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September 29, 2003

Ms. Jennifer J. Johnson, *Secretary*  
Board of Directors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, D.C. 20551

**Re: Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act  
Amendments of 1970      Docket No. OP-1158**

Dear Ms. Johnson:

The Independent Community Bankers of America (ICBA)<sup>1</sup> appreciates the opportunity to offer the following comments to the Board of Governors of the Federal Reserve System (the "Board") concerning the proposed interpretation of the anti-tying restrictions of section 106 of the Bank Holding Company Act.

Section 106 of the Bank Holding Company Act generally prohibits a bank from conditioning the availability or price of one product on a requirement that the customer also obtain another product from the bank or an affiliate of the bank. For example, the statute prohibits a bank from conditioning the availability of a loan from the bank (or a discount on the loan) on the requirement that the customer also purchase an insurance product from the bank or an affiliate. While Section 106 does apply to a bank whether or not it is owned by a bank holding company, it does not apply to non-bank affiliates of a bank or other non-bank entities.

Although the general prohibitions of section 106 can be stated fairly simply, determining whether a violation of the statute has occurred often requires a careful analysis of the statute, the regulations, and of the facts and circumstances associated with the particular transaction at issue. ICBA therefore commends the Federal Reserve for its effort in clarifying this complex subject. Without this guidance, community banks would find it difficult to interpret the law and to establish policies and procedures for complying with

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<sup>1</sup> ICBA is the nation's leading voice for community banks and the only national trade association dedicated exclusively to protecting the interests of the community banking industry. ICBA has nearly 5,000 members with branches in more than 17,000 locations nationwide. Our members hold more than \$526 billion in insured deposits, \$728 billion in assets and more than \$405 billion in loans for consumers, small businesses, and farms. They employ more than 231,000 people in the communities they serve

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the restrictions. In particular, ICBA applauds the Federal Reserve for clarifying the applicability of Section 106 to the following situations:

- (1) Section 106 does not require a bank to extend credit or provide any other product to any customer. For instance, a bank may deny credit to a customer on the basis of the customer's financial condition, financial resources or credit history, or because the bank does not offer the type of credit requested by the customer.
- (2) Section 106 does not prohibit an insurance agency affiliate from offering discounts on premiums to customers who also have a loan from, or deposit account with, the bank since it is the affiliate that is imposing the condition, not the bank.
- (3) Section 106 allows a bank to condition both the availability and price of any bank product on the requirement that the customer obtain a "traditional bank product" such as a loan, deposit or trust service. For example, a bank may condition the availability or price of a particular loan on a requirement that the customer maintain a specified amount of deposits with the bank or its affiliates or that the customer obtain cash management or trust services from the bank or its affiliates. In both cases, the bank's actions are permissible because the tied products are traditional bank products. In this regard, ICBA commends the Federal Reserve for specifically listing in the interpretation the types of products that are considered "traditional bank products" for purposes of this exemption.
- (4) Banks may offer mixed-product arrangements that give the customer the option to choose which products (traditional or non-traditional) to purchase as long as the customer has a meaningful choice of traditional or non-traditional products to choose. Similarly, banks may also offer combined-balance discount packages as long as they are structured in a way that does not obligate customers to purchase non-traditional products in order to obtain a discount.

These examples will assist community banks and their customers in understanding the scope and applicability of the anti-tying restrictions.

However, ICBA has one concern with the interpretation. The anti-tying policies and procedures of a bank are reviewed and evaluated by the banking agencies as part of its compliance exam. In Part IV of the proposed guidance, the Federal Reserve describes an elaborate set of policies and procedures that a bank must adopt to ensure compliance with Section 106. Banks are advised to have education and training programs for bank personnel, to have an internal audit that periodically reviews and test for its anti-tying policies, and a compliance function that would review the bank's marketing materials and individual transactions to evaluate the bank's compliance with the anti-tying restrictions. Since the focus of Section 106 violations should be on the large banks whose size and market share provide a greater potential for anticompetitive impact, ICBA urges the regulators to exercise some flexibility with community banks particularly when they examine them to see if they have the necessary policies and procedures in place to ensure

compliance with Section 106. The types of anti-tying policies, procedures and systems appropriate for a particular bank should depend on the size of the bank and the scope and complexity of the bank's activities including the activities conducted with affiliates. Community banks have an enormous regulatory burden and there is no need to add to that burden with unnecessary paperwork, compliance and internal audit requirements.

### **Conclusion**

ICBA commends the Federal Reserve for issuing the proposed interpretation of section 106 of the Bank Holding Company Act and for clarifying this complex subject for community bankers. If you have questions or need any additional information, please contact Chris Cole, ICBA's regulatory counsel at 202-659-8111 or [Chris.Cole@icba.org](mailto:Chris.Cole@icba.org).

Sincerely,



C.R. Cloutier  
Chairman