

balance in products specified by the company offering the discount.

EFFECTIVE DATE: May 26, 1995.

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SUPPLEMENTARY INFORMATION:

Background

Section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972) generally prohibits a bank from tying a product or service to another product or service offered by the bank or by any of its affiliates.¹ A bank engages in a tie for purposes of section 106 by conditioning the availability of, or offering a discount on, one product or service (the "tying product") on the condition that the customer obtain some additional product or service (the "tied product") from the bank or from any of its affiliates. Violations of section 106 can be addressed by the Board through an enforcement action, by the Department of Justice through a request for an injunction, or by a customer or other party through an action for damages. 12 U.S.C. 1972, 1973, and 1975.

Section 106 contains an explicit exception (the "statutory traditional bank product exception") that permits a bank to tie a product or service to a loan, discount, deposit, or trust service offered by that bank. The Board has extended this exception by providing that a bank or any of its affiliates also may vary the consideration for a traditional bank product on condition that the customer obtain another traditional bank product from an affiliate (the "regulatory traditional bank product exception").²

Section 106 authorizes the Board to grant exceptions to its restrictions by regulation or order. On October 19, 1994, the Board issued an order permitting the subsidiary banks of Fleet Financial Group, Inc., Providence, Rhode Island (Fleet) to offer a discount on the monthly service fee charged for its "Fleet One Account" to customers

who maintain a combined minimum balance of at least \$10,000 in one or more products selected from a menu of eligible Fleet products. All products offered as part of this arrangement were separately available to customers at competitive prices. In granting Fleet's request, the Board determined that, to the extent that Fleet's combined-balance discount was prohibited by section 106, an exemption was warranted given the public benefits and absence of anti-competitive concerns generated by the arrangement.

Final Rule

On October 21, 1994, the Board proposed a regulatory safe harbor from section 106 for combined-balance discounts similar to that offered by Fleet (59 FR 53761, October 26, 1994). The proposal would have permitted any bank to offer a combined-balance discount provided that (1) the bank offered deposits, (2) all such deposits were considered in the arrangement, and (3) all balances in products eligible to be contributed to the minimum balance counted equally towards the minimum balance. In addition, all products involved in the arrangement were required to be separately available for purchase. The Board proposed the safe harbor to provide certainty as to the general permissibility of combined-balance discounts similar to that proposed by Fleet, and because it believed that such discounts are pro-consumer and not anti-competitive.

As noted above, the proposal included a requirement that all deposits count toward the minimum balance. The Board was concerned that absent such a requirement, combined-balance discount plans could be constructed so that a non-traditional bank product, such as securities brokerage services, represented the only viable option for a customer to reach the minimum balance. Under the Board's proposal, a customer could have qualified for the discount based solely on deposit balances. Therefore, there would be no incentive for a customer to establish a securities brokerage account, or any other non-traditional bank product, that the customer did not want in order to obtain the discount.³

³The Board also noted that, under the statutory and regulatory traditional bank product exceptions, a bank already could offer a combined-balance discount where all products in an arrangement were traditional bank products. The proposed safe harbor would simply permit a bank to increase customer choice by adding a customer's securities brokerage account or other non-traditional products to the menu of traditional bank products that count toward the minimum balance.

Summary of Comments

The Board received 58 comments on its proposal. Those commenting included 42 banking organizations, seven trade associations representing the banking industry, six Reserve Banks, two thrifts, and one law firm representing numerous insurance trade associations. Commenters overwhelmingly supported the Board's proposal because they believed that it would provide benefits to both consumers and banks.⁴ Commenters stated that the proposal would provide customers increased opportunities to obtain services from a bank at discounted prices based on the customer's overall relationship with the bank by allowing customers to meet combined-balance requirements through non-traditional products as well as traditional bank products.

Commenters also supported the proposed safe harbor because it would permit banks to market products more efficiently and compete more effectively with their nonbanking competitors who currently offer combined-balance discount arrangements. In addition, commenters commended the Board for recognizing that the financial services industry is evolving as banks provide customers a broader range of financial services. The proposed safe harbor would permit banks to package these products and therefore attract and retain more customers.

A few commenters suggested modifications to the Board's proposal and recommended that the safe harbor be enlarged. First, six commenters objected to the requirement that the bank offering the discount also offer deposits because this would prevent a nonbank subsidiary of a bank holding company—for example, a trust company—from offering the type of combined-balance discount proposed by the Board.⁵ Commenters believed that customers could be protected from any anti-competitive effects so long as an affiliated bank offered deposits and those deposits count towards the minimum balance.

⁴One commenter continued to oppose blanket exceptions to section 106, recommending that the Board act on exemption requests on a case-by-case basis. As noted below, the Board believes that a safe harbor can be designed narrowly enough to prevent anti-competitive effects.

⁵Under the Board's Rules, a nonbank subsidiary of a bank holding company could offer a combined-balance discount involving products offered by the company and its nonbank affiliates so long as no bank was involved in the arrangement. See 12 CFR 225.7(b)(3). Because combined-balance discount arrangements under this proposal include products and services offered by banks and nonbanks, a further exception is required.

¹Although section 106 applies only when a bank offers the tying product, the Board in 1971 extended the same restrictions to bank holding companies and their nonbank subsidiaries. See 12 CFR 225.7(a).

²See 12 CFR 225.7(b)(2).