Jeffrey P. Neubert
President and CEO

100 Broad Street
New York, NY 10004
tele 212.612.9203

jeffrey.neubert@theclearinghouse.org

THE CLEARING HOUSE
Advancing Payment Solutions Worldwide

October 3, 2003

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Attn: regs.comments@federalreserve.gov

Re: Docket No. OP-1158

Ladies and Gentlemen:

The New York Clearing House Association L.L.C. ("The Clearing House")[1] appreciates the opportunity to comment on the proposed interpretation and supervisory guidance issued by the Board of Governors of the Federal Reserve System (the "Board") on the anti-tying restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970 (the "Release"). 68 Fed. Reg. 52,024 (Aug. 29, 2003). As the Board correctly points out in the Release, the general prohibitions of Section 106 may be stated simply, but applying and enforcing the statute can be difficult and highly dependent on the facts and circumstances. We applaud the Board's publication of an official interpretation of the applicability of Section 106 at

[1] The member banks of The Clearing House are: Bank of America, National Association; The Bank of New York; Bank One, National Association; Citibank, N.A.; Deutsche Bank Trust Company Americas; Fleet National Bank; HSBC Bank USA; JPMorgan Chase Bank; LaSalle Bank National Association; Wachovia Bank, National Association and Wells Fargo Bank, National Association. UBS AG, U.S. branches, a member of The Clearing House's affiliate, The Clearing House Interbank Payments Company L.L.C., participated in the preparation of this letter and supports its views.

this time and the Board's assurances that "[i]n supervising compliance by banking organizations with section 106 and [the] interpretation, the Board will take into account whether the manner of applying section 106 or the Board's interpretation in the context of a particular practice was unclear before [the] document was issued." 68 Fed. Reg. at 52,025.

I. Summary

In the view of the Clearing House, the proposed interpretation and supervisory guidance are very useful documents which should assist banks and their customers in understanding the application of the anti-tying rules to particular transactions and business practices. The Board's clear statements on a variety of issues should ease uncertainty and assist banks' compliance efforts. We are concerned, however, that in some important ways the Release fails to resolve adequately issues relating to banks' compliance efforts and may subject banks to significant additional legal risk. The following discusses our general concerns and raises a number of specific issues for the Board's consideration.

First, and perhaps foremost, we have serious concerns about the internal control and recordkeeping requirements described in the supervisory guidance for "mixed-product arrangements." The supervisory guidance states that a bank offering mixed-product arrangements must have policies, procedures and documentation that reflect how a bank establishes a "good faith belief" that each customer has a meaningful option to satisfy the condition associated with the mixed-product arrangement solely through the purchase of certain qualified bank products (the "meaningful option requirement"). The guidance sets forth due diligence information that the bank should obtain as a basis for this good faith determination, such as, information as to the customer's needs for the qualified bank products and the ability of the bank or its affiliates to offer those products to the customer. The guidance seems to suggest that this due diligence and analysis be performed on a customer-by-customer basis.

We believe that a bank should have the flexibility to perform the required due diligence and analysis by class of customer. A customer-by-customer analysis would be a futile exercise, based on the bank's subjective perception of customer need and assumptions regarding pricing of bank services and volume of transactions. In our view, the analysis would be speculative and, therefore, subject to second-guessing and challenge.[2] We believe that a better approach is to allow banks to perform an analysis that demonstrates generally that categories of customers can meet a bank's profitability threshold by using only qualified bank products. Documentation of this analysis should be a sufficient means to assure that the meaningful option requirement is met with regard to banks' mixed-product arrangements.

Moreover, for large customers with significant banking needs, the analysis should not be necessary. These customers satisfy the meaningful option requirement by their very nature. As discussed in more detail below, we urge the Board to recognize that mixed-product arrangements offered to these customers would not violate Section 106.

Second, we concur with the Board that the essential elements of an impermissible tying arrangement include a requirement that the arrangement be imposed on the customer "through some type of coercion." In our view, however, a bank must have market power in the market for the desired product to be able to "coerce" a customer into taking the tied product. The Board appears to have taken a different view in the Release by stating that the legislative history of Section 106 indicates that "economic power, anti-competitive effects, and effects on interstate commerce are not necessary elements of a section 106 claim." 68 Fed. Reg. at 52,027, fn. 21. The Clearing House concurs in the views expressed in the comments of certain of its member banks on the Release that a bank must have economic power in the market for the desired product to violate Section 106, because economic power is a necessary condition for coercion.

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2 Many of the civil actions brought against banks under Section 106 have involved counterclaims by defaulting borrowers, seeking to avoid payment of their loans. A mixed-product qualification that is based on individual subjective judgments could invite this type of litigation.

Third, we appreciate the Board's recognition in the Release that a tying arrangement proposed by a bank's customer does not violate Section 106. We believe, however, that once a customer proposes such a linkage, the bank should be permitted to issue a counter proposal to the customer and enforce the linkage without concern that it would be imposing an impermissible condition on its customer. To find otherwise would create the bizarre scenario of the bank being forced passively to decline repeated offers by its customer until it is presented with an offer it is willing to accept. We respectfully suggest, therefore, that the Board make clear in the final interpretation that a bank should be permitted to negotiate the terms of and enforce a customer-proposed tying arrangement without a fear that it could be construed as engaging in impermissible tying.

Fourth, in the view of the Clearing House, the list of products and services identified by the Board as qualified bank products under Section 106 (*i.e.*, "loan, deposit, discount and trust services") for purposes of the qualified bank product exceptions is helpful and provides some additional flexibility to banks in structuring product choices for their customers.[3] The Board's approach recognizes that banking practices have evolved since Section 106 was enacted in 1970, and includes as qualified bank products certain services that are the functional equivalent of a listed bank product (*e.g.*, a lease which is the functional equivalent of an extension of credit). We strongly urge the Board to consider expanding the list of qualified bank products to include foreign exchange and derivatives products that would be permissible for a bank to offer, in recognition of the significant role played by banks as credit intermediaries in the markets for those products. Alternatively, the Board could use its exemptive authority to extend the qualified bank product exceptions to transactions involving foreign exchange and derivatives products.

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[3] The Release refers to these products as "traditional bank products." In our view, the use of this term unnecessarily links the statutory exceptions in Section 106 to products historically offered by banks. We believe a more neutral term for products that qualify for the statutory exceptions is "qualified bank products." We use this terminology throughout our letter.

Fifth, in the Release, the Board identified as a required element of an impermissible tying arrangement that the arrangement involve two or more separate products: the customer's desired product and one or more separate tied products. The clarity of this statement is useful, but the Board does not provide sufficient guidance as to how banks should determine whether two products are separate and distinct for purposes of Section 106. As discussed in more detail below, we suggest that the Board adopt a standard based on whether particular services offered by a bank are so functionally integrated as to make it reasonable and appropriate for the bank to market them as one product, regardless of whether there may be consumer demand to obtain the two products separately.

Finally, we also have specific comments on the Board's discussion of price discounts for bundled products, the foreign transaction safe harbor and the application of Section 106 to subsidiaries of Edge Act corporations, which are discussed below.

II. <u>Discussion</u>

A. <u>Mixed-Product Arrangements</u>

In the Release, the Board states that Section 106 does not prohibit a bank from imposing a condition that requires its customer to take an additional product from a menu that contains nonqualified products, provided that the customer has the option of satisfying the condition by purchasing either qualified bank products or nonqualified products. In addition, according to the Board's proposed interpretation, the customer must have a "meaningful option" to satisfy the condition solely through the purchase of qualified bank products. The Board states that the meaningful option requirement is intended to assure that the bank's offer would not, in fact, require the customer to purchase a nonqualified product to satisfy the condition.
68 Fed. Reg. at 52,030–31.

In the supervisory guidance, the Board indicates that in order to ensure that these mixed-product arrangements are structured to comply with Section 106, a bank should have policies, procedures and documentation that reflect how the bank establishes a "good faith belief" that a customer would be able to satisfy the condition associated with the arrangement (*e.g.*, satisfy the bank's hurdle rate) through the purchase of qualified bank products. Information identified as relevant to this determination includes: (i) the types of qualified bank products included in the arrangement; (ii) the manner in which the various products are treated in determining whether the condition associated with the arrangement has been met; (iii) the types and amounts of qualified bank products typically required or obtained by companies comparable to the customer; and (iv) information provided by the customer as to the types and amounts of qualified bank products needed or desired by the customer and the customer's ability to obtain those products from the bank or its affiliates (including the customer's ability to legally transfer its business from another bank). The guidance also states that this analysis and determination must be made prior to, and reasonably current with, the time a customer is offered a mixed-product arrangement. 68 Fed. Reg. at 52,034–35.

The Board recognized in the supervisory guidance that this analysis could be performed for individual customers or *classes of customers,* and that "[t]he types and amount of information and level of analysis" could vary "depending on the nature and characteristics of the arrangement and the types of customer(s) to which it is offered." 68 Fed. Reg. at 52,035. In addition, the Board recognized 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 smaller company with less complex business operations." Id.[4]

[4] Although the size of a customer does relate to its needs for various banking services, we believe that complexity is not necessarily relevant.

At the same time, the Release seems to suggest that the analysis should be done on a customer-by-customer basis. For example, as noted above, the Release states that a bank should obtain from its customer information concerning the customer's needs for the bank's products and the customer's legal ability to transfer its business to the bank.

The Clearing House believes that a customer-by-customer analysis is unnecessary to accomplish the statutory objectives and highly burdensome, and it could create additional legal risk for banks. First, with many business customers, it is so apparent that there is both a need for and availability of qualified bank products that no individual analysis is necessary. Second, it would be very difficult for a bank to obtain reliable information as to its customer's specific banking needs without requesting the information from the customer. The customer may not be inclined to provide the information and the very inquiry to the customer may involve the bank in a discussion of its product offerings that is not permitted under the guidance until after the bank's determination of its customer's needs. Moreover, the bank could be accused of imposing an illegal condition or requirement if it later declines to make a loan because it determines that it cannot satisfy the meaningful option requirement with respect to that customer. Third, a customer-by-customer analysis could be subject to significant variation depending on the bank's assumptions with regard to both its customer and itself as to such variables as volume, price, timing, and profitability targets. As a result, the bank's analysis easily could be subject to second-guessing and challenge, thus increasing the bank's legal risk.

We believe that a bank should not be required to establish a good faith belief -- based on an individualized, customer-by-customer analysis -- that each customer can satisfy the bank's hurdle rate through the purchase of qualified bank products. Rather, a bank should be able to establish a reasonable basis for concluding that classes or types of its customers have sufficient need for the qualified bank products offered by the bank -- based on a generalized analysis of characteristics of the class of customers -- such that those customers would have a meaningful choice when offered a menu of products that included qualified bank products and nonqualified products. For example, a bank should be permitted to assume that a medium-sized retail store chain has needs for certain banking services, *e.g.*, cash management services, credit and debit card processing, pension fund management, inventory financing, etc. offered by the bank without having to obtain from the customer specific information as to the customer's actual needs.

If the Board determines that a customer-by-customer analysis is necessary for certain customers, we believe that banks should not be required to determine whether the customer may legally transfer its business to the bank. This could require a bank to review its customers' contracts with competitors to determine whether they may be terminated by the customer. It is not only impractical from the bank's viewpoint, but it is unlikely that a customer would allow a bank to review its contracts. A customer's ability to transfer its business ultimately is a question of cost. Even if the customer would be required to breach its contract and pay damages in order to terminate its relationship with another bank, it may be willing to do so under certain circumstances.[5]

Moreover, we believe that certain customers are so large, and their needs for banking services are so diverse, that the bank should not be required to perform an analysis as to whether they meet the meaningful option requirement. For example, a bank should not be required to conduct an analysis for customers with certain characteristics, such as those with (i) annual sales or revenues over a specific dollar threshold, (ii) more than a minimum number of employees, (iii) assets of more than a specified dollar amount, or (iv) credit needs of a specific dollar threshold. We would welcome the opportunity to work with the Board to develop appropriate thresholds for a class of customers that could be exempted from analysis of the meaningful option requirement. For example, we would suggest that customers with aggregate credit needs of $25 million or more would have both a sufficient breadth of need for banking services and a sufficient number of alternative sources to satisfy the meaningful option requirement.

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[5] Indeed, many contracts have a liquidated damages provision.

Banks that offer those customers a mixed-product arrangement that includes a wide array of a bank's services should be able to do so without performing customer-specific due diligence and analysis. This approach should also be available for customers that are governmental entities, and would logically also apply to sophisticated high net worth individuals. In each case, we believe a bank should be able to assume that these classes of customers are capable of making a meaningful choice when offered a menu of options for meeting a bank's profitability threshold that includes qualified bank products and nonqualified products.

We are also concerned that even if a bank formed a "good faith belief" that its customer could meet the meaningful option requirement, the proposed interpretation does not provide a safe harbor to protect the bank from liability if its customer alleges that it engaged in impermissible tying. In fact, it appears from the Board's statements in the Release that the burden might shift to the banks to establish that no impermissible tying existed in a mixed-product arrangement. The Clearing House suggests that the Board establish a safe harbor for mixed-product arrangements that meet the requirements of the interpretation. Without that protection, banks could be subject to litigation by customers as to their analyses of a customer's ability to satisfy the meaningful option requirement, which could expose banks to treble damages and civil money penalties.

B. <u>Economic Power Requirement</u>

As the Board points out in the Release, under the general antitrust laws, "an illegal tie exists only where the seller forces the customer to purchase the tied product in order for the customer to obtain its desired product." 68 Fed. Reg. at 52,028. The Board goes on to state that "[m]oreover, the evidence must demonstrate that the seller imposed the arrangement on the customer through some type of coercion." <u>Id</u>. In discussing the elements of a violation of Section 106, the Board states that a violation may occur "only when a customer is <u>required</u> to obtain an additional product from, or provide an additional product to, the bank or an affiliate in order to obtain the customer's desired product." Id. Such a requirement is not enough, however, to establish a violation. In fact, as the Board points out:

> Even if a condition or requirement exists tying the customer's desired product to another product, a violation of section 106 may occur only if the condition or requirement was imposed or forced on the customer by the bank. In this regard, section 106 was intended to prohibit banks from using their ability to offer bank products, and credit in particular, *as leverage to force* a customer to purchase (or provide) another product from (or to) the bank or an affiliate. 68 Fed. Reg. at 52,029 (emphasis added).

A recently released paper on relationship banking by the Office of the Comptroller of the Currency ("OCC") supports this view. As noted by the OCC, "banks [do not] appear to possess market power in lending to larger commercial customers that are the most likely targets for tying. Pricing power in this market is a necessary condition for effective tying by banks." [6]

At the same time, however, the Board takes the view in a footnote that the legislative history of Section 106 indicates that "economic power, anti-competitive effects, and effects on interstate commerce are not necessary elements of a section 106 claim." 68 Fed. Reg. at 52,027, fn 21. In our view, however, a bank cannot require or coerce a customer to accept a tying arrangement if it does not have economic power in the market for the desired product sufficient to enable it to restrain trade in the market for the tied product. The Clearing House supports the views expressed in the separate submissions of certain of its member banks on this issue and requests that the Board reconsider its position in footnote 21. At the very least, the non-possession of economic power should be a relevant consideration.

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[6] Office of the Comptroller of the Currency, *Today's Credit Markets, Relationship Banking and Tying* (September 2003), at 30 ("OCC Paper").

C. Voluntary Tying

In the Release, the Board states that if a bank's customer imposes a tying arrangement it does not result in a violation of Section 106. The Board provides as an example, a situation in which a large corporate customer of a bank demands a loan in order for the bank or its affiliates to obtain bond underwriting business from the customer. The Board states that, if the bank agrees to the customer's condition, no violation of Section 106 occurs. 68 Fed. Reg. at 52,029. Although this statement is very helpful, it remains unclear whether the bank may engage in negotiations with the customer with respect to the terms of the condition, including by making a counter proposal. In other words, in the Board's example, would the bank be permitted to respond to the customer that it would agree only if the customer agreed to give the bank a lead position in the underwriting? Similarly, could the bank say it will not commit the amount requested by the customer to the loan because its allotment of securities in the underwriting is insufficient?

We are also concerned that the bank would not be able to enforce a condition imposed by a customer, as illustrated by another example cited by the Board. In that example, the Board states that a violation of Section 106 does not occur if a customer proposes a multi-faceted transaction to a bank involving a package of products (*e.g.*, a bridge loan and related take-out financing) and the bank agrees to provide all of the requested products. Id. If the bank agrees to provide the package of products, it is not clear what the bank must do if the customer then decides it only wants one of the products (the loan). Is the bank bound to provide the loan without the underwriting assignment?

We believe that if a customer proposes a tying arrangement, the bank should be permitted at that point to discuss or negotiate the terms of the arrangement with the customer (including making a counter proposal), and to enforce those terms, without fear of running afoul of the anti-tying rules. We are concerned that under the proposed interpretation the bank could be at risk of being accused of violating the anti-tying rules by even suggesting a modification to the terms proposed by the customer. Once two-product linkage is proposed by the customer, the bank is not imposing that linkage.

D. Qualified Bank Products

The Board identifies in the Release a number of products and services that fall within the scope of the listed bank products in Section 106 (*i.e.*, "loan, discount, deposit, or trust services"). In doing so, the Board has provided banks with greater certainty and flexibility in structuring their banking relationships with customers. With regard to the list, we have one point of clarification and two suggestions.

One service identified by the Board is "discretionary asset management services provided as fiduciary." 68 Fed. Reg. at 52,030. The Board defines "discretionary" as acting in a fiduciary capacity with sole or shared authority (whether or not that authority is exercised) to determine what assets to purchase or sell on behalf of an account. Id. (citing 12 C.F.R. § 9.2(i)). We assume that the Board intended by this to include discretionary advisory services which do not involve the bank acting as trustee. Under Part 9 of the regulations of the OCC, acting in a fiduciary capacity includes acting "in any capacity in which the bank possesses investment discretion on behalf of another." We assume that by using the OCC's definition of investment discretion, the Board also intended to incorporate the use of that term in the definition of fiduciary capacity.

In addition, we believe that the Board should expand the list of qualified bank products to include foreign exchange and derivatives products offered by banks. As noted above, the Board's approach in identifying the list of qualified bank products recognizes the evolution of banking practices since 1970. This approach is supported by statements in the OCC Paper that, in enacting Section 106, Congress recognized that banking is "a dynamic industry which has changed and is changing substantially, almost from day to day."[7] The OCC indicates that the legislative history of Section 106 "supports a flexible interpretation of the scope of traditional bank products encompassed by the statutory exemption," and takes the view that "[m]odern versions of those 'traditional' bank products also should be included in the exemption."[8]

Banks offer foreign exchange and derivatives products to customers to manage liquidity needs, in connection with international payments, for risk management purposes, and in many other contexts. Banks have become the provider of choice for these products and services in their role as credit intermediaries. In modern banking practice, these are core banking products. Congress recognized this in enacting the Gramm-Leach-Bliley Act of 1999 by explicitly including certain swap agreements as "identified banking products" in the push-out provisions of Section 206. If the Board determines not to add foreign exchange and derivatives to the list of qualified bank products in the final interpretation, we respectfully request that the Board use its exemptive authority to clarify that foreign exchange and derivatives products offered by banks should be deemed qualified bank products for purposes of the qualified bank product exceptions under Section 106.

E. Definition of Separate Product

The Board states in the Release that an essential element of a tying arrangement is the tying of two or more separate products. The Board recognized that a bank does not violate Section 106 by "requiring a customer to obtain (or provide) two or more aspects of a single product." Id. at 52,027. The Board noted, however, that as a general matter, "two products are separate and distinct for purposes of section 106 only if there is sufficient consumer demand for

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7 OCC Paper, at 28 (quoting Statement of Hon. Richard W. McLaren, Assistant Attorney General for Antitrust, House Hearings, Bank Holding Company Act Amendments 91 (Apr. 17, 1969)).

8 Id. at 29.

each of the products individually that it would be efficient for a firm to provide the two products separately." 68 Fed. Reg. at 52,027, fn. 23.[9] In our view, this standard is highly fact-specific and subjective and would be very difficult to apply with any degree of confidence. We urge the Board, therefore, to consider a more practical test for separateness, one which analyzes whether the products are so functionally integrated that it is reasonable for the bank to determine that they be sold as one product.[10] For example, it may be more economically efficient and less risky for the bank to offer the products together. In addition, the bank may be able to offer a package of integrated products at a lower price because of efficiencies in processing or systems requirements.

An example of an integrated product would be a foreign exchange transaction conducted in connection with an international payment. The foreign exchange transaction should not be viewed as a separate product (even though foreign exchange services can be purchased separately), but rather as an aspect of the payment. Another example would be full service brokerage services (involving a combination of investment advisory services and brokerage services) offered by a subsidiary of a bank. Even though there is sufficient consumer demand for both products individually, it is widely recognized that banks' broker-dealer subsidiaries may offer full service brokerage services without violating Section 106.

We note that the Board asked for specific comment on how interest rate swaps, foreign exchange swaps, and other derivative products that are connected with lending transactions should be treated under Section 106. In our view, such derivatives products should be viewed as functionally integrated with the associated loan, and, therefore, treated as one product. A bank

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9 In this regard, the Board borrowed a concept from anti-trust law, but without also recognizing the context which includes the requirement that the bank have market power in the desired product market.

10 At a minimum, the Board should clarify that the test set forth in footnote 23 of the proposed interpretation is only an example of the type of analysis that could be used in determining whether a product should be viewed as a separate product. In this regard, we suggest that the Board delete the words *only if* from the footnote.

will often urge a customer to hedge its currency or interest rate risk on a loan made by the bank. If that derivative is entered into with another party, the bank is forced to take the credit risk of the customer's counterparty if the borrower fails to perform. In addition, in many cases the counterparty will require the customer to post collateral for the swap, which raises intercreditor issues for the bank and could affect the bank's credit protection. Although derivatives products can be and often are offered as separate products, derivatives offered to hedge a loan should be viewed as an integral element of the lending transaction. Generally, it is more economically efficient for a bank to offer a hedged loan product (where the bank enters into a derivative with the customer to hedge the customer's interest rate or currency risk) than to require that the customer hedge its exposure with a third party.

F. Price Discounts

The Release states that "section 106 may restrict the ability of banks to provide price discounts (including rebates) on bundled products." 68 Fed. Reg. at 52,026. At the same time, the Board acknowledges that Section 106 does not prohibit a customer from using its own bargaining power to obtain a price discount on a package of desired products. 68 Fed. Reg. at 52,029. In our view, as long as the bundled products are available separately at a competitive price, there can be no element of coercion when a bank offers a price discount on a package of products because the customer voluntarily elects to purchase the products as a package rather than separately. We respectfully request that the Board consider allowing price discounts on bundled products where the products are separately available at a price that gives the customer a meaningful choice between purchasing the product alone or through a package.[11] The Board could take this action by interpretation or separate rulemaking.

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[11] *See* 59 Fed. Reg. 65,473 (Dec. 20, 1994) (stating that the Board would interpret "separately available" to mean "available at a price that would generally attract customers and therefore leaves customers desiring a product a meaningful choice between purchasing the product alone or through a package").

G. Foreign Transaction Safe Harbor

The Board's treatment of the foreign transaction safe harbor has the potential in two respects to blur the bright line test created by the Board in its regulations. First, the Board states in the Release that a loan to a foreign company that is partially guaranteed by its U.S. parent would qualify for the safe harbor. This suggests that if the loan is fully guaranteed by the U.S. parent it would not qualify for the safe harbor. We believe that this view is inconsistent with the Board's intent in adopting the safe harbor to allow U.S. banks to compete with foreign banks in local markets. In our view, regardless of whether the loan is guaranteed by a U.S. company, it should qualify for the safe harbor if the borrower meets the test set forth in the regulation.

Second, the Board states in the Release that the foreign transaction safe harbor would generally be available even if the foreign company borrower directs the bank to disburse a portion of the loan proceeds to a U.S.-incorporated affiliate of the foreign company that is not a party to the loan agreement. We believe that if the bank participates in a multi-borrower facility (*i.e.*, both domestic and foreign), it should qualify for the safe harbor as long as any impermissible condition or requirement associated with the loan is not imposed on the U.S. borrowers in the facility. The issue should not be whether the U.S. borrower is a party to the loan agreement, but rather whether it is subject to an impermissible tying arrangement.

H. Edge Act Corporation Subsidiaries

Finally, the Board states in the proposed interpretation that Section 106 applies to all subsidiaries of banks other than financial subsidiaries. In addition, the Board points out that Section 106 applies to Edge Act corporations. As the Board is well aware, many Edge Act corporations are not engaged in the business of banking in the United States and are used only to hold investments in non-U.S. subsidiaries. In our view, subsidiaries of Edge Act corporations that are not engaged in banking in the U.S. should not be subject to the anti-tying rules.

Otherwise, nonbank companies outside the U.S. would be subject to the tying rules, while comparable U.S. nonbank companies held under the holding company would be exempt.

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The Clearing House appreciates the opportunity to comment on the Release, and would be pleased to discuss any of the points made in this letter in more detail. Specifically, we believe that the Board should discuss with banking industry representatives (and perhaps others) the appropriate standard(s) for “larger” customers where no analysis should be required of the meaningful option requirement. The Clearing House would be pleased to participate in any such process. Should you have any questions, please contact Norman R. Nelson at (212) 612-9205.

Very truly yours,