September 30, 2003

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

Re: Docket No. OP-1158

Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970

Dear Ms. Johnson:

The Association for Financial Professionals (AFP) welcomes the opportunity to comment on the Federal Reserve Board's (The Board) proposed interpretation of the anti-tying restrictions contained in section 106 of the Bank Holding Company Act Amendments of 1970 and related supervisory guidance. AFP supports the Board's efforts to add clarity to this complex issue, and applauds this important first step.

AFP represents 14,000 finance and treasury professionals who, on behalf of over 5,000 corporations and other organizations, are significant participants in the banking system. Organizations represented by our members are drawn generally from the Fortune 1,000 companies and the largest of the middle market companies. Many of AFP's members are responsible for selecting bank service providers, managing banking relationships and arranging credit on behalf of their organizations. They have a significant stake in Federal Reserve regulations that impact their access to bank services and/or govern how financial institutions interact with their corporate customers.

AFP members first raised concerns about banks conditioning the availability or pricing of credit on the purchase of other services in early 2001. To gather additional information on these concerns, AFP conducted a survey with the Georgetown University Capital Markets Research Center in March 2002. Based on our members' continuing concerns, we conducted a follow-up survey, the results of which were released in March 2003.

In the March 2003 survey, fifty-six percent of survey respondents from companies with annual revenues greater than $1 billion reported that a commercial bank had denied credit or changed the terms of credit after the company did not award other financial business, such as investment banking or strategic advisory services. Further, three out of five large companies reported that the pressure to award additional business had increased over the last year.

We commend the Board for recognizing the need for further interpretation and guidance to clarify which activities are prohibited and which activities are exempt from the anti-tying restrictions. However, certain aspects of the proposal raise concerns and merit further exploration before the interpretation and supervisory guidance are finalized. These include the definition of a "meaningful option" as referenced in the discussion of "mixed-product arrangements" (Section IV.A.2) and the types of information that may be considered when determining whether a condition or requirement exists (Section III.B.3). We also question some of the assumptions about the types of evidence that may show whether a customer was required to purchase or provide an additional product as a condition of obtaining the customer's desired product (Section III.B.3, Section VII.B).

The Board's proposal states that, in some cases, section 106 allows a bank to "provide the customer the freedom to choose whether to satisfy a condition imposed by the bank through the purchase of one or more traditional bank products or other 'non-traditional' bank products (a 'mixed-product arrangement')." This type of mixed-product arrangement would be allowed if the customer has a "meaningful option" to satisfy the bank's condition solely through the purchase of traditional bank products. For a "meaningful option" to exist, it is crucial that a prudent corporate finance professional could reasonably choose a combination of traditional bank products that would satisfy the condition imposed by the bank. The interpretation of a "meaningful option" is the linchpin that will determine whether the Board's proposal will be effective at clarifying the anti-tying restrictions.

Large companies often have a complex array of banking services. The banks providing these services are selected for their service capabilities, quality, price or other factors deemed important by the company. In many cases, these services provide benefits not only to the company, but also to employees, customers, and vendors. Switching these services could result in higher service costs, inferior services, disruptions for employees, customers and vendors, heavy administrative burdens, disruptions in cash flow, and a concentration of risks with one bank or a small number of banks. It is important that the Board clarify whether it would interpret mixed-product arrangements that would result in these or other adverse outcomes, including the purchase of unneeded services, as presenting a "meaningful option." We urge the Board to clarify that arrangements resulting in the adverse outcomes outlined above do not constitute a "meaningful option."

As an example, consider a large national retailer with locations in many states that offers a private-label credit card. The company has 1) invested significant time and resources in establishing an efficient network of local depository banks to accept deposits from its retail locations; 2) established a lockbox network with a bank to receive and process payments to its private-label credit card accounts; and 3) contracted with a bank to process direct deposits of payroll for its employees. The company also has an electronic data interchange (EDI) program to streamline its procurement process with vendors. The banks providing these services were selected to optimize availability of deposits, bank service charges, administrative costs, and service capabilities.

Changing these services to a new bank could result in higher bank fees, higher deposit transportation costs, the need to re-train personnel at each location, cash flow and supply-chain disruptions, delayed availability of checks, interruption of employees' direct deposit of payroll, internal re-programming costs, decreased service capabilities, and other adverse effects. If the company were offered the option of meeting the bank's hurdle rate by awarding all or a large part of these "traditional" services to the prospective lender, would this constitute a "meaningful option" as envisioned in the Board's interpretation? AFP posits that in the example above and other similar situations a "meaningful option" does not exist, since no prudent finance professional would willingly agree to an arrangement with so many negative consequences. This is one example of how the interpretation leaves the identification of prohibited activities in need of further clarification.

AFP agrees that the facts and circumstances surrounding a particular bank-customer relationship will be critical in determining whether a bank has violated the anti-tying restriction. However, some of the information that the Board has stated it may consider when determining whether a condition or requirement exists may not be useful in assessing whether illegal tying has occurred. The interpretation states that "[t]ypically, the terms of the bank's offer to the customer or the agreement entered into between the bank and the customer will provide the best evidence of whether the customer was required to purchase (or provide) an additional product as a condition of obtaining the customer's desired product." While an explicit written requirement in an offer or agreement would provide strong evidence, this type of explicit, documented, tying arrangement is the exception rather than the rule. Our survey results and anecdotal evidence indicate that implicit tying arrangements, most commonly verbally communicated, are far more common than explicit arrangements. The Board should not interpret the lack of a written requirement in the offer or an agreement as evidence that such a requirement does not exist.

Short of a written offer or agreement, the best evidence of a condition or requirement imposed on a company may come from corporate finance professionals that manage bank relationships. AFP members, who are often responsible for bank relationship management, have indicated to us that many conditions or requirements are implicit, and that even those that are explicit are seldom in writing. However, these same members are hesitant to discuss these situations with the press or with any regulator, even off the record. While the majority of respondents to AFP's 2003 survey reported that they had been subjected to some form of pressure to award other business to a credit provider, not a single respondent to the survey indicated that their company had ever notified a regulator of such activity.

Finance professionals' primary responsibilities include managing financial institution relationships and ensuring that their companies have access to essential services, including credit. If a bank were to refuse to offer or withdraw credit from a company because that company raised tying issues, the company could experience severe financial consequences. If the Board is to be effective at identifying illegal tying arrangements, it must clarify the anti-tying restrictions to bank customers and develop a method for the aggrieved to notify regulators that minimizes the likelihood of retribution. A statement in banks' policies and procedures "prohibiting the bank or any employee of the bank from taking adverse action against a customer because the customer submitted a complaint to the bank or a Federal banking agency alleging a violation of section 106 by the bank" is not enough.

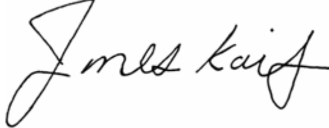
Businesses, small or large, may be subject to illegal tying arrangements. However, we are concerned about the statement that "the financial resources and level of sophistication of the customer" will be useful in determining whether a condition or requirement exists. Our March 2003 survey found that companies with more than $1 billion in annual revenue were more likely than smaller companies to have credit denied or terms changed if they did not award lenders other financial business, including investment banking. Although these companies have significant financial resources and sophisticated finance professionals, our survey clearly shows that they are more, not less, likely to have credit made contingent upon the purchase of other bank services. The Board should not assume that larger companies are immune from bank actions that may violate anti-tying restrictions.

In addition, we disagree with the assertion that "a less detailed and granular review likely would be required for a bank to establish a good faith belief that a large, complex company has a meaningful option of satisfying a condition solely through the purchase of traditional bank products than a small company with less complex business operations." Because of the complexity of the these large companies, the adverse effects of changing banking relationships on these companies and their employees, customers and vendors, is greater than for small companies with less complex operations. Further, large companies often have fewer banks that can satisfy their complex service needs, which increases the advantage that banks can employ. Again, mixed-product arrangements that would result in above-market costs, disruptions of cash flow or decreased service levels should be considered a "meaningful option."

AFP has long supported relationship banking and legislation that facilitates this practice, including the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and the Gramm-Leach-Bliley Financial Modernization Act of 1999. We are pleased that the Board is acting to clarify the distinction between relationship banking and illegal tying. The Federal Reserve Board's proposed interpretation and related supervisory guidance, along with the its August action against a bank that violated the anti-tying restrictions, are clear signs that the Board has recognized that tying is a problem and is committed to enforcing existing regulations.

AFP looks forward to working with the Federal Reserve to ensure a fair marketplace for all participants. Please feel free to contact Jeff Glenzer, CTP, AFP's Director of Treasury Services at 301.907.2862.

Sincerely,



President and CEO