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February 2, 2005

VIA E-MAIL

Mr. Scott G. Alvarez
General Counsel
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Dear Scott:

In our telephone conversation last week, you stated that Federal Reserve staff would be happy to look at a bullet-point presentation prepared by Bank of America, Citigroup, Deutsche Bank, JPMorgan Chase, and UBS that summarizes the conclusion that the framework for a coercion interpretation proposed by the bank group is a necessary and critical component of any action by the Federal Reserve Board in establishing a "large customer" safe-harbor exemption. Attached is the presentation.

As I discussed with you, the bank group is very concerned that without such a coercion framework certain *non-coercive* tying arrangements involving customers that are outside the safe harbor may be viewed as violating section 106. Further, the bank group strongly believes that any action by the Board in this regard should make clear that the fact that a tying arrangement is "bank initiated" is in no way dispositive of whether a bank can coerce or force a customer into accepting unwanted products or services.

The three-page bullet-point presentation sets out the bank group's views regarding the section 106 coercion element. The presentation includes three brief annexes, which support the conclusion of the bank group that the proposed coercion interpretation framework would be accorded judicial deference. Most of the points in the presentation and the annexes are drawn from materials the bank group has previously submitted.

If Federal Reserve staff has any question regarding any point in the attached presentation or believes that any point is not adequately supported, then representatives of the bank group would be pleased and desirous to provide clarification or to have further discussion with the staff.

Best regards.

Very truly yours

/s/ John

John L. Walker

Attachment

cc: Kieran J. Fallon
Mark E. Van Der Weide
Andrew S. Baer
Robin Prager
Ron Borzekowski
Kenneth P. Brevoort
Joyce Hansen
Ivan Hurwitz

Jennifer J. Johnson
Secretary of the Board
Re: Docket No. OP-1158

THE SECTION 106 COERCION ELEMENT

<u>Section 106 applies only to coercive tying arrangements</u>

- In the *Proposed Interpretation*, the Board concludes: "After carefully reviewing the language, legislative history and purposes of the statute, **the Board believes that a violation [of section 106] may exist only if a bank *forces or coerces* a customer to obtain (or provide) the tied product as a condition to obtaining the customer's desired product**." 68 Fed. Reg. 52024, 52029 n.36 (Aug. 29, 2003) (emphasis added); s*ee also id.* at 52028 ("[S]ection 106 applies only if . . . [the tying] condition or requirement was imposed or forced on the customer by the bank."); *id.* at 52029 ("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."); *id.* at 52028 ("Moreover, the evidence must demonstrate that the seller imposed the [tying] arrangement through some type of coercion.").

- As reflected in the numerous general antitrust law cases that the Board cites in the *Proposed Interpretation*, "actual coercion" is an indispensable element of a tying violation under the general antitrust laws, and the Board concludes that **this actual coercion element of the general antitrust laws "also is embedded in section 106."** 68 Fed. Reg. at 52028.

- In the *DOJ Letter*, the Antitrust Division of the Department of Justice states: **"The Division believes it is very important that the [*Proposed Interpretation*] retains the clear understanding that only coercive ties forced on a customer by a bank**, and not voluntary ties, **may violate section 106."** *DOJ Letter* at 2.

- In a letter dated December 8, 2004 to Chairman Greenspan, Senator Sununu states that "it would seem that **tying by banks can only occur if banks can coerce their customers** . . . ." *Sununu Letter* at 2; *see also OCC White Paper* at 18 ("Section 106(b) Prohibits 'Coercive' Not Voluntary Tie-Ins.").

<u>The need for the proposed coercion interpretation</u>

- The "large customer" safe-harbor exemption proposed by the bank group is non-exclusive and only addresses customers that so clearly cannot be coerced by banks into accepting unwanted products or services that no analysis is required. "Large customers" within the exemption certainly are not the only customers that cannot be coerced by banks. Thus, **it is essential that the Board's final interpretation include a framework for case-by-case coercion analysis with respect to customers outside the "large customer" safe-harbor exemption**.

- The proposed coercion interpretation is necessary to ensure that the Board's final interpretation regarding section 106 serves as a **comprehensive interpretation** and **provides banks with guidance on how the coercion requirement is applied**.

- **Pursuant to the proposed coercion interpretation, a bank may present a tying arrangement to a customer so long as *the bank can reasonably establish* that the customer was not coerced or forced by the bank into accepting unwanted products or services.** The proposed coercion interpretation provides workable guidelines for identifying customers that cannot be coerced by banks and, if adopted, would allow banks to determine in advance with a degree of certainty whether a tying arrangement complies with section 106.

- The proposed coercion interpretation sets the limits on the scope and applicability of section 106 to all customers, while also providing the rationale for the narrower safe-harbor exemption for "large customers" that clearly cannot be coerced by banks.

- If the Board does not adopt the proposed coercion interpretation, then section 106 may be interpreted to prohibit pro-competitive practices involving customers that fall outside the "large customer" safe-harbor exemption. *See DOJ Letter* at 8 (**"The Division is concerned that the Board's proposed interpretation of section 106 . . . will continue to prohibit procompetitive practices such as multi-product discounting, and will continue to encourage competitive inequities in markets in which banks and nonbanks compete."**); *Sununu Letter* at 2 (emphasis in original) (**"[A]n overly broad interpretation of Section 106**, which is intended to curb anti-competitive practices, **could have the *opposite* effect and hinder pro-competitive behavior."**).

<u>**Tying arrangements that are "bank initiated" are not necessarily coercive**</u>

- At the December 1 meeting with the bank group, Board staff indicated that the coercion requirement in the *Proposed Interpretation* could be read merely to mean that a requirement or condition in a tying arrangement will be coercive if it is "bank initiated," in contrast to a "customer initiated" voluntary tying arrangement which is not prohibited by section 106. The bank group submits that the *Proposed Interpretation* cannot reasonably be read so narrowly and that such a reading would be entirely inconsistent with the legal and logical underpinnings of section 106.

- **The fact that a tying arrangement is "bank initiated" is not even indicative, and is in no way dispositive, of whether a bank can coerce or force a customer into accepting unwanted products or services.** It makes no sense for a violation of section 106 to hinge on whether a bank first proposed a tying arrangement. **Certainly there is no basis for such a position under the actual coercion element of the general antitrust laws.**

- The common English language meaning of "coerce" is **"to compel to an act or choice"** and **"to enforce or bring about by force or threat."** *Webster's New Collegiate Dictionary* (1979). In the words of the Supreme Court, which the Board quoted in the *Proposed Interpretation* (68 Fed. Reg. at 52028 n.25): "The common core of . . . unlawful tying arrangements is **the forced purchase** of a second distinct commodity with the desired purchase of a dominant 'tying' product. . . ." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 614 (1953). **There is no legal or logical relationship between such a forced purchase and a bank's proposal of a tying arrangement to a customer.**

- In one of the cases cited by the Board in the *Proposed Interpretation* with respect to "actual coercion" being "an indispensable element of a tying violation," the Second Circuit Court of Appeals concluded that the conduct that the plaintiff asserted to be unlawful coercive behavior "is **nothing more than aggressive salesmanship** and is therefore insufficient evidence" to support a tying violation. *Unijax, Inc. v. Champion Int'l, Inc.*, 683 F.2d 678, 685-86 (2d Cir. 1982). **Salesmanship by a bank, including by proposing a tying arrangement to a customer, in no way equates with coercion.**

- Coercion requires force and an unwilling customer that does not have access to other providers of a product or service. Absent that, a bank may engage in *bona fide*, even aggressive, negotiations with a customer, involving normal give and take in a commercial context, without being able to coerce or force the customer. **The existence of force or of an unwilling customer that is required to violate section 106 cannot be determined by whether a bank first proposed a tying arrangement to a customer.**

<u>The proposed coercion interpretation would be accorded judicial deference</u>

- At the December 1 meeting with the bank group, Board staff stated that the Board would want to assure that its final interpretation of section 106 would be accorded judicial deference. The bank group believes that the proposed coercion interpretation would be accorded such deference. The Supreme Court has stated: **"Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. *They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.*"** *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka, and Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967) (emphasis added; citations omitted). **Courts will defer to a regulatory body's revised interpretation of a statute provided that the regulatory body sets forth a "reasoned analysis" for the revision.** *Rust v. Sullivan*, 500 U.S. 173, 187 (1991). (For further discussion, *see* Annex A.)

- While regulatory bodies and courts "must give effect to the unambiguously expressed intent of Congress" (*Chevron, U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)), **the provisions of section 106 are far from unambiguous and have been subject repeatedly to inconsistent or irreconcilable interpretations**. (For further discussion, *see* Annex B.)

- The literal language of section 106 does not preclude adoption of the proposed coercion interpretation. **Antitrust laws, including section 106, should be interpreted and enforced in a manner that makes economic sense and not in a literal manner that is hostile to economic efficiency.** (For further discussion, *see* Annex C.)

Annex A

The proposed coercion interpretation would be accorded judicial deference

- At the December 1 meeting with the bank group, Board staff stated that the Board would want to assure that its final interpretation of section 106 would be accorded judicial deference. The bank group believes that the proposed coercion interpretation would be accorded judicial deference even if such interpretation represented a departure by the Board from the historical interpretation of section 106.

- The Supreme Court has "rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." *Rust v. Sullivan*, 500 U.S. 173, 186 (1991), quoting *Chevron, U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984). In rejecting this argument, the Supreme Court recognized that **a regulatory body's interpretation is not "carved in stone" since an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis**.**"** *Id.* at 864.

- Indeed, the Supreme Court has "fully recognize[d] that regulatory agencies do not establish rules of conduct to last forever, and that **an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances**." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (internal quotation marks and citations omitted); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) ("[A]dministrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances."); *Paralyzed Veterans of Am. v. Secretary of Veterans Affairs*, 345 F.3d 1334, 1352 (Fed. Cir. 2003) (**"It is well established that an agency may change course, even absent any statutory change, as long as it explains its reasons for doing so."**); 1 R. Pierce, *Administrative Law Treatise* § 3.3, at 147 (2002) ("An agency is always free to change its policy, as long as it announces a policy that is within the range permitted by Congress, uses a procedure Congress has authorized it to use to make binding policy decisions, and explains the reasons for its change in policy.").

- **Courts will defer to a regulatory body's revised interpretation of a statute provided that the regulatory body sets forth a "reasoned analysis" for the revision.** *Rust*, 500 U.S. at 187.

- The Supreme Court has stated:

> [W]e agree that the [regulatory agency], faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. In fact, although we make no judgment as to the policy aspects of the [regulatory agency]'s action, this kind of flexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a

> regulatory agency. **Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.** ***They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.***

Am. Trucking Ass'ns, Inc. v. Atchison, Topeka, and Santa Fe Ry. Co., 387 U.S. 397, 416 (1967) (emphasis added; citations omitted).

- Unquestionably, the market for financial services has changed dramatically since the enactment of section 106 in 1970. As noted by the Antitrust Division, **"[t]he financial world today is quite different from the one that existed when section 106 was enacted, and a more liberal interpretation of the section would not be inconsistent with the rationale that led Congress to adopt this provision."** *DOJ Letter* at 8. The *OCC White Paper* cites numerous sources in the legislative history of section 106 for the proposition that "[b]anking is not a static form of activity" and that "Congress Intended Section 106(b) to Permit Banks to Evolve." *OCC White Paper* at 28. The *OCC White Paper* concludes: "The legislative history evinces Congress' understanding that banking is dynamic and banking practices evolve. **Congress did not intend section 106(b) to be frozen in time**, just as Congress recognized banking is not static." *Id.* at 31.

- The proposed coercion interpretation is consistent with section 106's legislative purpose. *See, e.g.*, *DOJ Letter* at 3 (**"[A] more liberal interpretation of section 106 than currently proposed in the [*Proposed Interpretation*] would not undercut Congress' intent and in certain circumstances would indeed increase competition and thereby benefit consumers."**).

<u>**Annex B**</u>

<u>**The provisions of section 106 are far from unambiguous**</u>

- While regulatory bodies and courts "must give effect to the unambiguously expressed intent of Congress" (*Chevron, U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)), the discussion below very clearly evidences that **the provisions of section 106 are far from unambiguous and have been subject repeatedly to inconsistent or irreconcilable interpretations**.

- Courts have failed to reach unanimity regarding whether market power in the tying-product market is required for a bank to violate section 106. *Compare Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1338 (7th Cir. 1989) ("[I]t is all but impossible to define a 'tie' [under section 106] apart from inquiry into competitive conditions. . . . **We doubt that [the defendant] has market power. . . . So [the plaintiff] has a tough row to hoe.**"), *with Parsons Steel v. First Alabama Bank*, 679 F.2d 242, 245 (11th Cir. 1982) (the purpose and effect of section 106 "is to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, **without requiring plaintiffs to establish the economic power of a bank**"). Indeed, the Eleventh Circuit Court of Appeals has issued conflicting opinions regarding whether such economic power is required for section 106 to be violated. *See McGee v. First Fed. Sav. and Loan Ass'n of Brunswick*, 761 F.2d 647, 648 (11th Cir.) (emphasis added), *cert. denied*, 474 U.S. 905 (1985) (**Section 106 *"requires a showing of*** two distinct products: ***a tying product*, *in the market for which defendant has economic power***, and a tied product, which defendant *forces* on consumers wishing to purchase the tying product."). *But see Parsons Steel*, cited and quoted above. These cases illustrate the inconsistent and irreconcilable interpretations that courts have given section 106.

- The legislative history of section 106 explicitly states that **section 106 is designed "to prohibit anti-competitive practices"** (S. Rep. No. 91-1084 (1970), at 17), and several courts have stated that a bank tying arrangement must be an "anti-competitive practice" to violate section 106. *See Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1305 (8th Cir. 1997); *Palermo v. First Nat'l Bank and Trust Co. of Oklahoma City*, 894 F.2d 363, 368 (10th Cir. 1990); *Davis v. First Nat'l Bank of Westville*, 868 F.2d 206, 208 (7th Cir.), *cert. denied*, 493 U.S. 816 (1989). **Yet the Supreme Court has concluded that a tying arrangement can be an anticompetitive practice *only if* the seller has market power in the tying-product market.** *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 25 (1984) (majority opinion) ("Only if [buyers] are forced to purchase [seller's] services as a result of the [seller's] market power would the arrangement have anticompetitive consequences.").

- The *OCC White Paper* observes that **court decisions regarding section 106 are "somewhat inconsistent."** *OCC White Paper* at 23.

- In three orders, the Board has stated: "It is clear that coerced tying is forbidden by § 106. . . . [T]he record indicates that **the market power required for the successful practice of tying does not appear to be present**." *Barnett Banks, Inc.*, 61 Fed. Res. Bull. 678, 684 (1975); *Barnett Banks of Florida, Inc. and The Chase Manhattan Corp.*, 61 Fed. Res. Bull. 686, 691 (1975); *Pan Am. Bancshares*, 61 Fed. Res. Bull. 693, 699 (1975). The Board has also stated: **"In the Board's view, unless it would be likely that the seller's market power in the . . . market for the tying product is high enough to force a customer to also purchase on uncompetitive terms a . . . service in the tied product market, a [tying] arrangement would not appear to produce anticompetitive effects."** 55 Fed. Reg. 47741, 47742 (Nov. 15, 1990). **On other occasions, the Board has stated that a plaintiff in an action under section 106 does not have to establish that the bank had market power in the tying-product market.** *See* 62 Fed. Reg. 9290, 9313 (Feb. 28, 1997); 61 Fed. Reg. 47242, 47255 (Sept. 6, 1996); 59 Fed. Reg. 65473 (Dec. 20, 1994); 55 Fed. Reg. 26453, 26454 n.4 (June 28, 1990); *Norwest Corp. and NCNB Corp.*, 76 Fed. Res. Bull. 702, 703 n.9 (1990).

- From the legislative history of section 106, it is clear that **the Board did not believe that the bank tying legislation would materially alter in the bank context the then-existing antitrust laws**. In a written response to questions submitted to the Board by Senator Brooke, Board Vice Chairman Robertson, on behalf of the Board, stated:

> **The Board understands that under present antitrust laws, [coercive tying] practices [by a bank] are prohibited where the bank has sufficient market power to force tie-ins on unwilling customers**. . . . While the Board has no objection to provisions [in the bank tying legislation] explicitly prohibiting banks from engaging in coercive tying practices, **we do not believe such provisions would materially alter existing law**.

One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, S. 1211, S. 1664, S. 3823, and H.R. 6778 Before the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. (1970), at 136-37 (letter dated June 1, 1970). In this connection, Board Chairman Burns stated:

> . . . I believe that tie-ins are definitely illegal now.
>
> **I don't see that much would be accomplished by adding a provision with respect to tie-ins.** However, I also see no objection to it.

Id. at 148-49 (May 17, 1970 proceedings). **If the bank tying legislation eliminated in the bank context the well-established, "essential"** (quoting *Jefferson Parish Hosp.*, 466 U.S. at 12 (majority opinion)) **requirement under the antitrust laws that the seller of the tying product must have market power in the tying-product market, then the legislation would have materially altered in the bank context the then-existing antitrust laws.**

- The remedy provisions of sections 106(e) and 106(f) require a plaintiff to prove injury as a direct consequence of a tying arrangement. If market power in the tying-product market is not required for a tying arrangement to violate section 106, then section 106 would constitute a statutory scheme whereby arrangements that violate the substantive provisions of the scheme could not cause any injury to the persons the scheme is designed to protect since, in the words of the Supreme Court, "[a]bsent such power tying cannot conceivably have any adverse impact in the tied-product market, and can only be pro-competitive in the tying product market." *Jefferson Parish Hosp.*, 466 U.S. at 37-38 (concurring opinion).

- A Board Economist has referred to **section 106** as a statute that **has been "plagued" with confusion**. *See* Direct Testimony of Paul R. Schweitzer, Board Economist, before James V. Mattingly and Carl V. Howard, Board Counsel, in *Formal Hearing in the Matter of the Application by Citicorp to Engage in Certain Data Processing and Electronic Funds Transfer Activities Through a Subsidiary to be Known as Citishare Corporation* (Oct. 13, 1981), at 1.

- **Section 106 was intended to be "in general terms analogous to existing antitrust law."** 116 Cong. Rec. S15708 (daily ed. Sept. 16, 1970) (letter from Assistant Attorney General McLaren to the Chairman of the Senate Committee on Banking and Currency). **If Congress eliminated the market power requirement in section 106, then section 106 would not be "in general terms analogous to existing antitrust law."**

Annex C

The literal language of section 106 does not preclude adoption of the proposed coercion interpretation

- The "literal reading" of statutory language should not be given effect if doing so would "compel an odd result" or raise "a serious doubt of constitutionality." *See, e.g., Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 455, 465-66 (1989).

- The Supreme Court has stated that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (citations and internal quotation marks omitted). With respect to the conclusion of the bank group that **the historic interpretation of section 106 is unconstitutional**, *see* pages 25-31 of the March 30, 2004 letter from the bank group to J. Virgil Mattingly, Jr.

- It is important to understand that when the Supreme Court first interpreted the substantive provisions of section 1 of the Sherman Act in 1897, the Court held that *all* contracts that in fact restrained trade, whether reasonably or unreasonably, were prohibited by section 1. The Supreme Court refused to exempt reasonable restraints of trade from the prohibition of section 1 in the face of "the plain and ordinary meaning" of the language of the Sherman Act. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 328, 340 (1897). The Supreme Court reaffirmed its *Trans-Missouri* holding in *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898). In a vigorous dissent in *Trans-Missouri*, Justice White stated:

  > [T]here is no canon of interpretation which requires that the letter be followed, when by so doing an unreasonable result is accomplished. On the contrary, the rule is the other way, and exacts that **the spirit which vivifies, and not the letter which killeth, is the proper guide by which to correctly interpret a statute**.

  166 U.S. at 354. In 1911, 21 years after enactment of the Sherman Act (and one year after Justice White became the Chief Justice of the Supreme Court), Chief Justice White wrote a landmark opinion that concluded that only contracts in unreasonable restraint of trade violate section 1 of the Sherman Act. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

- The Supreme Court has more recently stated: "One problem presented by **the language of § 1 of the Sherman Act** is that it **cannot mean what it says**. [R]ead literally, § 1 would outlaw the entire body of private contract law. . . ." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687-88 (1978).

- The broad language of section 106(e), which defines the class of persons who may maintain a private damage action under section 106, has not been read literally. *See Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 443 (5th Cir. 1986), which is discussed in footnote 76 (at pages 36-37) of the March 30, 2004 letter from the bank group to J. Virgil Mattingly, Jr.

- **Antitrust laws must be interpreted to reflect changing economic times**, and this has meant that over the more than 110 years of federal antitrust jurisprudence, the courts and regulatory bodies have frequently shifted, sometimes quite dramatically, their interpretation of statutory language which itself has never changed. The 19th century language of the Sherman Act is interpreted by the courts and the Antitrust Division to apply to 21st century economic realities. The Supreme Court has stated that the Sherman Act "has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). One leading antitrust treatise has stated that this statement "is simply another way of saying that the **antitrust laws have been a tool of economic policy making**. As such, they have always been wedded to prevailing economic doctrine. **The result is a statute whose meaning has evolved over the years**. . . ." 1 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 104f, at 94 (2000). **Antitrust laws, including section 106, should be interpreted and enforced in a manner that makes economic sense and not in a literal manner that is hostile to economic efficiency.** Antitrust laws are designed to be applied to conduct in light of continuing experience as to their effect on competition in evolving economic conditions.