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March 31, 2006

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

RE: Docket No. OP-1158

Dear Ms. Johnson:

The Association of the Bar of the City of New York ("ABCNY" or the "Association")[1] respectfully requests that the Board of Governors of the Federal Reserve System (the "Board") issue a final revision of its proposed interpretation and supervisory guidance (the "Proposed Interpretation") on the Anti-Tying Restrictions of Section 106 of the Bank Holding

[1] The Association is one of the oldest and largest local bar associations in the United States, with a current membership of over 22,000 lawyers. The Association serves not only as a professional association, but also as a leader and advocate in the legal community on a local, state, national, and international level. The Association pursues its advocacy role through the work of over 170 Committees, each devoted to a substantive area of the law. Among other activities, the Association's committees prepare comments for legislative bodies and regulatory agencies on pending and existing laws and regulations that have broad legal, regulatory or policy implications. Further information regarding the Association can be found at the Association's website, www.abcny.org.

Company Act Amendments of 1970 (the "Anti-Tying Restrictions" or "Section 106") released on August 25, 2003, Docket No. OP-1158.

The Association has been corresponding with the Board for five years now concerning Section 106. By letter of May 8, 2001, it recommended that the Board consider exempting by regulation certain large commercial loans from the prohibitions of Section 106. By letter dated September 30, 2003, the Association commented extensively on the Proposed Interpretation and recommended that it be adopted with some revisions. It is because no final action has been taken on the Proposed Interpretation and the fact that the Association remains convinced of the importance of this issue to the banking industry in the United States that we write to request that final action be taken.

The vast majority of comments on the Proposed Interpretation applauded the Board for its efforts to issue guidance on the Anti-Tying Restrictions and for the Proposed Interpretation in general. It was applauded for being very useful and helpful in assisting financial institutions with their compliance with Section 106, as well as for bringing a much needed clarity and guidance to the application of Section 106.

Indeed, Section 106, despite its straightforward language, is widely known as a very complex statute which has caused a large number of uncertainties, misconstructions, and misunderstandings since its enactment in 1970. These problems have been further aggravated by recent developments which changed the financial services landscape when compared to the situation Congress had in mind in 1970 when enacting Section 106. Banking organizations are now in a position to offer significantly more banking products and services to its customers than in 1970, especially after Congress passed the Gramm-Leach-Bliley Act in 1999. On the other hand, traditional banks today face far fiercer competition from other institutions than they did thirty-six years ago. One of the reasons for this is the fact that the prohibitions on interstate banking have been greatly reduced so that banks no longer enjoy a monopoly position over credit in local markets.

In today's financial markets, Section 106, as currently read, places traditional banks in a disadvantageous competitive position to those institutions which are not subject to its provisions, primarily investment banks and other non-bank lenders. This effect is clearly contrary to Congress' intentions in passing the Gramm-Leach-Bliley Act, which was enacted to create a level playing field among all financial institutions. It also contradicts the general purpose of Section 106 as an antitrust law which is to protect competition and not to restrain it.

The aforementioned developments and concerns call for a prompt release of an official interpretation of Section 106 that not only clarifies but also modernizes its scope and remedies its provisions which remain problematic. ABCNY believes that the Board originally acted in response to these urgent needs when it initiated the rulemaking process by publishing

the Proposed Interpretation. This was an important first step. However, in the light of the significant compliance challenges that the Anti-Tying Provisions present to banks, reliable guidance is needed, and banks will only be able to rely on a final interpretation of the Board. Considering this, as well as the amount of work that has been done in the rulemaking process so far, both by the Board and by interested parties, the standstill of two and a half years is regrettable and hard to understand.

Today's commercial and economic realities in the financial services industry require that the overly stringent interpretation of Section 106 as a strict *per se* rule (as such has been adopted by certain[2] courts) be cut back. This need was emphasized by numerous submissions on the Proposed Interpretation and was recognized by official commentators such as the Department of Justice[3] and U.S. Senators Sununu, Dole, and Crapo.[4] It is widely accepted that antitrust laws should only be interpreted as strict *per se* rules in regard to practices that, as the Supreme Court has noted, are conclusively presumed to be unreasonable "*because of their pernicious effect on competition and lack of any redeeming virtue*".[5] This is certainly not true for tying arrangements in general as shown by the fact that federal antitrust laws generally do not impose a strict *per se* rule on them. Quite to the contrary, the Supreme Court, ever since its *Fortner II*[6] decision in 1977, has consistently required a showing of market power in the tying product in order to declare tying arrangements illegal. The Supreme Court recently re-emphasized this approach in its March 1, 2006 decision, *Illinois Tool Works v. Independent Ink,* where it held that "*in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.*"[7] We believe that there remain no convincing arguments why tying arrangements by banks should be viewed differently under Section 106 and why the commercial banking industry should continue to be the only business on which antitrust laws impose a strict *per se* condemnation of tying arrangements.

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[2] Opinions in other United States Court of Appeal cases have recognized the requirement to show economic or market power in the tying product: *McGee* v. *First Federal Savings and Loan Association of Brunswick,* 761 F.2d 647, 648 (11th Cir.), *cert. denied*, 474 U.S. 906 (1985), and *Mid-State Fertilizer Co.* v. *Exchange Bank of Chicago,* 877 F.2d 1333, 1338 (7th Cir. 1989).

[3] Letter to the Board from the Antitrust Division of the United States Department of Justice dated November 7, 2003.

[4] Letters to the Board from Senator John E. Sununu dated December 8, 2004, Senator Elizabeth Dole dated February 23, 2005 and Senator Mike Crapo dated May 27, 2005.

[5] *Northern Pac. Ry. Co.* v. *United States,* 356 U.S. 1, 5 (1958). In *National Soc. Of Professional Engineers* v. *United States,* 435 U.S. 679, 692 (1978), the Supreme Court held that *per se* liability is to be reserved for only those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.", and in its decision in *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997), the Supreme Court "expressed reluctance to adopt *per se* rules ... 'where the economic impact of certain practices is not immediately obvious.'"

[6] *United States Steel Corp.* v. *Fortner Enterprises, Inc.,* 429 U.S. 610, 622 (1977).

[7] *Illinois Tool Works* v. *Independent Ink,* 547 U.S. 1, 16 (2006).

ABCNY, therefore, strongly encourages the Board to adopt the widely supported proposal to interpret Section 106 in a manner consistent with, and no broader than, the federal antitrust laws, to the extent that a tying arrangement by a bank, just as any other tying arrangement, is *per se* illegal only if it can be shown that the bank has sufficient market power in the tying product.

The Association understands that the Board based the Proposed Interpretation on a reading of the legislative history of Section 106 which appears to indicate that the usual requirements under the Sherman and Clayton Acts (especially the showing of economic or market power) are not necessary elements of a Section 106 violation. ABCNY believes that the legislative history is at best unclear in this regard. During the rulemaking process the Board received numerous well-reasoned submissions which persuasively prove that Section 106 can and should be read to require a showing of market power and that neither the unclear legislative history nor the various older court opinions preclude the Board from interpreting Section 106 this way. That the Board, in the light of the ambiguous guidance offered by Section 106 itself, its vague legislative history, and the inconsistent court opinions relating thereto, has the power to issue a clarifying interpretation of this nature is backed by last year's Supreme Court ruling in *National Cable & Telecommunications Association v. Brand X Internet Services.*[8]

ABCNY shares the belief of commentators, such as the Antitrust Division of the Department of Justice,[9] that an interpretation that brings Section 106 into line with the federal antitrust laws is to be preferred over an approach that would create certain exceptions from Section 106. But in case the Board decides not to issue a final interpretation in this direction, it should, at a minimum, create an exemption that limits the scope of Section 106 so that it applies only to such bank customers that the legislators originally intended to protect, which are, as the legislative history and case law strongly indicates, small businesses and consumers only. As the Association urged in 2001, and as shown by voluminous submissions to the Board,[10] an exemption for large loan customers would be in line with the purpose of Section 106 not only because of the aforementioned limited original focus of the legislation but also because there is plausible evidence that large loan customers cannot be coerced by banks, a commonly accepted requirement of a Section 106 claim. The Association, therefore, continues to strongly support the proposal for a "large customer" safe-harbor exemption.

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[8] 125 S.Ct. 2688 (2005).

[9] Letter to the Board from the Antitrust Division of the United States Department of Justice dated November 7, 2003, pg. 6.

[10] *See, e.g.*, Letter to the Board from the Antitrust Division of the United States Department of Justice dated November 7, 2003; paper entitled *Today's Credit Markets, Relationship Banking, and Tying* issued by the Office of the Comptroller of the Currency, International and Economic Affairs Department and Law Department, in September 2003; as well as numerous other commentaries by interested parties.

Lastly, we would like to reiterate our comments and proposals regarding Lending and Derivative Products and Mixed-Products Arrangements offered under Relationship Banking strategies as submitted in our 2003 letter to the Board. We believe that the "meaningful option" test proposed by the Board is, as other commentators agree, impractical and unworkable and we ask the Board to reconsider this proposal. In case the Board decides to adopt a "meaningful option" requirement in the final interpretation, the Association supports the suggestion of other commentators to enable banks to perform this analysis on a class-of-customer basis rather than on a customer-by-customer basis.

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Once again, the Association wants to emphasize the urgent need to finish the process of issuing a final interpretation of Section 106 as well as its belief that an interpretation that brings Section 106 into line with the general federal antitrust laws is to be preferred over an approach of implementing a number of exemptions. We believe that there is substantial legal guidance and support which proves that such an interpretation is required and permissible.

If you have any questions regarding this letter or wish to discuss our comments further, please contact the Chair of the ABCNY Committee on Banking Law, Bradley K. Sabel, at 212-848-8410, or Bettina Turck, Committee Secretary, at 212-848-4773. Thank you.

Very truly yours,

Bradley K. Sabel
Chair, Committee on Banking Law

ABCNY COMMITTEE ON BANKING LAW MEMBERSHIP

Not all of the Committee members participated in the preparation of this letter, nor did the participation of a member mean that he or she supported the views expressed in this letter. Moreover, the Committee members acted only as individuals and not as representatives of the organizations to which they belong or by which they are employed, and therefore the views expressed in the letter are not to be considered the views of any organization other than the Association. *Individuals named below who are employed by Federal or State governmental agencies or self-regulatory organizations have abstained from and do not express any opinion on the issues in the foregoing letter.*

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