F.2d 1143, 1150 (11th Cir. 1993), the Eleventh Circuit Court of Appeals stated that "a tying claim under the [BHC Act Amendments] has two elements: (1) two separate products, a 'tying' or 'desirable' product and a 'tied' or 'undesirable' product; and (2) the buyer was in fact *forced* to buy the tied product to get the tying product; that is, a 'tying'." (Emphasis added.) It is noted that in *Dibidale of Louisiana, Inc. v. American Bank & Trust Co.,* 916 F.2d 300 (5th Cir. 1990), *amended and reinstated*, 941 F.2d 308 (5th Cir. 1991), the Fifth Circuit Court of Appeals stated that Section 106(b)(1) was intended to apply to tying arrangements whether or not the arrangements were coerced. In support of this statement, the court quoted from the *Conference Report.* While the language quoted by the court does state that the BHC Act Amendments were intended to address coercive as well as voluntary tie-ins, it is clear from a reading of the language in context that, with respect to voluntary tie-ins, Congress intended that they would be addressed under Section 4(c)(8), as amended, rather than under Section 106(b)(1) of the BHC Act Amendments. In fact, the *Conference Report* language quoted by the court in *Dibidale* is immediately followed by the language in the *Conference Report* that is quoted above in this note. The dissenting opinion in *Dibidale* strongly disagreed with the majority opinion, concluding that "the plain meaning of the statute, its similarity to the anti-tying provisions of the federal antitrust laws, and the history of its drafting all clearly indicate that a tying arrangement must be forced upon an unwilling party to constitute a violation." *Dibidale,* 916 F.2d at 308 (dissenting opinion). The Eleventh Circuit Court of Appeals in *Integon Life Insurance Corp.* agreed with the position of the dissenting opinion in *Dibidale. Integon Life Insurance Corp.*, 989 F.2d at 1150, 1151 n.20.

[103] *See* the discussion in Part E below.

> The bill language prohibits all tying arrangements involving any bank . . . without any reference to bank dominance or any reference to exceptions for normal banking practices.
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> * * *
>
> An amendment is in order to show that the purpose of this section is to prohibit only those tying arrangements whose effect may be to lessen competition or tend to create a monopoly. . . .
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> * * *
>
> We intend to offer such amendments when the bill is considered by the Senate.[104]

On September 16, 1970, Senator Bennett proposed on the floor of the Senate amendments to the bill on behalf of himself and Senators Tower, Percy and Packwood (as well as several other Senators) that would address these stated concerns regarding the need in the bill language for a "reference to exceptions for normal banking practices" and for a "reference to bank dominance."[105] With respect to the need for a reference to bank dominance, the amendment proposed by Senator Bennett confirmed that coercion is required for a bank tie-in to violate the bank tying provisions. When the Senate Committee on Banking and Currency reported H.R. 6778 to the Senate, the bill prohibited a bank from providing certain products or services on the "condition, agreement, or understanding" that the customer would purchase some other product or service from the bank or its affiliates.[106] Senator Bennett proposed an amendment, which was supported by the Department of Justice, the Department of the Treasury and the Federal Reserve Board,[107] that replaced the words "condition, agreement, or understanding" with

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104 *Senate Report* at 30, 31, 33.

105 *See* 116 *Cong. Rec.* S15708 (daily ed. Sept. 16, 1970) (statement of Sen. Bennett).

106 *See* H.R. 6778, 91st Cong., 2d Sess. 26, Sec. 104(b) (Aug. 10, 1970).

107 116 *Cong. Rec.* at S15708-09 (daily ed. Sept. 16, 1970).

the words "condition or requirement." In proposing this amendment, which was approved, Senator Bennett stated: "The bill as amended would require that a condition or requirement *imposed* by the bank must be demonstrated in order to prove that a violation of the section has occurred."[108] As discussed in detail in Part E below, such *imposition of a condition or requirement*, or *coercion*, would only be possible if a bank has economic power in the tying-product market.[109] Senator Brooke, in his Supplementary Views included in the *Senate Report*, failed to recognize this fundamental requirement of antitrust law, which is grounded in economic logic and common sense.

On the day the bank tying provisions were passed by the Senate, Senator Brooke, perhaps recognizing the error of his Supplementary Views four months earlier, stated: "It is important to note that per se illegality arises where either express or implied coercion is involved. Thus, where the totality of the circumstances indicates that the customer has not voluntarily entered into the transaction, but rather has been induced into doing so through coercion -- either expressed or implied -- the conduct under consideration is actionable under this provision."[110] This statement, which recognizes that the bank tying provisions apply only to

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[108] *Id.* at S15708 (daily ed. Sept. 16, 1970) (statement of Sen. Bennett) (emphasis added).

[109] A paper published in The Antitrust Bulletin at the time the bank tying legislation was pending states:

> It is assumed for purposes of this paper that banks possess monopoly power (or market power) over at least one product. Indeed if this were not true, banks would not be able to impose tie-in sales on their customers.

Franklin R. Edwards, *Tie-in Sales in Banking and One Bank Holding Companies*, XIV The Antitrust Bulletin 587, 590 n.8 (1969).

[110] 116 *Cong. Rec.* S20648 (daily ed. Dec. 18, 1970) (statement of Sen. Brooke). Earlier, Senator Brooke had expressed the concern of "concentrating such vast caches of economic resources in their [the banks'] hands that they are able to *foreclose* independent

coercive tie-ins, is inconsistent with Senator Brooke's earlier stated Supplementary Views because tying conduct cannot be coercive unless a bank has economic power with respect to the tying product. Thus, it would appear that by the conclusion of the legislative process Senator Brooke had recognized the need to demonstrate economic power in the tying-product market.

The conclusion that economic power in the tying-product market is not a requirement under the bank tying provisions is not consistent with the above discussion of the legislative history of the bank tying provisions, and indeed is not consistent with the plain meaning of the "condition or requirement" language of such provisions. The above discussion makes clear that none of the various bills addressing bank tie-ins would eliminate the fundamental requirement of the general antitrust laws that a bank must have economic power in the tying-product market in order to violate such provisions.

Given the relatively low level of proof of economic power that was required in a tying case under antitrust law at the time bank tie-in legislation was under consideration and ultimately enacted, it might be argued that the level of banks' economic power in the various product markets met the level of economic power required at that time under the general antitrust laws. If such position were correct, however, as the Supreme Court has subsequently interpreted the general antitrust laws to require an increased level of economic power for a tying arrangement to be illegal *per se*, Section 106(b)(1) should also be interpreted in a manner that reflects such increased economic power requirement.[111] Even if in passing the bank tying

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businessmen from competing in their fields of endeavors." 116 *Cong. Rec.* S15710 (daily ed. Sept. 16, 1970) (statement of Sen. Brooke) (emphasis added). Such foreclosure in the tied-product market requires economic power in the tying-product market.

[111] One commentator has stated: "Thus, because Congress directed § 1972 to the Supreme Court's 1969 [*Fortner I*] position, courts should interpret § 1972 in light of the Supreme Court's more sophisticated response to credit tie-ins in [its] 1977 [*Fortner II* position].

provisions Congress found in 1970 that banks had the requisite level of economic power for bank tie-ins to violate such provisions, if it were later determined that banks no longer had such level of economic power, then the statutory provisions should be read flexibly so as not to produce absurd results.

The existence of economic power in the tying-product market is a fundamental prerequisite for a *per se* tie-in violation and the existence of such power is a factual determination and not a legislative determination. It might be argued that in passing the bank tying provisions Congress made a legislative finding that banks had economic power in tying-product markets. But Congress cannot by legislation establish as a matter of fact the economic power of banks in various markets, and therefore, unless the statutory provisions *explicitly* provide that a bank is not required to have economic power in the tying-product market to violate such provisions, such economic power requirement, which is an essential requirement as a matter of antitrust law and logic, cannot be read out of the statutory requirements. It should be recognized that neither Section 1 of the Sherman Act nor Section 3 of the Clayton Act includes a statutory provision requiring that the seller have economic power in the tying-product market.[112] The economic power requirement has been read into the general antitrust laws by the courts as a matter of economic logic, commercial necessity and common sense. If Congress had intended to eliminate in the bank tying provisions this fundamental requirement of the general antitrust laws,

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Congress wanted to maintain flexibility, and *Fortner II* allows for a flexible response to changes in the banking industry." Daniel Aronowitz, *Retracing the Antitrust Roots of Section 1972 of the Bank Holding Company Act*, 44 Vand. L. Rev. 865, 874 n.54 (1991).

112 *See* Section 1 of the Sherman Act and Section 3 of the Clayton Act quoted in Part A above. Indeed, Section 3 of the Clayton Act uses the "condition, agreement, or understanding" language that Congress replaced with the "condition or requirement" language in the bank tying provisions.

thereby materially altering in the bank context the antitrust law, language to that specific effect would have to be included in the statutory provisions. Indeed, Congress' explicit inclusion of the "condition or requirement" language in the bank tying provisions makes clear that Congress intended, and expressly provided, that a bank must have economic power in the tying-product market in order for a bank tie-in to violate the bank tying provisions. The legislative history of the BHC Act Amendments, the plain reading of the statutory language of the bank tying provisions, the Supreme Court decisions discussed in Part B above, logic and common sense dictate this conclusion.

To summarize, a complete and careful reading and analysis of the very long legislative history of the BHC Act Amendments evidences the following correct interpretation of the provisions of the Section 106(b)(1): Section 106(b)(1) imposes on bank tie-ins the *per se* rule that is applied to tying arrangements under the general antitrust laws. Thus, once an arrangement is found to be a tie-in, which requires a finding that the bank has economic power in the tying-product market, the tie-in is then treated as a *per se* violation such that the effect of such an arrangement is deemed to be anti-competitive without further proof. While a plaintiff in a Section 106(b)(1) case is not required to prove that the tie-in resulted in a specific anti-competitive effect, the plaintiff is required to prove that the bank had economic power in the tying-product market. Since, as the Supreme Court has recognized, a tie-in cannot result in an anti-competitive practice that lessens competition unless the seller has economic power in the market for the tying product, it follows that to prove a violation of the bank tying provisions the plaintiff is required to prove that the bank had economic power in the market for the tying product in order for the tie-in to constitute an anti-competitive practice that lessens competition and therefore is unlawful under the *per se* bank tying provisions.

E. The coercion requirement. In the *Proposed Interpretation*, the Federal Reserve Board has made clear that the coercion requirement under Section 106(b)(1) is the same as under the provisions of the general antitrust laws that addresses illegal tying arrangements -- Section 1 of the Sherman Act and Section 3 of the Clayton Act. The Board stated in the *Proposed Interpretation* that the "[bank-imposed condition or requirement] element of section 106 was modeled on the tying prohibitions in the general antitrust laws."[113]

The Federal Reserve Board stated in the *Proposed Interpretation* that "a seller engages in an illegal tie under the general antitrust laws only if it requires the customer to purchase the tied product to obtain the customer's desired product. Moreover, the evidence must demonstrate that the seller imposed the arrangement through some type of coercion."[114] The Board cited[115] numerous cases under the general antitrust laws to the effect that "actual coercion" is an indispensable element of a tying violation under the general antitrust laws, and the Board concluded that this actual coercion element "also is embedded in section 106."[116]

The Federal Reserve Board is correct in its analysis and conclusions (i) that under both the general antitrust laws and Section 106 a condition or requirement must be imposed by a seller on a customer through actual coercion or force to constitute an illegal tying arrangement and (ii) that such coercion requirement under Section 106 is the same as under the general antitrust laws.

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[113] 68 Fed. Reg. at 52028.

[114] *Id*.

[115] *Id*. at n.27.

[116] 68 Fed. Reg. at 52028.

The *Proposed Interpretation* states in a footnote that legislative history "indicates" that economic power is not a necessary element of a Section 106 claim.[117] It is concluded in this paper, based on an understanding of antitrust jurisprudence and an extensive analysis of the legislative history of the BHC Act Amendments, that a bank *must* have economic power in the tying-product market to violate Section 106(b)(1). The conclusions of the Federal Reserve Board (i) that a violation of Section 106 may occur only if a bank forces or coerces a customer to obtain (or provide) a tied product as a condition to obtaining the customer's desired product (the tying product), (ii) that Section 106 is an antitrust statute and (iii) that the coercion requirement under Section 106 is the same as under the general antitrust laws necessarily lead to the conclusion that a bank must have economic power in the tying-product market to violate Section 106(b)(1).

As a matter of common sense and logic, which is reflected in the case law, if a seller does not have economic power with respect to the tying product, a tying arrangement cannot be imposed, forced or coerced. Power is a necessary condition for coercion, and economic power is a necessary condition for an anti-competitive tying arrangement. The Supreme Court's statements in *Jefferson Parish Hospital* that are quoted in Part A above bear repeating with respect to this point:

> Our cases have concluded that *the essential characteristic of an invalid tying arrangement* lies in the seller's *exploitation of its control* over the tying product *to force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

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[117] 68 Fed. Reg. at 52027 n.21.

> Accordingly, we have condemned tying arrangements when the seller has some special ability -- usually called "market power" -- to force a customer to do something that he would not do in a competitive market.
>
> *   *   *
>
> *Only if* [buyers] are forced to purchase [seller's] services as a result of the [seller's] *market power* would the arrangement have anticompetitive consequences.[118]

The Office of the Comptroller of the Currency (the "OCC") has very recently stated: "Coercive ties . . . are premised on the bank's power to control the situation."[119]

This general principle reflects the common English language meaning of "coerce" -- "to compel to an act or choice" and "to enforce or bring about by force or threat."[120] Without power, threatening conduct is not credible and can achieve no objective and thus the threatening party will stand only to lose the goodwill, respect and business of its customer.

The Federal Reserve Board cited in the *Proposed Interpretation*[121] numerous cases under the general antitrust laws to support its conclusion that proof of coercion is a required element of an illegal tying arrangement. Importantly, in virtually every such case, coercion was explicitly linked to proof of the seller's economic power in the desired-product

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[118] 446 U.S. at 12, 13-14, 25 (emphasis added). The Supreme Court's decision in *Jefferson Parish Hospital* is replete with "forcing of buyers" language; it is clear from the context of the opinion that such language is used to refer to the need to show that the defendant had economic power in the tying-product market.

[119] Office of the Comptroller of the Currency, International and Economic Affairs Department and Law Department, *Today's Credit Markets, Relationship Banking, and Tying* 19 (Sept. 2003) (the "*OCC White Paper*").

[120] *Webster's New Collegiate Dictionary* (1979).

[121] 68 Fed. Reg. at 52028 n.25 and n.27.

market. *Thompson v. Multi-List, Inc.*[122] is among these cited cases. There, the Eleventh Circuit Court of Appeals concluded that economic power is a necessary condition for coercion. The court stated:

> In order to prove the economic coercion prong of the tying analysis, the plaintiffs must prove that Metro [the defendant] has "sufficient market power," *Tix-X-Press*, 815 F.2d at 1420, within the tying market and that Metro has wielded its market power to force brokers to "buy a product that [they do] not want or would have preferred to buy elsewhere on other terms." *Id.* at 1416.
>
> The plaintiffs first must prove that Metro has sufficient market power within the relevant product market to coerce. . . .
>
> * * *
>
> To satisfy the coercion element of the claim, the plaintiffs need to show that Metro not only has this market power but also has wielded this market power to force brokers to alter their choice. . . .[123]

The *Thompson* court makes explicitly clear that the existence of economic power and the wielding of such power are necessary conditions for coercion. The court logically concluded that to prove coercion a plaintiff must prove that the seller has economic power in the tying-product market and that the seller has wielded such economic power to force the buyer to purchase the tied product.

Both the Eleventh Circuit Court of Appeals in *Thompson* and the Federal Reserve Board in the *Proposed Interpretation*[124] cited *Tic-X-Press, Inc. v. Omni Promotions Co.*[125] with

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122 934 F.2d 1566 (11th Cir. 1991), *reh'g en banc denied*, 946 F.2d 906 (1991), *cert. denied*, 506 U.S. 903 (1992).

123 *Id.* at 1576, 1577.

124 68 Fed. Reg. at 52028 n.26 and n.27.

125 815 F.2d 1407 (11 Cir. 1987).

respect to the coercion element of an illegal tying arrangement. In *Tic-X-Press*, the Eleventh Circuit stated:

> The key element to such [a tying] arrangement's anticompetitiveness (and thus its illegality) is the seller's ability to *force* buyers to purchase one product in the package, the tied product, by virtue of the seller's control or dominance over the other product in the package, the tying [or desired] product.[126]

This court makes clear that "[t]he key element to . . . a [tying] arrangement's . . . illegality . . . is the seller's ability to *force* . . . by virtue of the seller's control or dominance over . . . the tying [or desired] product." The court in *Tix-X-Press* further stated that "proof of coercion" "appears to be part and parcel of two other requisite elements of proof" of an illegal tying arrangement: "1) that the products are actually 'tied' as a matter of antitrust law and 2) that the seller has the market power to force the buyer to purchase the tied product."[127]

Similarly, the Federal Reserve Board cited in the *Proposed Interpretation*[128] *Unijax, Inc. v. Champion Int'l, Inc.*[129] with respect to "actual coercion" being "an indispensable element of a tying violation." In *Unijax*, the Second Circuit Court of Appeals concluded that the conduct that the plaintiff "asserts was unlawful coercive behavior, is nothing more than aggressive salesmanship and is therefore insufficient evidence to support a finding of the actual exercise of economic muscle, an indispensable element of proving a tying violation."[130] This

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[126] *Id.* at 1414 (emphasis in original).

[127] *Id.* at 1416 n.15 (citations omitted).

[128] 68 Fed. Reg. at 52028 n.27.

[129] 683 F.2d 678 (2d Cir. 1982).

[130] *Id.* at 685-86.

court makes clear that the "actual exercise of economic muscle" is an indispensable element of "unlawful coercive behavior."

Another case cited by the Federal Reserve Board in the *Proposed Interpretation*[131] with respect to the "actual coercion" element of an illegal tying arrangement is *Bob Maxfield, Inc. v. American Motors Corp.*[132] There, the Fifth Circuit Court of Appeals stated that one of the four characteristics of an illegal tying arrangement is "(2) sufficient market power in the tying [desired] market to coerce purchase of the tied product. . . ."[133] This court's statement of the characteristics of an illegal tying arrangement makes clear that economic power is a necessary condition for coercion.

The Federal Reserve Board cited in the *Proposed Interpretation*[134] *Times-Picayune Publishing Co. v. United States*[135] with respect to "force" being a required element in an illegal tying arrangement. It is noted that in the quotation cited by the Board, the Supreme Court required that the tying product be a "dominant" product that is used by the seller to force the purchase of the tied product.[136] In discussing tying arrangements, the Supreme Court stated in *Times-Picayune*:

> By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market. But . . .

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[131] 68 Fed. Reg. at 52028 n.27.

[132] 637 F.2d 1033 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981).

[133] *Id.* at 1037.

[134] 68 Fed. Reg. at 52028 n.25.

[135] 345 U.S. 594.

[136] *Id.* at 614.

> "(i)n the usual case . . . only [the seller's] control of the supply [*i.e.*, economic power] of the tying device [*i.e.*, the desired product] . . . could induce a buyer to enter one."[137]

The Supreme Court continued by stating that "*to the extent the enforcer of the tying arrangement enjoys market control*, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment. . . ."[138] Implicit in these statements is the requirement that economic power over the tying product must exist in an illegal tying arrangement. If a seller does not have economic power in the tying-product market, the seller could not coerce or induce the buyer to purchase the tied product. If a seller does not enjoy "market control" over the tying product, other sellers of the tied product will not be foreclosed from offering up their goods to a free competitive judgment.

The Supreme Court in *Times-Picayune* described an example of an unlawful tying arrangement involving a "buyer's *wielding of* lawful monopoly *power* in one market *to coerce* concessions that handicapped competition facing him in another."[139] Further, the Supreme Court stated: "[T]he essence of illegality in tying agreements is the *wielding of monopolistic leverage*; a seller *exploits* his *dominant position* in one market to expand his empire into the next."[140] The Supreme Court concluded that no "dominant" tying product existed in *Times-Picayune*[141] and thus held that there was no coerced or forced purchase of a tied product.

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[137] *Id.* at 605 (citation omitted).

[138] *Id.* (emphasis added).

[139] *Id.* at 608 (emphasis added).

[140] *Id.* at 611 (emphasis added).

[141] *Id.* at 614.

The Federal Reserve Board also cited in the *Proposed Interpretation*[142] *Datagate, Inc. v. Hewlett-Packard Co.*[143] In *Datagate*, the Ninth Circuit Court of Appeals stated that in an illegal tying arrangement, the seller "*uses* its *market power* in the tying product *to coerce* the customer into purchasing the tied product."[144]

Still again, the Federal Reserve Board also cited in the *Proposed Interpretation*[145] *Response of Carolina, Inc. v. Leasco Response, Inc*.[146] In this case, the Fifth Circuit Court of Appeals stated: "As recognized by the Supreme Court, implicit in this formulation [of what constitutes an illegal tying arrangement] is the requirement that the requisite *economic power actually be utilized to coerce* the purchase of the tied product."[147] This court quoted[148] the opinion of the Third Circuit Court of Appeals in *Ungar v. Dunkin' Donuts of America, Inc.*:

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[142] 68 Fed. Reg. at 52028 n.25.

[143] 60 F.3d 1421 (9th Cir. 1995), *cert. denied*, 517 U.S. 1115 (1996).

[144] *Id.* at 1423 (emphasis added). The court in *Datagate*, citing the Supreme Court's decision in *Jefferson Parish Hospital*, 446 U.S. at 12-13, further stated: "The 'essential characteristic' of a *per se* illegal tying arrangement is that the seller makes use of its market power in the tying product to coerce the buyer to purchase the tied product." *Id.* at 1426.

[145] 68 Fed. Reg. at 52028 n.25.

[146] 537 F.2d 1307 (5th Cir. 1976).

[147] 537 F.2d at 1327 (emphasis added). The Fifth Circuit Court Appeals then quoted the Supreme Court's statement in *Times-Picayune* that the Federal Reserve Board quoted from in note 25 of the *Proposed Interpretation*, 68 Fed. Reg. at 52028 n.25: "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." *Times-Picayune*, 345 U.S. at 614.

[148] *Response of Carolina*, 537 F.2d at 1327.

> We believe that *coercion is implicit both logically and linguistically in the concept of leverage* upon which the illegality of tying is premised: the seller with market power in one market uses that power as a "lever" to force acceptance of his product in another market.[149]

The Federal Reserve Board further cited in the *Proposed Interpretation*[150] *American Manufacturers Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*[151] There, the Second Circuit Court of Appeals concluded:

> [T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice.
>
> [Such t]ying arrangements . . . foreclose a substantial quantity of business to competitors and extend preexisting economic power to new markets for no justification. [Such f]oreclosure implies actual exertion of economic muscle. . . .[152]

This statement of the Second Circuit clearly equates "unlawful coercion" with the "actual exertion of economic muscle" in the tying-product market, which forecloses competition in the tied-product market.

The *American Manufacturers* opinion is cited in *Capital Temporaries, Inc. v. Olsten Corporation*,[153] which the Federal Reserve Board also cited in the *Proposed* Interpretation.[154] In *Capital Temporaries*, the Second Circuit Court of Appeals noted: "The question raised in the pertinent cases is not whether coercive pressure is used but how can it be

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149 531 F.2d 1211, 1218 (3d Cir. 1976) (emphasis added), *cert. denied*, 429 U.S. 823 (1976). The Board cited *Ungar v. Dunkin' Donuts* in the *Proposed Interpretation*, 68 Fed. Reg. at 52028 n.28.

150 68 Fed. Reg. at 52028 n.25.

151 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

152 *Id.* at 1137.

153 506 F.2d 658 (2d Cir. 1974).

154 68 Fed. Reg. at 52028 n.28.

established."[155] The court examined the Supreme Court's opinion in *International Salt Co. v. United States*[156] and concluded that "[t]he coercion resulted from the existence of the patented machinery" which provided the defendant with "monopoly" power.[157] The *Capital Temporaries* court then analyzed how coercion was established in other leading tying cases and found that in each case coercion was established through proof of the existence of economic power.[158]

Finally, the Federal Reserve Board cited in the *Proposed Interpretation*[159] *Northern Pacific Ry. v. United States*[160] to support its conclusion that a seller engages in an illegal tie only if it requires the customer to purchase the tied product to obtain the customer's desired product. In *Northern Pacific*, the Supreme Court stated:

> Of course where the seller has no control or dominance over the tying product so that it does not represent an *effectual weapon* to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.[161]

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155 *Id.* at 662.

156 332 U.S. 392.

157 *Capital Temporaries*, 506 F.2d at 662.

158 *Id.* at 662-63. In *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976) (emphasis added), the Second Circuit Court of Appeals stated: "An unremitting policy of tie-in, *if accompanied by sufficient market power in the tying product* to appreciably restrain competition in the market for the tied product constitutes the requisite coercion under *Capital Temporaries*. . . ."

159 68 Fed. Reg. 52028 n.26.

160 356 U.S. 1.

161 *Id.* at 6 (emphasis added). One commentator has stated: "In *Northern Pacific*, for example, the Court explained that the reason for requiring economic control in the tying product is that control is the means of coercion. . . ." W. Perry Brandt, *Tying Arrangements and the Individual Coercion Doctrine*, 30 Vand. L. Rev. 755, 785 (1977).

Each of these cases cited by the Federal Reserve Board in the *Proposed Interpretation* makes absolutely clear that economic power is a necessary condition for coercion, which is required for a tying arrangement to violate the general antitrust laws and Section 106(b)(1).

This conclusion is also supported by antitrust experts and scholars. For example, a memorandum prepared by Robert Pitofsky on behalf of the National Association of Insurance Agents that is included in the *House Hearings* defines a "tie-in" as "coercion through the use of power as a seller."[162] The treatise of the noted antitrust scholar Phillip Areeda concludes: "Many courts state correctly that 'coercion' is not generally likely in the absence of power."[163] This treatise cites, among other cases, *Thompson v. Metropolitan Multi-List*, which is discussed above. The treatise also cites *Airweld, Inc. v. Airco, Inc.*, in which the Ninth Circuit Court of Appeals stated: "Coercion takes place in the context of power in the tying product market."[164] Another antitrust treatise, *Kintner Federal Antitrust Law*, equating "coercion" with the "exploitation of economic power," states:

> Coercion is the use of that market power in a particular market, to force items upon consumers they would not otherwise have purchased or would have obtained from another source. . . . Since the exploitation of economic power to exclude rivals is at the heart of judicial concern, it is appropriate that coercion should be a requirement for an unlawful tying agreement.[165]

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162 *House Hearings* at 735 (Memorandum of Prof. Robert Pitofsky, New York University School of Law) (included in May 1, 1969 proceedings).

163 10 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 1752e n.19, at 284.

164 742 F.2d 1184, 1190 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985).

165 2 Joseph P. Bauer and William H. Page, *Kintner Federal Antitrust Law* § 13.18, at 255 (2002). This statement is followed immediately by a footnote that describes the Supreme Court's opinion in *Jefferson Parish Hospital*, 466 U.S. at 15, as "equating 'market

Various commentators have confirmed the same conclusion. One commentator has stated: "Evidence of coercion of buyers is simply another type of evidence of power in the tying product market."[166] Another commentator has stated that "the existence of leverage implies the power to coerce, and the power to coerce, assuming rational behavior in the market, exists only when the seller has leverage in the market for the tying product."[167] And another commentator has stated that "coercion is presumed from the existence of the requisite economic power. . . . [I]t is automatically present when all the other elements [of the *per se* tying rule] are present."[168]

For the reasons discussed in this paper, the Federal Reserve Board has correctly concluded in the *Proposed Interpretation* that the provisions of Section 106 -- which the Federal Reserve Board recognizes is an antitrust statute -- apply only to coercive tie-ins and that the coercion requirement under Section 106 is the same as under the general antitrust laws. These conclusions necessarily lead to the conclusion that a bank must have economic power in the tying-product market to violate Section 106(b)(1). Without such economic power, a bank simply could not force or coerce a customer to obtain (or provide) the tied product as a condition to obtaining the customer's desired product (the tying product).

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power' with ability to coerce. . . ." 2 Joseph P. Bauer and William H. Page, *Kintner Federal Antitrust Law* § 13.18 n.208, at 255.

166 Jean W. Burns, *The New Role of Coercion in Antitrust*, 60 Fordham L. Rev. 379, 427 n.211 (1991-1992).

167 Ralf R. Boer, *Franchise Tie-ins and Antitrust: A Critical Analysis*, 1973 Wis. L. Rev. 847, 857 n.74.

168 W. Perry Brandt, *Tying Arrangements and the Individual Coercion Doctrine*, 30 Vand. L. Rev. at 785.

F. Analysis of certain United States Court of Appeals opinions. It is recognized that the opinions in certain United States Court of Appeals cases have stated that under the bank tying provisions, unlike under the general antitrust laws, a plaintiff does not have to establish the economic power of a bank in the tying-product market. For the reasons discussed below, the opinions in such cases should not be viewed as setting precedent that the appropriate federal banking agencies and the Department of Justice must follow in interpreting and enforcing the provisions of Section 106(b)(1).

This conclusion is supported by the fact that the opinions in other United States Court of Appeals cases have recognized that economic power in the tying-product market is required for a bank to violate the bank tying provisions. In *McGee v. First Federal Savings and Loan Association of Brunswick*, the Eleventh Circuit Court of Appeals, in a *per curiam* opinion, stated that Section 106(b)(1) "*requires a showing of* two distinct products: *a tying product, in the market for which defendant has economic power*, and a tied product, which defendant *forces* on consumers wishing to purchase the tying product."[169]

In *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, the Seventh Circuit Court of Appeals discussed the market (or economic) power requirement of Section 106(b)(1) as follows: "[I]t is all but impossible to define a 'tie' [under Section 106(b)(1)] apart from inquiry into competitive conditions. . . . We doubt that [defendant] Exchange National Bank of Chicago has market power (especially not in mid-state Illinois). . . . So . . . [plaintiff] Mid-State has a tough row to hoe."[170]

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[169] 761 F.2d 647, 648 (11th Cir.) (emphasis added), *cert. denied*, 474 U.S. 905 (1985).

[170] 877 F.2d 1333, 1338 (7th Cir. 1989).

The discussion that follows evidences a line of cases that, without any analysis, simply repeat, one after the other, a statement made by previous courts and have at their foundation the view of one Senator -- Senator Brooke -- taken from the legislative history of Section 106(b)(1) that, as discussed in Part D above, is incorrect and indeed was contradicted by the same Senator in subsequent legislative history. In the majority of these opinions, the statement that under Section 106(b)(1) a plaintiff does not have to establish the economic power of a bank in the tying-product market is *dicta*, which has *no* precedential value. In all but two of these opinions, this statement merely reflects each court's erroneous view that the statement was a simple uncontroversial summary of Section 106(b)(1) and was included by each court as a way to introduce the statute into the opinion; as such, this statement in these opinions should not be accorded any precedential value. This is particularly appropriate when, as discussed in this paper, such statement entirely disregards what the Supreme Court has found is "the essential characteristic of an invalid tying arrangement." In only two of these opinions did such statement figure into the analysis that led to the outcome of the case, and the analysis in these two opinions is so unreasonable or flawed that they should not be accorded any precedential value. Further, as discussed in Part G below, a number of courts have struggled with the illogic of such statement, and these courts have concluded, consistent with the legislative history of the bank tying provisions, that under Section 106(b)(1) a bank tie-in must be an "anti-competitive practice." As discussed in this paper, for a bank tie-in to be an anti-competitive practice, the tying bank *must* have economic power in the tying-product market since "absent such power tying cannot conceivably have any adverse impact" (quoting the Supreme Court).

Costner v. Blount National Bank is the first United States Court of Appeals opinion that states that a violation of Section 106(b)(1) may be found "without the necessity of

proving any economic power in the market for the tying product. . . ."[171] Without providing any analysis or reasoning regarding this statement, the court simply quoted Senator Edward Brooke's Supplementary Views that are set out in the *Senate Report* as the *only* support for this statement.[172]

As discussed in Part D above, this view of Senator Brooke is incorrect and inconsistent with (i) the legislative history of Section 106(b)(1), (ii) economic logic and (iii) common sense. Indeed, as discussed in Part D above, over four months after his Supplementary Views were included in the *Senate Report*, Senator Brooke, in a statement made on the Senate floor the day the bank tying provisions were passed by the Senate, recognized that the bank tying provisions apply only to coercive tie-ins.

It is important that the *Costner* court first found that the evidence of the defendant bank's economic power in the tying-product market was sufficient under Section 1 of the Sherman Act as a matter of law to warrant submission of the plaintiff's Sherman Act claim to the jury;[173] the court then reasoned that if its conclusion in this regard were incorrect it would be only a harmless error since the plaintiff also brought a claim pursuant to Section 106(b)(1) under which, in the court's view, economic power is not required.[174] Thus, the holding in *Costner* as it applies to Section 106(b)(1) is an alternative holding and is not the primary holding of the court.

In *Parsons Steel v. First Alabama Bank*, the Eleventh Circuit Court of Appeals stated that the purpose and effect of Section 106(b)(1) "is to apply the general principles of the

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171 578 F.2d 1192, 1196 (6th Cir. 1978).

172 *Id.*

173 *Id.* at 1195-96.

174 *Id.* at 1196.

Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, without requiring plaintiffs to establish the economic power of a bank. . . ."[175] Again, the *Parsons Steel* court, like the *Costner* court before it, quoted Senator Brooke's Supplementary Views as the *only* support for this conclusory statement.[176] It is not possible to reconcile the court's statement regarding economic power with its statement, which is correct, that the purpose and effect of Section 106(b)(1) is to apply the general principles of the Sherman Act to bank tying arrangements. Clearly, an "essential characteristic" of an invalid tying arrangement under the Sherman Act, which has been recognized by the Supreme Court, must constitute a "general principle" of such Act that Congress intended to apply to the field of commercial banking under Section 106(b)(1).

Finally, the *Parsons Steel* court's statement regarding economic power is only *dicta* since the court found that there was no tied product or service.[177] Thus, the court's statement with respect to economic power was not relevant to its holding. The Supreme Court has stated that it "refus[es] to be bound by dicta"[178] and that it cannot "accord the unsupported dicta of . . . earlier decisions the authority of decided precedents."[179] The Supreme Court has stated further: "When an opinion issues for the Court, it is not only the result but also those

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175 679 F.2d 242, 245 (11th Cir. 1982).

176 *Id.*

177 *Id.* at 246.

178 *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 528 (2002), quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994).

179 *Colgrove v. Battin*, 413 U.S. 149, 158 (1973).

portions of the opinion necessary to that result by which we are bound."[180] Based upon the Supreme Court's unequivocal treatment of *dicta*, the *Parsons Steel* court's statement regarding economic power has no precedential value.

In *Campbell v. Wells Fargo Bank, N.A.*, the Fifth Circuit Court of Appeals, quoting virtually verbatim from the *Parsons Steel* opinion, stated that the purpose and effect of Section 106(b)(1) "is to apply the general principles of the Sherman Antitrust Act to the field of commercial banking, without requiring plaintiffs to establish . . . the economic power of a bank. . . ."[181] The *Campbell* court cited *Parsons Steel* as the *only* support for this statement. As discussed above, the *Parsons Steel* opinion has no precedential value with respect to such statement. Further, the *Campbell* court, like the *Parsons Steel* court, failed to recognize that economic power in the tying-product market is an essential characteristic of an invalid tying arrangement under the Sherman Act and therefore must be a general principle of such Act that Congress intended to apply under Section 106(b)(1).

The *Campbell* court then stated: "In construing the [Bank] Tying Act, then, reference to antitrust statutes and decisions is 'most pertinent in view of the substantial similarity of the [Bank Tying and the Sherman] Acts.'"[182] The court, however, failed to recognize that its statement that the economic power of a bank is not required under Section 106(b)(1), if correct, would make the "Bank Tying Act" and the Sherman Act substantially *dis*similar.

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180 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996).

181 781 F.2d 440, 443 (5th Cir.), *rehearing denied*, 784 F.2d 1113 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986).

182 *Id.*, quoting *Swerdloff v. Miami National Bank*, 584 F.2d 54, 58-59 (5th Cir. 1978).

In dismissing the plaintiffs' claims, the *Campbell* court applied general antitrust law principles to find that the plaintiffs' injuries were not a direct consequence of the defendants' activities, and thus the court held that the plaintiffs did not have standing. Therefore, the *Campbell* court's statement regarding economic power is only *dicta* and, as such, has no precedential value.

In *Bruce v. First Federal Savings and Loan Association*,[183] the Fifth Circuit Court of Appeals interpreted the tying provisions of the Home Owners' Loan Act (12 U.S.C. § 1464(q)), which as stated earlier in this paper are viewed as being virtually identical to the bank tying provisions. The court stated that Section 106(b)(1) obviates the need for a plaintiff to establish that the defendant has market power over the tying product.[184] Again, the *Bruce* court, like the *Parsons Steel* and *Costner* courts before it, quoted Senator Brooke's Supplementary Views in support of this statement; the court also cited *Parsons Steel* and *Costner*.[185] Earlier in the opinion, the *Bruce* court quoted the *Senate Report* stating that Section 106(b)(1) was "intended to provide specific statutory assurance that the use of the economic power of a bank will not lead to lessening of competition or unfair competitive practices."[186] Obviously, the *use* of economic power in such an anti-competitive manner requires the *existence* of economic power. This statement in the *Senate Report* should not be viewed as evidence that Congress assumed or presumed that banks have economic power, but rather should be viewed as evidence

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183 837 F.2d 712 (5th Cir. 1988).

184 *Id.* at 718.

185 *Id.* at n.10.

186 *Id.* at 715, quoting *Senate Report* at 16.

of Congress' intent to prevent the misuse of economic power if it exists; preventing the misuse of economic power is very different from assuming or presuming that economic power exists.

The *Bruce* court, unlike a number of other United States Courts of Appeals, concluded that the bank tying provisions could be violated irrespective of whether the tying arrangement was anti-competitive.[187] It is unreasonable to conclude that conduct that is not anti-competitive may violate Section 106(b)(1), which is after all an antitrust statute, and thus this opinion should not be accorded any precedential value.

In *Davis v. First National Bank of Westville*, the Seventh Circuit Court of Appeals stated that Section 106(b)(1) does not require a showing of economic power, again by quoting verbatim the statement of the *Parsons Steel* court that is quoted above; in doing so, the court also cited *Parsons Steel*.[188] To repeat, the *Parsons Steel* opinion has no precedential value with respect to such statement. The *Davis* court, like the *Bruce*, *Parsons Steel* and *Costner* courts before it, quoted Senator Brooke's Supplementary Views.[189] However, as discussed in Part G below, the *Davis* court held that since the practice of which the plaintiffs complained "is in no way anticompetitive, it is outside the scope of [Section 106(b)(1)]."[190] As discussed in this paper, for a practice to be anti-competitive necessarily requires a finding that the tying bank has

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187 *Id.* at 718. As discussed in Part A and Part D above, it is generally agreed that a showing of a specific anti-competitive effect is not required under Section 106(b)(1) or under the general *per se* antitrust tying law. But, as discussed in Part G below, courts have required that a tying arrangement be an anti-competitive practice.

188 868 F.2d 206, 208 (7th Cir.), *cert. denied*, 493 U.S. 816 (1989).

189 *Id.*

190 *Id.*

economic power in the tying-product market since it is well established that "absent such power tying cannot conceivably have any adverse impact."[191]

Finally, the *Davis* court's statement regarding economic power is only *dicta* since the court concluded that the defendants' requirement that was the basis for the plaintiffs' claim was merely a permissible credit term.[192] Thus, the court's statement regarding economic power was not relevant to its holding, and, as discussed above, has no precedential value.

In *Amerifirst Properties, Inc. v. FDIC*, the Fifth Circuit Court of Appeals concluded that (i) a loan commitment constitutes "extending credit" within the meaning of Section 106(b)(1) even if the loan facility is never actually funded, (ii) the plaintiff was a customer of the defendant bank and therefore had standing and (iii) Section 106(b)(1) does not require a showing of a specific anti-competitive effect.[193] While the *Amerifirst Properties* court did not itself state that Section 106(b)(1) does not require a showing of economic power, the court did quote (in a footnote) Senator Brooke's Supplementary Views and it also cited *Bruce*, *Parsons Steel* and *Costner*.[194]

The economic power issue was not relevant to how the phrase "extend credit" in Section 106(b)(1) should be construed or to the issue of standing, and, irrespective of whether economic power is required under Section 106(b)(1), there is no disagreement that a showing of a specific anti-competitive effect is not required under Section 106(b)(1). Therefore, even if it

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[191] Quoting *Jefferson Parish Hospital*, 466 U.S. at 37-38 (concurring opinion). *See* note 27 above.

[192] *Davis*, 868 F.2d at 209.

[193] 880 F.2d at 825-826.

[194] *Id.* at 826 and n.12.

were concluded that the *Amerifirst Properties* court, by quoting Senator Brooke's Supplementary Views, implicitly stated that economic power is not required under Section 106(b)(1), such statement would only be *dicta* and, as such, would have no precedential value.

Earlier in its opinion, the *Amerifirst Properties* court stated that Congress' intent in enacting Section 106(b)(1) was to address the "improper use of economic leverage that the Act seeks to prevent. . . ."[195] The term "leverage" is synonymous with economic power.[196] Again, obviously a bank must *have* economic leverage/power before it can improperly *use* economic leverage/power.

In *Palermo v. First National Bank and Trust Company of Oklahoma City*, the Tenth Circuit Court of Appeals stated that plaintiffs "are not required to prove actual competitive effects of the challenged practice, such as a bank's dominance or control over the tying product market. . . ."[197] To support this statement, the court cited *Amerifirst Properties*, *Campbell*, *Parsons Steel* and *Costner*.

The *Palermo* court held in favor of the defendant "because plaintiffs-appellants have failed to establish an anticompetitive practice" that would result in unfair competition or could lessen competition.[198] To repeat, economic power in the tying-product market is required for a practice to be anti-competitive.

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[195] *Id.* at 824, quoting *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F.Supp. 542, 554 (S.D.N.Y. 1985).

[196] *Jefferson Parish Hospital,* 466 U.S. at 14 n.20. *See also* note 27 above.

[197] 894 F.2d 363, 368 (10th Cir. 1990).

[198] *Id.* at 365.

Notwithstanding its statement that "a bank's dominance or control over the tying product market" does not have to be proven, the *Palermo* court stated that the purpose of Section 106(b)(1) is "to deter a bank from using its economic power to reduce competition or to compete unfairly."[199] The court, quoting from the *Senate Report*, also stated that the "legislative history indicates that the broad purpose of the statute simply is to guard against possible 'misuse of economic power of a bank' which might result in 'a lessening of competition or unfair competitive practices.'"[200] To repeat, the *misuse* of economic power requires the *existence* of economic power.

The *Palermo* court mistakenly viewed "a bank's dominance or control over the tying product market" (*i.e.,* economic power) to be an anti-competitive effect. Such dominance or control may result in an anti-competitive effect, but it is not itself an anti-competitive effect.

Finally, the *Palermo* court ultimately concluded that the defendant bank's conduct was within the exemption for traditional banking practices in connection with making loans.[201] The *Palermo* court's statement regarding "a bank's dominance or control over the tying product market" has no relevance to its conclusion regarding the traditional banking practices exemption. Therefore, such statement is only *dicta* and, as such, has no precedential value.

In *Dibidale of Louisiana, Inc. v. American Bank & Trust Company*,[202] the Fifth Circuit Court of Appeals stated that Section 106(b)(1) does not require a showing of economic power. To support this statement, the court cited *Bruce*, *Campbell*, *Parsons Steel* and *Costner*;

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[199] *Id.* at 368.

[200] *Id.* at 367, quoting *Senate Report* at 16.

[201] *Id.* at 370.

[202] 916 F.2d at 305-06.

the court cited as *contra* authority *McGee*[203] (which as discussed above stated that Section 106(b)(1) "requires a showing of . . . a tying product, in the market for which defendant has economic power. . . ."). The *Dibidale* court concluded, contrary to the well-established view, that Section 106(b)(1) applies to both voluntary and coercive tying arrangements. For the reasons discussed above (in the last paragraph of note 102), the *Dibidale* case presents a flawed analysis of Section 106(b)(1) and should not be accorded any precedential value.

In *Integon Life Insurance Corp. v. Browning*,[204] the Eleventh Circuit Court of Appeals interpreted the tying provisions of the Home Owners' Loan Act (12 U.S.C. § 1464(q)(1)). The *Integon* court stated that Section 106(b)(1) does not require a showing of economic power. Once again the court, like the *Amerifirst Properties*, *Davis*, *Bruce*, *Parsons Steel* and *Costner* courts before it, quoted Senator Brooke's Supplementary Views; the court also cited *Parsons Steel* and *Dibidale*.[205]

The *Integon* court held for the defendant because it found that the plaintiff had not demonstrated that there was a genuine issue of material fact as to whether the defendant had forced or coerced the plaintiff to enter into the tying arrangement. In reaching its decision, the court stated that "'the plaintiff must establish that the seller *forced* or *coerced* the buyer into purchasing the tied product.'"[206] While the Eleventh Circuit Court of Appeals reached the correct conclusion in *Integon*, it did not address the inconsistency between its requirement that

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[203] *Id.* at 306.

[204] 989 F.2d 1143, 1150 (11th Cir. 1993).

[205] *Id.*

[206] *Id.* at 1151 (emphasis added), quoting *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1415 (11th Cir. 1987).

force or coercion be proven with the well-recognized fact that economic power in the tying-product market is required to force or coerce a buyer to purchase the tied product.

S & N Equipment Company v. Casa Grande Cotton Finance Co.,[207] is the most recent United States Court of Appeals opinion that states that a plaintiff is not required to establish the economic power of a bank under Section 106(b)(1). To support this statement, the court cited *Dibidale*, *Integon*, *Palermo*, *Amerifirst Properties* and *Davis*.[208] This court, like the *Dibidale* court, concluded that plaintiffs are not required to show even "some modicum of coercion" to establish a violation of Section 106(b(1).[209]

The *S & N Equipment* court quoted from *Dibidale*, as follows:

> Unlike the general marketplace where the power to coerce a consumer to accept a tying arrangement is directly related to the market power of the proposed coercer, in the banking industry the power to coerce is inherent in the banking relationship itself, regardless of an individual bank's market power.[210]

It is incorrect to state that the power to coerce is inherent in all banking relationships, regardless of the bank's market power. For example, there is nothing inherent in a wholesale bank's relationship with its large, sophisticated corporate customers that would allow such a bank to coerce such customers; this simply reflects the fact that such banks do not have economic power in the commercial credit market for large corporate borrowers. Further, the legislative history of Section 106(b)(1) does not support this general statement made by the *S & N Equipment* and *Dibidale* courts. Indeed, Senator Wallace Bennett made the following observation when the

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[207] 97 F.3d 337, 346 (9th Cir. 1996).

[208] *Id.*

[209] *Id.* at 346 n.18.

[210] *Id.*, quoting *Dibidale*, 916 F.2d at 306.

bank tie-in legislation was debated on the Senate floor: "[T]ying is not a practice which is more of a problem in banking than it is in other businesses, and . . . I am sure that the practice is far less common among banks and their affiliates than it is in other segments of our economy."[211]

The only issue before the *S & N Equipment* court was whether the defendant constituted a "bank" under Section 106(b)(1). Therefore, the court's statement regarding economic power is only *dicta* and, as such, has no precedential value.

Section 106(b)(1) is designed "to prohibit anti-competitive practices,"[212] and, as discussed in this paper, without economic power in the tying-product market a tying arrangement cannot be an anti-competitive practice. This conclusion is not controversial. The noted antitrust scholar Phillip Areeda has stated that "the rationale for requiring proof of power over the tying product must be that no 'tie-in' can occur or cause any detrimental effect . . . without it."[213] "[P]ower is a precondition that must be satisfied before detriments, if any, can flow from an illegal tie."[214] "[W]ithout power in the first [tying] market, no harm to competition in the tied market can occur."[215] The Supreme Court has concluded: "*Only if* [buyers] are forced to purchase [seller's] services as a result of the [seller's] market power would the arrangement have anticompetitive consequences."[216] The concurring opinion in *Jefferson Parish Hospital*, which was joined by four Justices, stated: "[T]he seller must have power in the tying product market.

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211 116 *Cong. Rec.* S15713 (daily ed. Sept. 16, 1970) (statement of Sen. Bennett).

212 Quoting *Senate Report* at 17.

213 10 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 1734a, at 39.

214 *Id.* at ¶ 1734b5, at 46.

215 *Id.* at ¶ 1734d, at 54.

216 *Jefferson Parish Hospital*, 466 U.S. at 13-14 (emphasis added).

Absent such power tying cannot conceivably have any adverse impact in the tied-product market. . . ."[217] The courts in *Costner*, *Parsons Steel*, *Campbell*, *Bruce*, *Davis*, *Amerifirst Properties*, *Palermo*, *Dibidale*, *Integon* and *S & N Equipment* failed to recognize this. Instead, they merely stated as "boilerplate" *without any analysis* the conclusion that economic power is not required under Section 106(b)(1). These cases might serve as meaningful precedent if the basis for such statements -- in particular Senator Brooke's Supplementary Views -- had any grounding in logic or common sense. Because there is no such foundation underlying these statements, it is time for this "house of cards," with each "card" resting on an earlier case, to come tumbling down. Removal of Senator Brooke's Supplementary Views from the "deck" will cause this "house of cards" to immediately tumble; Senator Brooke's subsequent statement on the Senate floor, which is discussed in Part D above, provides ample basis for removing his Supplementary Views from the "deck."

The Federal Reserve Board, the OCC and the Federal Deposit Insurance Corporation (the "FDIC") under Section 8(b) of the Federal Deposit Insurance Act, as amended,[218] and the Department of Justice under Section 106(c) of the BHC Act Amendments are the federal authorities charged with enforcement of the provisions of Section 106(b)(1), and they have the authority with respect to the banks subject to their respective jurisdictions to make clear that these statements of these courts are incorrect and without any reasonable foundation. The Supreme Court stated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*:[219]

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[217] *Id.* at 37 (concurring opinion).

[218] 12 U.S.C. § 1818(b).

[219] 467 U.S. 837, 844-45 (1984) (internal citations and quotation marks omitted).

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

It is clear from the above-discussed opinions of United States Courts of Appeals that the interpretation of the bank tying provisions requires more than "ordinary knowledge" respecting bank tying arrangements.

G. Certain courts have recognized that a bank tie-in must be an "anti-competitive practice" to violate the bank tying provisions. As discussed in Part F above, certain courts have stated that under the bank tying provisions a plaintiff does not have to establish the economic power of a bank in the tying-product market. But as discussed in this paper, this conclusion is completely at odds with the Supreme Court's antitrust jurisprudence which recognizes that a seller's economic power in the tying-product market is "the essential characteristic of an invalid tying arrangement"[220] and that a tying arrangement can have anti-competitive consequences only if the seller has economic power in the tying-product market.[221] However, given (i) the relatively low level of economic power that the Supreme Court found necessary under the general antitrust laws at the time of the enactment of Section 106(b)(1) and (ii) the above-discussed and often-quoted Supplementary Views of Senator Brooke in the *Senate Report*, it is not completely surprising that certain courts, banking lawyers and others have

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220 Quoting *Jefferson Parish Hospital*, 466 U.S. at 12.

221 *See* the discussion in Part B above.

concluded that a plaintiff in an action under Section 106(b)(1) does not have to prove that a bank had economic power in the tying-product market.

Over the years, various courts have clearly struggled with the illogic of such a conclusion, particularly as the required showing of economic power has significantly increased under the general antitrust laws while the role of banks in financial intermediation has significantly decreased. In their struggle, numerous courts have concluded that a plaintiff in a Section 106(b)(1) case must prove that a bank tie-in is an *anti-competitive practice* in order to prove a violation of the bank tying provisions.

In *Doe v. Norwest Bank Minnesota, N.A.*, the Eighth Circuit Court of Appeals stated:

> [A] plaintiff in a § 1972 action need not show that a tie has anti-competitive effects. But a § 1972 plaintiff is required to show an anti-competitive *practice*, that is, "that the practice results in unfair competition or *could lessen competition*."[222]

In *Palermo v. First National Bank and Trust Co. of Oklahoma City*, which is discussed in Part F above, the Tenth Circuit Court of Appeals held that while Section 106(b)(1) does not require a showing of anti-competitive effect, it does require a showing that the "practice complained of is anticompetitive, that the practice results in unfair competition or could lessen

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222 107 F.3d 1297, 1305 (8th Cir. 1997) (emphasis in original; citations omitted). The Eighth Circuit Court of Appeals stated that "[w]e disagree with trial court decisions from within our own Circuit opining that a tie is a per se violation of § 1972." *Id.* The court cited *Sharkey v. Security Bank & Trust Co.*, 651 F. Supp. 1231, 1232 (D. Minn. 1987), in which a District Court stated that "defendant's admitted tying arrangement is, *per se*, a violation of the statute" "without showing that such arrangement was anti-competitive in nature." As discussed in Part D above, the bank tying provisions apply the *per se* rule to bank tie-ins, which requires proof of economic power in the tying-product market. It is the use of such economic power that results in an anti-competitive practice that the Eighth Circuit Court of Appeals found necessary in *Doe v. Norwest Bank.* The Eighth Circuit Court of Appeals was therefore correct to disagree with the District Court in *Sharkey*.

competition, and that the practice benefits the bank in some way other than merely allowing the bank additional asset protection."[223] The court stated:

> Given the language of the statute and its legislative history, we must reject the plaintiffs' argument that no anticompetitive practice need be shown. Plaintiffs have not addressed the distinction between requiring proof of an anticompetitive *effect* versus requiring proof of an anticompetitive *practice*.
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> Requiring plaintiffs to show an anticompetitive practice which benefits the bank is also consistent with the purpose of the statute; to deter a bank from using its economic power to reduce competition or to compete unfairly. . . . Thus, the reach of the statute is limited not only by statutory exemptions, but also by the statute's purpose.[224]

The Seventh Circuit Court of Appeals stated in *Davis v. First National Bank of Westville*, which is also discussed in Part F above, that under Section 106(b)(1) a plaintiff must "complain of a practice that is anticompetitive."[225] The court reasoned that Section 106(b)(1)

> proscribes certain conditional transactions where their effect would be to increase the economic power of banks and to lessen competition. It was intended "only to 'prohibit *anticompetitive* practices which require bank customers to accept . . . some other service or product . . . in order to obtain the bank product or service they desire.'" [Quoting the *Senate Report* at 17.]
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> Thus, to achieve its purpose of checking the economic power of banks, section 1972 proscribes tying . . . arrangements that traditionally have been targets of the antitrust laws because of their potentially anticompetitive effects. . . . A tie-in lessens competition when it enables an economically powerful seller of the tying product to coerce customers of that product into buying an additional product they do not want or would rather buy elsewhere. . . . The antitrust laws are concerned with tie-ins . . . when they enable a party with sufficient power in one market to avoid the standard market criteria of price, quality, and service in another market and thereby lessen competition.

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223 894 F.2d at 368.

224 *Id.* (emphasis in original).

225 868 F.2d at 208.

> [S]ection 1972 renders tying arrangements involving a bank unlawful "without any showing of specific adverse effects on competition or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product or service. Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of [section 1972] are applicable regardless of the amount of commerce involved." [Quoting Senator Brooke's Supplementary Views in the *Senate Report* at 45.]
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> Nevertheless, even under this "relaxed" *per se* approach to banking tie-ins, a plaintiff seeking relief under section 1972 must still complain of a practice that is anticompetitive.
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> [S]ection 1972 . . . was enacted to prevent banks from using their economic power to *lessen competition.*[226]

In *Davis*, the court stated that the "showing of some degree of bank dominance or control over the tying product or service" is not required under the bank tying provisions, yet at the same time it concluded that such provisions were "enacted to prevent banks from using their economic power to lessen competition." While the court in *Davis* presumably accepted, without requiring any proof, that the defendant bank had economic power in the tying-product market, it nevertheless held that since the practice of which the plaintiffs complained "is in no way anticompetitive, it is outside the scope of [Section 106(b)(1)]."[227]

As a logical matter, whether or not recognized by these courts, the conclusion of these courts that a bank tie-in must be an anti-competitive practice to violate the bank tying

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[226] *Id.* at 207-09 (emphasis in original; citations omitted).

[227] *Id.* at 209. It is noted that in *S & N Equipment Company v. Casa Grande Cotton Finance Co.*, which is discussed in Part F above, the Ninth Circuit Court of Appeals, immediately after citing *Palermo* and *Davis*, which clearly require that a bank tie-in be an anti-competitive practice, stated: "Thus, while our test speaks in terms of an 'anti-competitive' tying, the modifier either drops out or is presumed to exist. The deletion from the test of the misleading term 'anti-competitive' or the substitution of the word 'unlawful' might be helpful." 97 F.3d at 346. This court's reasoning is clearly flawed: under its logic, the court would find a tie-in that is not an anti-competitive practice and that does not lessen competition nevertheless to be unlawful. Congress could not have intended such a result in passing the bank tying provisions.

provisions necessarily requires a finding that the tying bank has economic power in the tying-product market since it is well established and recognized that "absent such power tying cannot conceivably have any adverse impact. . . ."[228]

H. Statements of the Federal Reserve Board. It is recognized that on various occasions the Federal Reserve Board has itself stated that a plaintiff in an action under Section 106(b)(1) does not have to establish that the bank had market power in the market for the tying product.[229] It is important and instructive to note that each such statement post-dated the *Costner*, *Parsons Steel*, *Campbell*, *Bruce*, *Davis*, *Amerifirst Properties* and *Palermo* opinions. More importantly, as discussed in Part D above, such statements are inconsistent with the statements of the Federal Reserve Board to Congress in 1970 that the bank tying legislation would not materially alter the then-existing general antitrust laws, which required then and continue to require that the seller have market power in the market for the tying product.

On two of these occasions, the Federal Reserve Board cited *Parsons Steel* as support for the statement that "tying arrangements under Section 106 are unlawful even without a showing of . . . the degree of bank control over the tying product."[230] As discussed in Part F

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[228] Quoting *Jefferson Parish Hospital*, 466 U.S. at 37-38 (concurring opinion).

[229] *See* 62 Fed. Reg. 9290, 9313 (Feb. 28, 1997); 61 Fed. Reg. 47242, 47255 (Sept. 6, 1996); 59 Fed. Reg. 65473 (Dec. 20, 1994); 55 Fed. Reg. 26453, 26454 n.4 (June 28, 1990); *Norwest Corporation and NCNB Corporation*, 76 Fed. Res. Bull. 702, 703 n.9 (1990).

[230] 55 Fed. Reg. at 26454 n.4; *Norwest Corporation and NCNB Corporation*, 76 Fed. Res. Bull. at 703 n.9. The Federal Reserve Board stated that ". . . Section 106's prohibitions exceeded applicable antitrust standards and imposed a per se prohibition against tie-ins involving credit." 55 Fed. Reg. at 26454; 76 Fed. Res. Bull. at 703. From this statement the Federal Reserve Board concluded that no showing (i) of adverse effects on competition or (ii) of economic power in the tying-product market are required under Section 106(b)(1). As discussed in Part A and Part D above, *both* the general antitrust laws and Section 106(b)(1) impose a *per se* prohibition against tie-ins involving credit (the general antitrust laws also imposes a "rule of reason" prohibition), and while under

above, the *Parsons Steel* court's statement regarding economic power is *dicta* and has no precedential value.

On another occasion, the Federal Reserve Board stated that Section 106(b)(1) "was based on congressional concern that *banks' unique role in the economy, in particular their power to extend credit*, would allow them to create a competitive advantage for their affiliates in the new, nonbanking markets that they were being allowed to enter."[231] The Supreme Court has stated that economic power may arise under the general antitrust laws when the plaintiff can make a showing of "uniqueness" such that the seller "has some advantage not shared by his competitors in the market for the tying product."[232] It is clear that there is no "uniqueness" to banks' activities in certain credit markets, for example, the commercial credit market for large corporate borrowers. The Federal Reserve Board and the OCC have recently stated: "There are many other entities, besides banks, offering creditworthy customers a wide choice of credit on favorable terms."[233] At March 31, 2003, the outstanding commercial and industrial loans of large domestically-chartered commercial banks and foreign-related institutions amounted to only 13% of total credit market debt owed by corporate (nonfinancial and nongovernment)

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the *per se* tying prohibition no showing of adverse effects on competition is required, the showing of economic power in the tying-product market is required.

[231] 62 Fed. Reg. at 9313 (emphasis added). The Federal Reserve Board generally cited to the *Senate Report*. *Id.* Earlier, on September 6, 1996, when it published the proposal that it adopted on February 28, 1997, the Federal Reserve Board also generally cited to the *Senate Report*. 61 Fed. Reg. at 47255.

[232] *Jefferson Parish Hospital*, 466 U.S. at 15-17.

[233] *Appendix to Letter to Representative John D. Dingell from Alan Greenspan, Chairman of the Federal Reserve Board, and John D. Hawke, Jr., Comptroller of the Currency* (Aug. 13, 2002) (the "*Greenspan and Hawke Letter Appendix*"), at 4 of 7. *See also* the *OCC White Paper* at 7-9.

businesses.[234] As early as 1981, the Federal Reserve Board had recognized that "this 'unique ability' [of banks to extend commercial credit] has been reduced."[235]

The Federal Reserve Board and the OCC have recently stated that Section 106(b)(1) "was enacted in 1970 to address concerns that banks would use their *presumed market power* in the loan business to expand their market share in other nonbank business segments by forcing bank customers to obtain additional products or services from the bank or its affiliates as a condition of obtaining credit."[236] Section 106(b)(1) requires the *existence* of market power, not the *presumption* of market power. The legislative amendment discussed in Part D above that replaced the "condition, agreement, or understanding" language with the "condition or requirement language" and the related legislative history make clear that Congress did not presume the economic power of banks since the "condition or requirement *imposed* by the bank must be *demonstrated* to prove that a violation of the section has occurred."[237] In order to demonstrate that a condition or requirement was imposed, the plaintiff must demonstrate that the "imposer" had economic power since without such power it would not be possible to impose the condition or requirement.

It is very clear, as discussed in Part D above, that the Federal Reserve Board did not believe that the bank tie-in legislation would materially alter in the bank context the then-

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[234] *Commercial Banking Institutions-Assets and Liabilities: Commercial Banks in the United States*, 89 Fed. Res. Bull. A17, A20 (Aug.. 2003); *Flow of Funds: Summary of Credit Market Debt Outstanding*, 89 Fed. Res. Bull. at A38.

[235] *Citicorp*, 67 Fed. Res. Bull. 443, 445 n.5 (1981).

[236] *Greenspan and Hawke Letter Appendix* at 3 of 7 (emphasis added).

[237] 116 *Cong. Rec.* S15708-09 (daily ed. Sept. 16, 1970) (statement of Sen. Bennett) (emphasis added).

existing antitrust laws. If the bank tie-in legislation (a) eliminated in the bank context the well-established, "essential"[238] requirement under the general antitrust laws that the seller of the tying product must have economic power in the tying-product market or (b) presumed such power, whether or not it existed, then the legislation would have materially altered in the bank context the then-existing antitrust laws.

The statements made by the Federal Reserve Board to Congress are consistent with the following statement made by the Federal Reserve Board in 1975 in each of three orders approving applications to engage in certain insurance agency activities: "It is clear that coerced tying is forbidden by § 106. . . . [T]he record indicates that the market power required for the successful practice of tying does not appear to be present."[239] It is important and instructive that these statements pre-dated the *Costner*, *Parsons Steel*, *et al.* progeny of cases.

It is also instructive to note that when the Federal Reserve Board has exempted certain transactions from the coverage of Section 106(b)(1), "the Board has considered it appropriate to analyze the competitiveness of the relevant . . . market" to determine whether the exemption would not be contrary to "the purpose [of Section 106(b)(1)] of preventing anticompetitive practices."[240] In this connection, the Federal Reserve Board has stated: "In the Board's view, unless it would be likely that the seller's market power in the . . . market for the tying product is high enough to force a consumer to also purchase on uncompetitive terms a . . .

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[238] Quoting *Jefferson Parish Hospital*, 466 U.S. at 12.

[239] *Barnett Banks, Inc.*, 61 Fed. Res. Bull. 678, 684 (1975); *Barnett Banks of Florida, Inc. and The Chase Manhattan Corporation*, 61 Fed. Res. Bull. 686, 691 (1975); *Pan American Bancshares*, 61 Fed. Res. Bull. 693, 699 (1975).

[240] 55 Fed. Reg. 47741, 47742 (Nov. 15, 1990).

service in the tied product market, a [tying] arrangement would not appear to produce anticompetitive effects."[241]

The statements of the Federal Reserve Board and Board Chairman Burns that were made to Congress in 1970 during the legislative process that led to the enactment of the bank tying provisions are correct, and the Federal Reserve Board's interpretation of Section 106(b)(1) should not be affected by certain of its later statements that are inconsistent with the statements it made to Congress.

I. Comparison of the language of Section 106(b)(1), Section 1 of the Sherman Act and Section 3 of the Clayton Act. As stated earlier in this paper, neither Section 1 of the Sherman Act nor Section 3 of the Clayton Act includes a statutory provision requiring that the seller have economic power in the tying-product market. Rather, the economic power requirement has been read into the general antitrust laws by the courts.

Section 3 of the Clayton Act, unlike Section 1 of the Sherman Act and Section 106(b)(1), by its terms prohibits a tying condition "where the effect of . . . such condition . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." As discussed above (at note 83), it would appear from this statutory language of Section 3 of the Clayton Act that an element of a plaintiff's tie-in case under the Clayton Act would be a showing that the effect of the tying arrangement was to "substantially lessen competition" in the tied-product market. But courts have effectively read out of Section 3 of the Clayton Act the "substantially lessen competition" language. As discussed above (on pages 29-

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241 *Id.* The Federal Reserve Board stated further: "[T]he Board believes that market analyses for . . . tying products would be relevant to the Board's determination of whether those tying products would result in anticompetitive practices and thus would be inconsistent with the purposes of section 106." *Id.* at 47742-43.

31), Assistant Attorney General Richard McLaren, in commenting on the bank tie-in legislation, confirmed this view by stating that the "injury to competition" (*i.e.*, the "substantially lessen competition") criteria "are not essential elements to an antitrust case against a tie-in."[242]

With this language effectively eliminated from Section 3 of the Clayton Act, the language of Section 106(b)(1) and Section 3 of the Clayton Act is very similar. But Section 3 of the Clayton Act uses the "condition, agreement, or understanding" language that Congress replaced with the "condition or requirement" language in the bank tying provisions. As discussed in Part D above, Congress replaced the "condition, agreement, or understanding" language with the "condition or requirement language" in Section 106(b)(1) to make clear that coercion is required for a bank tie-in to violate the bank tying provisions and thereby to address the need in the statute for a "reference to bank dominance."[243]

The use of language in Section 106(b)(1) that as a literal matter is narrower (and therefore as a literal matter is less comprehensive in the scope of its coverage) than the language that is used in Section 3 of the Clayton Act provides further evidence that Congress did not assume or presume the economic power of banks in Section 106(b)(1). If Congress intended to assume or presume economic power in Section 106(b)(1), it does not make sense that it would

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[242] *House Hearings* at 487 (included in Apr. 24, 1969 proceedings).

[243] Since coercion and economic power in the tying-product market are required for a tying arrangement to be illegal under Section 3 of the Clayton Act, it would appear as an interpretive matter that the "condition, agreement, or understanding" language of the Clayton Act would have the same meaning as the "condition or requirement" language of Section 106(b)(1). Nevertheless, the intent of the amendment to replace the "condition, agreement, or understanding" language with the "condition or requirement" language was to use as a literal matter narrower language that would make clear that coercion is required to violate the statutory provisions.

amend the bank tie-in legislation to adopt such narrower, less comprehensive language than that used in Section 3 of the Clayton Act, under which economic power must be proven.

The "condition or requirement" language of Section 106(b)(1) is narrower than the broad sweeping language of Section 1 of the Sherman Act, which reads: "Every contract . . . in restraint of trade . . . is . . . illegal. . . ." As discussed in Part A above, every contract is in restraint of trade, which has caused the courts to read the word "unreasonable" into the statutory provisions. Further, Section 1 of the Sherman Act, unlike Section 3 of the Clayton Act and Section 106(b)(1), does not by its terms specifically address tying arrangements.

As discussed in Part D above, Assistant Attorney General McLaren stated in a letter to the Chairman of the Senate Committee on Banking and Currency that the bank tie-in provision "is in general terms analogous to existing antitrust law. . . . "[244] It is irrefutable that if Congress eliminated the economic power requirement in Section 106(b)(1), then such provision would not be "in general terms analogous to existing antitrust law."

J. The tying arrangements that were the focus of Section 106(b)(1) would be illegal under the economic power analysis. From the legislative history of the BHC Act Amendments, it is clear that Congress enacted the bank tying provisions to address concerns that are not presented in all banking relationships, for example, the commercial credit market for large corporate borrowers. Assistant Attorney General McLaren stated:

> There is clearly a competitive problem here. It exists because a commercial bank enjoys significant market power vis-à-vis a borrower. . . . This power results from a number of factors. In part, it results from limited entry into banking and the concentrated market structure which tends to prevail in local banking markets. It also rests on the fact that the relationship between a commercial borrower and a bank tends to be a continuing one, with little effective opportunity of "shopping around" for credit: changing banks is quite inconvenient to the borrower and

[244] 116 *Cong. Rec.* S15708 (daily ed. Sept. 16, 1970).

> requires considerable disclosure of confidential internal business information necessary for credit evaluation.[245]

The Assistant Attorney General stated over one year later that

> banks enjoy a significant degree of economic power, particularly in local markets where banking alternatives are few.
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> The economic power enjoyed by banks is substantially enhanced by the fact that commercial banking markets are *local* markets for most customers. Competitive alternatives in local markets are few, and entry of new competitors is frequently restricted by legislative provisions or regulatory action. For substantial classes of financial customers in such markets, unable to journey conveniently and economically to distant metropolitan areas, local banks can be the sole suppliers of the services needed.[246]

The *Conference Report* on the bill that was ultimately enacted states:

> The House conferees agreed to this provision [Section 106(b)(1)], particularly because of the necessity of protecting small independent businessmen from unfair and predatory business practices by banks, bank holding companies and subsidiaries thereof.[247]

One commentator has stated:

> The giant corporate customer may have the resources to shop around for banks suited to its needs and, indeed, may maintain accounts with fifty or more different banks located around the country. But the small-business borrower is often likely to prefer a stable banking relationship for a number of reasons. In particular, the small customer would prefer to stay with one bank over a period of years to avoid the initial costs associated with the severing of one banking relationship and the beginning of another one. In addition, the loss of confidentiality of financial data

[245] *House Hearings* at 93 (statement of Asst. Attorney General McLaren) (Apr. 17, 1969 proceedings).

[246] *Senate Hearings* at 269 (statement of Asst. Attorney General McLaren) (May 15, 1970 proceedings) (emphasis in original).

[247] *Conference Report* at 29 (Dec. 15, 1970).

resulting from a change in banking connections also serves as an inducement to preserve an existing banking relationship.[248]

These descriptions of market structure certainly are not applicable to the commercial credit market for large corporate borrowers. As discussed above (on pages 77-78), the Federal Reserve Board has concluded that the commercial credit market for large corporate borrowers is an unconcentrated market, with numerous, active competitors. The geographic market of such business is national or global, and certainly not local, in scope.

As discussed in Part B above, at the time bank tie-in legislation was under consideration and ultimately enacted, the level of proof of economic power that the Supreme Court required in a tying case under antitrust law was relatively low. Certainly under the level of proof at that time, the provisions of Section 106(b)(1) would reach tying arrangements involving bank credit in local banking markets and in the new, nonbanking markets that banking organizations would be allowed to enter as a result of the broader provisions of the BHC Act Amendments. This has remained true as the Supreme Court has raised the level of proof of economic power over the years following the enactment of Section 106(b)(1). Clearly there may be markets, including credit markets, where banks have economic power. But no bank has the requisite economic power in the commercial credit market for large corporate borrowers. It is the conclusion of this paper that this is the central issue that should be analyzed in connection with the interpretation and enforcement of Section 106(b)(1).

Finally, requiring proof of economic power in the tying-product market under Section 106(b)(1) would not in any way undermine one of the objectives of Congress in passing

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[248] Donald A. Leonard, *Unfair Competition Under Section 106 of the Bank Holding Company Act: An Economic and Legal Overview of "Conditional Transactions"*, 94 Banking L.J. 773, 787 (1977).

Section 106(b)(1), which was to "make the Government's or a plaintiff's case easier to establish."[249] By applying the *per se* rule of antitrust law (which requires that a plaintiff prove such economic power) to bank tie-ins, the Government or the plaintiff does not have to show an actual adverse effect on competition resulting from a bank tie-in.

K. The provisions of Section 106(e) and Section 106(f) support the economic power requirement. In Section 106(e) and Section 106(f) of the BHC Act Amendments,[250] Congress has provided that any person "who is injured in his business or property" by reason of a violation of Section 106(b)(1) may bring suit in a United States District Court to recover three times "the amount of damages sustained by him, and the cost of suit" and may also "sue for and have injunctive relief . . . against threatened loss or damage" by reason of a violation of Section 106(b)(1).

A plaintiff under Section 106(b)(1), like a plaintiff under the general antitrust laws, must prove injury to the plaintiff, must prove that the injury was a direct consequence of the antitrust violation, and must demonstrate that the extent of the injury is determinable and not speculative.[251] If a bank does not have economic power in the tying-product market, a plaintiff would not be able to prove any injury that is caused by a tying arrangement. As discussed in this paper, the Supreme Court has stated that absent such economic power, tying cannot conceivably have any adverse impact;[252] Judge Frank Easterbrook has stated that without such economic

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[249] Quoting *House Hearings* at 487 (statement of Asst. Attorney General McLaren) (April 24, 1969 proceedings). *See also* note 84 above.

[250] 12 U.S.C. §§ 1975, 1976, respectively.

[251] *See, e.g., Walker v. U-Haul of Mississippi*, 747 F.2d 1011, 1014 (5th Cir. 1984), discussed and applied in *Campbell*, 781 F.2d at 443.

[252] *See* note 41 above and the accompanying text.

power a firm cannot injure competition no matter how hard it tries;[253] and the noted antitrust scholar Phillip Areeda has stated that without such economic power a tie-in cannot cause any detrimental effect.[254] Thus, without such economic power there can be no injury, loss or damage to business or property.

Further, if a bank does not have economic power in the tying-product market, then a customer's acceptance of a tied product would have to be viewed as a voluntary decision of the customer since the bank could not coerce or force the customer to accept such product. In such case, the plaintiff would effectively be claiming that the injury complained of resulted from the plaintiff's own voluntary decision; clearly in such a case the injury would not be a direct consequence of an antitrust violation.

Therefore, the fact that Congress provided such a remedy in Section 106(e) and Section 106(f) of the BHC Act Amendments supports the conclusion that Congress intended that a bank must have economic power in the tying-product market for a tying arrangement to violate Section 106(b)(1). A "presumption" of such economic power would not be enough to establish injury to business or property by reason of violation of Section 106(b)(1) since if economic power that is presumed to exist did not in fact exist, there could be no such injury. Proof of the existence of economic power in the tying-product market is a central element to the proof of injury under Section 106(e) and Section 106(f). It follows that such economic power must be established to prove a violation of Section 106(b)(1) itself since it would be illogical for Congress to create a statutory scheme whereby arrangements that violate the substantive

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[253] *See* note 27 above.

[254] *Id.*

provisions of the scheme could not cause any injury to the persons the scheme is designed to protect.

L. The "level playing field." The conclusion that a bank must have economic power in the tying-product market to violate the bank tying provisions is consistent with, and is made even more compelling by, the Gramm-Leach-Bliley Act of 1999. In the *Proposed Interpretation*, the Federal Reserve Board recognized "the increasing importance of section 106 in the wake of the Gramm-Leach-Bliley Act. . . ."[255] The intent of the Gramm-Leach-Bliley Act is to place as a general matter all financial institutions on the same "level playing field"[256] so that all financial institutions may engage in the same activities either directly or through affiliates.

As a result of the enactment of the Gramm-Leach-Bliley Act, every financial institution may either be affiliated with a bank or be a bank itself, and thus no financial institution has an advantage over another financial institution that results from a bank's ability to accept deposits that are insured by the FDIC or from a bank's access to the discount window of a Federal Reserve Bank. If there is any advantage that results from having a bank affiliate, then the Gramm-Leach-Bliley Act makes affiliation with a bank possible for all financial institutions. Thus, it would not be consistent with the "level playing field" policy underlying the Gramm-Leach-Bliley Act to conclude that a nonbank financial institution must have economic power in the tying-product market for a tying arrangement to violate the *per se* tie-in prohibition of the

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[255] 68 Fed. Reg. at 52025.

[256] *See, e.g.,* 145 *Cong. Rec.* S13880 (daily ed. Nov. 4, 1999) (statement of Sen. Schumer) (the Gramm-Leach-Bliley Act "will create a level playing field"); 145 *Cong. Rec.* S13878 (daily ed. Nov. 4, 1999) (statement of Sen. Bunning) (the Act "creates a level playing field"); 145 *Cong. Rec.* S13879 (daily ed. Nov. 4, 1999) (statement of Sen. Enzi) (the Act creates "an opportunity for people to compete evenly on the playing field"); 145 *Cong. Rec.* H11533 (daily ed. Nov. 4, 1999) (statement of Rep. Bliley) (under the Act, "everyone gets . . . the same rules, with no special advantages towards any party").

general antitrust laws but that a bank does not have to have such economic power for the exact same arrangement to violate the *per se* bank tying provisions.

M. Conclusion. The application of the *per se* tie-in rule under the general antitrust laws, the decisions of the Supreme Court and other courts regarding tying arrangements, the full legislative history of the BHC Act Amendments, the language of the bank tying provisions, the conclusion of the Federal Reserve Board that Section 106(b)(1) of the BHC Act Amendments applies only to coercive tie-ins, logic and common sense all support the conclusion, and indeed dictate, that a bank must have economic power in the tying-product market in order for a bank tie-in to violate the bank tying provisions.

Section 106(b)(1) is an antitrust statute and, as such, applies only to coercive tie-ins whereby a bank forces or coerces a customer to obtain (or provide) a tied product as a condition to obtaining the customer's desired product (the tying product). The coercion requirement under Section 106(b)(1) is the same as under the general antitrust laws. These conclusions necessarily lead to the conclusion, which is consistent with the legislative history of the BHC Act Amendments, that a bank must have economic power in the tying-product market to violate Section 106(b)(1), since economic power is a necessary condition for coercion.

It is recognized that the conclusion that a bank must have economic power in the tying-product market to violate Section 106(b)(1) may be at odds with the historical understanding of banking lawyers, certain courts and others, but such historical "misunderstanding" should not be perpetuated. In this regard, it is noted that the conclusions in the *OCC White Paper* issued by the OCC very recently are generally consistent with the conclusions in this paper. While the *OCC White Paper* does not explicitly state that a bank must have such economic power to violate Section 106(b)(1), the *OCC White Paper* does conclude

that "Congress Intended [Section 106] to Prevent Anti-Competitive Consequences Resulting From Improper Tying Arrangements"[257] and that "Banks Do Not Possess the Market Power [in the Commercial Loan Market] to Engage in Anti-Competitive Tying."[258] It necessarily follows from these two conclusions that a bank must have economic power in the tying-product market to violate Section 106(b)(1).

From the legislative history of the bank tying provisions, it is clear that the Federal Reserve Board, throughout the long legislative process that led to the enactment of the bank tying provisions, understood (i) that the bank tying legislation would "prohibit banks from engaging in coercive tying practices[,]" (ii) "that under present antitrust laws, such [coercive tying] practices are prohibited where the bank has sufficient market power to force tie-ins on unwilling customers[,]" and (iii) that the bank tying legislation, if enacted, would not "materially alter existing law."[259] Elimination in the bank context of the well-established requirement of the general antitrust laws that the seller of the desired product must have economic power in the desired-product market would have materially altered in the bank context the then-existing antitrust laws. The time is long overdue that it be recognized, understood and accepted that economic power in the tying-product market is an essential element of an illegal tying arrangement under Section 106. Failure to recognize this fundamental principle, which is based

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257 *OCC White Paper* at 21.

258 *Id.* at 7. The *OCC White Paper* states further that "banks [do not] appear to possess market power in lending to larger commercial customers that are the most likely targets for tying. Pricing power in this market is a necessary condition for effective tying by banks." *Id.* at 30.

259 Quoting the *Senate Hearings* at 136-37 (letter from the Federal Reserve Board to Senator Brooke).

on economic logic and common sense, could itself have anti-competitive consequences and indeed could have a significant adverse impact in the banking and credit markets.