

Second, thirteen commenters sought modification to the requirement that all deposits be eligible products (that is, count toward the combined minimum balance). Commenters argued that deposits should not be distinguished from other traditional bank products and that therefore the safe harbor should include plans where, for example, loans are among the eligible products but deposits are not. Commenters also argued that requiring all deposits at a bank to be counted as eligible products was unnecessary and burdensome, and that a requirement that a "substantial majority" or "all types" of deposits would serve to prevent anti-competitive arrangements.

Finally, eight commenters objected to the requirement that all eligible products count equally toward the minimum balance, arguing that different products impose different costs on banks and that a company should be able to weight the products in an economically rational way.<sup>6</sup>

#### *Consideration of Comments*

The Board agrees with the commenters that customers should be able to count deposits at an affiliated bank toward a minimum balance, and thus that a trust company, for example, should be able to offer a combined-balance discount arrangement that includes deposits at its affiliated bank. Accordingly, the final rule has been modified so that a combined-balance discount arrangement involving products from banks and nonbanks also may be offered by a nonbank subsidiary of a bank holding company so long as a customer may use deposit balances at an affiliated bank to reach the minimum balance required to obtain the discount. This modification assumes that the affiliated bank offering the eligible deposits is reasonably accessible to the customer.

As noted above, the Board proposed the requirement that a bank include deposits among the eligible products in order to ensure that any exempt combined-balance discount would offer customers meaningful choices and therefore could not have an anti-competitive effect. Loans, discounts, or

<sup>6</sup>One commenter representing the insurance industry indicated that the inclusion of certain insurance products in a combined-balance discount arrangement may undermine or perhaps contradict state insurance laws which generally prohibit insurance agents from varying the consideration charged for insurance products. The Board's regulation is not intended to, and does not, exempt any arrangements from state or federal law. Companies offering combined-balance discount arrangements are responsible for ensuring that these arrangements comply with all applicable state and federal restrictions.

trust services—the other "traditional bank products" that commenters suggested should be able to replace deposits in a combined-balance arrangement—may not be so viable a choice for many customers. While the Board believes that deposits should in almost every case be an attractive option, a large trust account or mortgage loan may be a realistic option for only a small percentage of customers. Without deposits as eligible products, customers who are not eligible for a large trust account or mortgage loan may effectively be required to elect another, non-traditional, product in order to obtain the combined-balance discount. Thus, the Board is maintaining a deposit requirement for combined-discount plans that fall under this safe harbor.<sup>7</sup> For similar reasons, the Board is not adopting the suggestion by commenters that only some deposits be required to count toward the minimum balance, simply because it is impossible to predict the effect of this more malleable standard.

The Board recognizes, however, that discount arrangements other than those within the safe harbor may also be consistent with the purposes of section 106. The Board will continue to consider such plans on a case-by-case basis and is delegating authority to approve such plans to the General Counsel. The Board will also, in appropriate cases, expand the safe harbor by rule.

The Board shares commenters' concerns that the proposal would prevent banks from assigning products different weights in counting them toward the minimum balance, and thereby could force banks to price their products irrationally. Commenters stressed that some products are more profitable than others, and that different weights should be assigned accordingly. Although there is a concern that weighting could be used to require purchase of certain non-traditional products, the Board believes this concern can be addressed by the narrower requirement that any deposit included in a combined-balance discount arrangement count at least as much toward the minimum balance as any non-deposit. This approach, which was suggested by several commenters, will allow companies to assign different weights among deposits and non-deposits.<sup>8</sup>

<sup>7</sup>The Board also is retaining the requirement that all products involved in a combined-balance discount arrangement are separately available for purchase.

<sup>8</sup>For example, a bank could count toward the minimum balance 100 percent of demand deposits, 80 percent of certificates of deposit, 70 percent of

One commenter argued that combined-balance discounts do not violate section 106 when a multiplicity of options that includes traditional bank products means that there is no "condition or requirement" that the customer purchase a non-traditional bank product. However, the commenter acknowledged that a bank could effectively tie through differential pricing. In order to address this possibility, the commenter favored general language providing that combined-balance discounts generally are not covered by section 106 so long as all eligible products are "meaningful alternatives." The commenter urged the Board to adopt this reading as an interpretation, in lieu of a safe harbor.

As discussed in the preamble to the proposed rule, section 106 covers any condition or requirement that a customer purchase "some additional product," which would appear to include combined-balance discounts. The statutory and regulatory traditional bank product exceptions would clearly exempt combined-balance discounts where all eligible products are traditional bank products. However, the question is whether, when both traditional and non-traditional bank products are included in the list of eligible products: (1) The transaction continues to be covered, does not qualify for the traditional bank product exceptions, and therefore requires an exemption, or (2) the transaction is not covered by section 106 because it is possible for a customer to meet the minimum balance through traditional products. The commenter urges the Board to adopt the second interpretation with the added requirement that the choice of traditional products be "meaningful."

The Board sees no need to resolve this issue in prescribing the final rule, as any interpretation would not be binding and the need for the safe harbor would be the same in either case. Even under the second interpretation, there would remain confusion about what constitutes sufficiently "meaningful" choice among traditional bank products so that a combined-balance discount is not covered by section 106.

#### *Related Issue*

As in past rulemakings in the tying area, the Board has received numerous comments recommending that the Board repeal its extension of section 106 to bank holding companies and their

mutual fund shares, and 60 percent of stock held in a brokerage account. So long as the percentages assigned to all deposits are higher than the percentages assigned to the non-deposits, the safe harbor would apply.