Tying: Enhancing Competition through the Bank Holding Company

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Relationship banking is the process through which banks establish ongoing relationships with corporate customers. By gaining specific information about individual customers and identifying unique needs, banks can more readily fulfill customer demand, sell more banking products, and increase the bottom line. In the relationship banking context, banks typically evaluate the overall profitability of their relationships with corporate customers based on each customer’s mix of loans, cash management services, deposits, and other banking services. The importance of relationship banking is not a new development; indeed, the practice has been common in the financial services industry for well over a century. The range of products available in the banking context, however, has greatly expanded in recent years and culminated in the passage of the Gramm-Leach-Bliley Act of 1999 (GLBA).

Banks, freed from many restrictions after GLBA, have greatly expanded their presence beyond the traditional banking arena. The commercial lending relationship serves as a springboard from which banks may offer new services and build relationships with existing customers in securities underwriting, advisory services,

1. “Bank” as used in this Note applies to bank holding companies. Any reference to a different type of entity will be expressly stated.
3. Id.
4. Id.
5. Id.
7. GAO Report, supra note 2, at 8. Banks have broadened their horizons into areas such as securities and insurance. Id. Some banks have used the expansion to “decrease their reliance on the income earned from credit products . . . and to increase their reliance on fee based income.” Id.
insurance offerings, and other financial services. A primary purpose of GLBA was to encourage competition between banks and other financial institutions, such as investment banks. As banks expand into new territory, bank-specific laws continue to impose restrictions on how products may be packaged together.

Banks are subject to general antitrust law, most notably the Sherman Act and the Clayton Act. Yet banks are held to a more exacting standard because of the unique position they hold in the nation's economy. Section 106 of the Bank Holding Company Act Amendments of 1970 (Section 106) generally prohibits a bank from requiring the purchase of an additional product as a condition of sale for the purchase of the customer's desired product. The anti-tying prohibitions of Section 106 reflect congressional concern that banks may leverage their products to gain a competitive advantage in non-traditional banking products and services. The anti-tying prohibitions are not absolute, however, and contain potentially broad exceptions. Ironically, Section 106 sat largely unnoticed for nearly thirty years until banks significantly increased their expansion into non-traditional areas in the late 1990's and after GLBA.

The increase in permissible bank activities after GLBA also gave rise to confusion by corporate borrowers, federal examiners, and banks regarding the application of Section 106. A key area of confusion involves the underwriting of debt and equity issues.

9. Id. at 160.
10. See infra notes 87-103 and accompanying text.
13. See infra notes 52-86 and accompanying text.
17. See infra notes 99-103 and accompanying text.
19. Id.
Section 20 of the Glass Steagall Act (Section 20), generally prohibited banks from engaging in the issuance, flotation, underwriting, public sale, or distribution of debt or equity instruments. Beginning in 1988 expansive judicial interpretations began to chip away at the prohibitions of Section 20. Moreover, a bank affiliate could legally engage in underwriting so long as the affiliate was not “engaged principally” in substantial bank-ineligible activities and revenue from the bank-ineligible activities did not exceed five to ten percent. In 1996, the FRB increased the permissible revenue level from ten to twenty five percent, and shortly thereafter many banks acquired major securities firms. Indeed, although Congress may have intended to “sever completely the commercial and investment banking industries,” Section 20 fell well short of its purpose. In 1999, GLBA repealed Section 20 and expressly permitted a bank to engage in securities underwriting without any revenue limitation.

As a result of judicial and administrative expansion and GLBA, banks have made significant inroads into securities underwriting and view the area, with its high profit margins and relatively low risk, as essential to long-term profitability. For example, between 1995 and 2002 the market share of the three largest

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23. Id.
25. BROOME & MARKHAM, supra note 24, at 750 (noting acquisitions by five bank holding companies of major securities firms).
26. See Securities Indus. Ass'n, 839 F.2d at 60. Severance was sought only for the more “perilous” investments, such as corporate stocks and bonds. Id. Additionally, Congress intended to control only speculative securities underwriting, not all underwriting. Id.
28. See Johnson, supra note 8, at 171.
investment banks declined from 38.1 percent to 31.9 percent in debt and equity underwriting. During that same period, the newly-formed investment banking affiliates of the three largest bank holding companies saw their market share surge from 17.8 percent to 30.4 percent.

Due to the increased competition posed by banks in underwriting, investment banks allege "commercial banks offer loans and loan commitments to corporate borrowers at below market rates," in an effort to obtain the more lucrative underwriting business. Indeed, banks "view their lending businesses as an important competitive advantage to both retain current underwriting customers and also attract new ones." If banks are using their lending power to coerce customers into obtaining undesired products, this forced relationship could constitute a violation of Section 106.

Moreover, if a loan was offered at a below-market rate, the bank may not only face a tying problem, but may also be in violation of Section 23B of the Federal Reserve Act of 1913 (Section 23B). Section 23B prohibits member banks from making below-market rate loans when dealing with an affiliate. In short, Section 23B prohibits a bank from pricing credit for an affiliate below the market rate in order to reduce the bank's income for the affiliate's benefit. Not only could the below-market loan be a violation of Section 23B, but it might also constitute an "unsafe and unsound banking practice."

Corporate customers may be "unaware of the subtle distinctions that make some tying arrangements lawful and others

29. See GAO Report, supra note 2, at 25.
30. Id. at 25-26. This result may be misleading, because of acquisition and consolidation within the investment banking firms. Specifically, the merger between Citicorp and Salomon Smith Barney was given as an example of the misrepresentation.
31. Id.
35. GAO Report, supra note 2, at 14.
36. Id.
unlawful." As a result of the perceived lack of knowledge, the federal government has begun to act on many different fronts to investigate and attack improper tying practices. Congressional action has come from both the House Committee on Energy and Commerce and the Senate Committee on Banking, Housing and Urban Affairs. Additionally, the Federal Reserve Board (FRB) released a proposed interpretation of Section 106, the General Accounting Office (GAO) published a report in light of an extensive investigation, and the Office of the Comptroller of the Currency (OCC) weighed in as well.

By enabling banks legally to tie a broader range of products the FRB provides a large springboard from which banks may explode into the marketplace for non-traditional bank products. Despite opposition from the banking community because of the possibility for "treble damages" and general "flaws," the liberal interpretation presented by the proposed interpretation greatly expands the permissible business practices of banks. The key

37. Id. at 16.
38. See infra notes 169-197 and accompanying text
40. U.S. SENATE COMM. ON BANKING, HOUSE AND URBAN AFFAIRS, http://banking.senate.gov (last visited Feb. 7, 2004). The Senate Committee operates under the leadership of Chairman Richard C. Shelby and Ranking Member Paul S. Sarbanes. Id. Chairman Shelby has stated the Senate Committee intends to hold hearings about tying practices, but at the time of publication no hearings had been scheduled. Id.
41. See generally Proposed Interpretation, supra note 15.
42. See generally GAO Report, supra note 2; see also infra notes 169–178 and accompanying text.
43. See infra notes 179–183 and accompanying text.
44. See generally Proposed Interpretation, supra note 15.
45. See George Stein, Banks Protest Fed Plan to Unlink Loans, Services, CHARLOTTE OBSERVER, Oct. 4, 2003, at 3D. Notably, J.P. Morgan Chase & Co. and Bank of America Corp. sent letters to the FRB in opposition to the proposed interpretation. Id. Additionally, the law firm of Simpson Thacher & Bartlett filed a 121 page comment with the FRB on behalf of holding corporations involving commercial lending and investment banking such as Citigroup, Bank of America, J.P. Morgan, Deutsch Bank AG and UBS AG. Id.
terms behind the expansion are the liberal definitions employed for "traditional bank products" and "meaningful choice."47

This Note focuses on the proposed interpretation of Section 106 set forth by the FRB on August 25, 2003. In analyzing the future application of the proposed interpretation, this Note will first discuss the history of Section 106 and the elements of a tying violation.48 Part II will analyze the proposed interpretation by the FRB.49 Part III will discuss the GAO Report before discussing other governmental action.50 Finally, in Part IV this Note will present a viable method for banks to cross-market and cross-brand products while fully complying with the letter and spirit of Section 106.51

I. SECTION 106 – THE ROOT OF THE CONTROVERSY

Over half a century ago the United States Supreme Court in Standard Oil v. United States recognized the anti-competitive effect of tying by stating, "tying arrangements serve hardly any purpose beyond the suppression of competition."52 The importance of banking to the national economy places banks as a unique threat to impose negative influence. Banks may not engage in specific product tying arrangements because tying is thought to result in the concentration of resources, decreased competition, and impermissible conflicts of interest.53 Yet until the enactment of Section 106, tying regulations in the banking sector lacked specific force.54

47. Id.
48. See infra notes 52–103 and accompanying text.
49. See infra notes 104–168 and accompanying text.
50. See infra notes 169–197 and accompanying text.
51. See infra notes 198–248 and accompanying text.
A. The Bank Holding Company Act Amendments of 1970

The Bank Holding Company Act Amendments of 1970 were the cumulative congressional response to the dramatic growth of one-bank holding companies.\(^55\) The Bank Holding Company Act of 1956\(^56\) (BHCA) expressly excluded all one-bank holding companies from its coverage.\(^57\) This exclusion manifested congressional belief that a one-bank holding company could not present a sufficient danger to warrant inclusion within the scope of the BHCA.\(^58\) As a result of the exclusion, one-bank holding companies escaped many FRB requirements, such as examination and annual reports, and were only subject to regulation by state bank commissions or the Federal Deposit Insurance Corporation.\(^59\) Most notably, one-bank holding companies could enter into non-banking activities and own non-bank related corporations.\(^60\) By 1969, one-bank holding companies had engaged in a wide array of ventures including real estate, insurance, ranching, and pizzerias.\(^61\)

The lack of regulation made the one-bank holding company an extremely attractive entity, and by 1969 one-bank holding companies possessed commercial deposits exceeding $181 billion, or approximately forty-three percent of all commercial bank deposits.\(^62\) The vast number of one-bank holding companies concerned many lawmakers because of the resulting concentration of wealth and possible threats to the public interest resulting from the lack of regulation.\(^63\) After nearly two years of debate,\(^64\) Congress changed the definition of a bank holding company to

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57. Id.
59. Id. at 1208.
60. Id.
61. Id. at 1208 n.61.
62. Id. at 1201.
63. Id. at 1210.
64. See Sax & Sloan, supra note 55, at 1212. Most notably, President Richard Nixon opposed the one-bank holding company. See id. at 1210 n. 70.
include within the BHCA one-bank holding companies. Proponents of the amendments saw the change as closing a major loophole in the original act and eliminating a major weakness of the legislation.

Additionally, the 1970 amendments addressed the retention and acquisition of non-banking affiliates by bank holding companies. As a result of the inclusion of one-bank holding companies, a large number of bank holding companies were engaged in activities prohibited by the BHCA. In light of the conflict, a grandfather clause was included to allow the continuation of non-banking activities if the activity was lawfully engaged in prior to June 30, 1968. The clause was not all inclusive and empowered the FRB to terminate the exemption if it determined it was "necessary to prevent undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices..." The final crucial impact of the 1970 amendments was the addition of major anti-tying provisions through Section 106.

B. Legislative History of Section 106

Section 106 was part of a legislative response to judicial decisions which failed to attack anti-competitive forces in banking with enough strength. Congress' express intent was to apply the general principles of the Sherman Antitrust Act to banking. Furthermore, the amendment was intended to "prevent the further spread of seriously anticompetitive practices... in the banking

65. Id. at 1213.
66. Id. at 1201.
68. Sax & Sloan, supra note 55, at 1215.
69. § 103(2), 84 Stat. at 1763–64; Sax & Sloan, supra note 55, at 1216.
70. § 103(2)(B)(ii), 84 Stat. at 1764.
71. See infra notes 72–86 and accompanying text.
73. See Kenty v. Bank One, Columbus, N.A., 92 F.3d 384, 394 (6th Cir. 1996).
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and financial areas.” Congress sought to ensure the nation of “adequate safeguards against the possibility of misuse of economic power of a bank.” Of special congressional purpose was “statutory assurance that the use of the economic power of [a] bank [would] not lead to a lessening of competition or unfair competitive practices.”

Congress was concerned by the potential combination of banks with traditional business firms. By merging with a typical business firm, Congress feared “[a] bank’s credit will be more readily available to the customers of the affiliated business than to customers of other businesses not so affiliated.” Moreover, Congress felt “[a] business firm that can offer an assured line of credit . . . has a very real competitive advantage.” Because of the reliance of businesses of all sizes upon bank credit, Congress determined banks were in a position to strongly suggest a borrower should purchase additional products in order to guarantee future access to credit. Additionally, the strong suggestions imposed by banks would not only create unfair competition in the market for certain banking products, but in the long run would cause a vast reduction of competition in a wide array of non-banking markets. In passionate testimony, the FRB Chairman stated that if stronger anti-tying prohibitions were not added to the Bank Holding Company Act:

The Bank might deny credit to competing firms or grant credit to other borrowers only on condition that they agree to do business with the affiliated firm . . . If we allow the line between banking and commerce to be eased, we run the risk of cartelizing our economy . . . We could later see the country’s business firms clustering about banks . . . in the

76. Id.
80. Id.
belief that such an affiliation would be advantageous, or perhaps even necessary to their survival.\(^{81}\)

In no uncertain terms, the legislative history of Section 106 makes congressional intent clear. Without legislative action Congress felt “the trend toward the combining of banking and business could lead to the formation of a relatively small number of power centers dominating the American economy.”\(^{82}\) In opposition to such a concentration, Congress passed Section 106 to ensure it would not occur.\(^{83}\) President Richard Nixon summarized the opposition: “The strength of our economic system is routed in diversity and free competition; strength of our banking system depends largely on its independence. Banking must not dominate commerce or be dominated by it.”\(^{84}\) In passing Section 106, Congress did not intend to prevent banks from adhering to the normal practices of traditional banking relationships.\(^{85}\) Indeed, the desire and expectation of Section 106 was to protect against decreased competition; Section 106 was not intended to preclude appropriate traditional banking practices.\(^{86}\)

C. Section 106 Analysis

Section 106 broadly prevents a bank from conditioning the sale of a desired product\(^{87}\) or service (the “desired product”), upon the purchase of, or an agreement to purchase, another undesired product (the “tied product”).\(^{88}\) Such arrangements, commonly known as “tying arrangements” are considered anti-competitive\(^{89}\)

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82. Id. at 44, reprinted in 1970 U.S.C.C.A.N. 5519, 5557.
83. Id.
84. Id.
87. While banks offer both products and services, for purposes of this Note “product” encompasses both products and services.
89. See BROOME & MARKHAM, supra note 24, at 239.
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because it is feared the ability to extend credit may centralize market power in the hands of a few well capitalized banks. Tying arrangements are not limited to requiring the purchase of an unwanted product, but can also occur when the desired product is offered at a discount if the tied product is purchased.

The Clayton Act states tying is only illegal if the arrangement may "substantially lessen competition or tend to create a monopoly in any line of commerce." The competition requirement is not present in the bank-specific legislation. Although Section 106 does not contain a market effects test, courts have held it is "all but impossible to define a [tying arrangement] apart from inquiry into competitive conditions." Without examining the competitive effects, nearly anything could be considered a tying arrangement. Moreover, the Supreme Court has held a tying arrangement cannot exist in a market with many sellers offering unbundled products. Even if there are not many sellers of unbundled products, a tying arrangement can only exist if there is separate demand for the different products.

The prohibitions against tying arrangements are not absolute. Section 106 specifically allows tying arrangements when the tied product is (1) "a loan, discount, deposit or trust service;" (2) "related to and usually provided in connection with a loan, discount, deposit or trust service;" or (3) a condition or requirement "reasonably impose[d] in a credit transaction to assure the soundness of the credit." In addition to the statutory

91. BROOME & MARKHAM, supra note 24, at 239.
95. Mid-State Fertilizer Co., 877 F.2d at 1338.
96. Id.
98. Id.
100. § 1972(1)(C).
exceptions, the FRB may declare exceptions to the anti-tying requirements through regulations, provided the exceptions are not "contrary to the purposes" of Section 106. The functionality and flexibility provided to the FRB by Congress was a critical element behind the passage of Section 106.

II. THE SPRINGBOARD – THE FEDERAL RESERVE BOARD’S PROPOSED INTERPRETATION

As banks vastly expanded in the wake of GLBA, the FRB found it "useful and appropriate" to issue an official interpretation of Section 106 and to provide supervisory guidance for all banks. In the proposed interpretation, the FRB vastly expands a bank’s ability to tie products without violating Section 106. The proposed interpretation "describes the scope and purposes of [S]ection 106, the elements of a tying arrangement... and the statutory and regulatory exceptions to the prohibitions of [S]ection 106" while employing the concepts of traditional banking products, mixed product arrangements, and meaningful choice to propose a scheme through which banks may effectively "cross-market" products without running afoul of Section 106. While not under

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104. The FRB is vested with the discretionary authority to provide exceptions to the anti-tying prohibitions which are "founded on sound economic analysis." S. REP. No. 91-1084, at 46 (1970), reprinted in 1970 U.S.C.C.A.N. 5521, 5559. Thus, the proposed interpretation has a significant statutory basis and should be viewed with great deference. Inv. Co. v. Camp, 401 U.S. 617 (1971); Johnson, supra note 8, at 166. In Camp, the Supreme Court indicated it would defer to any reasonable interpretation of Glass-Steagall. 401 U.S. at 626-27. Applying the same analysis to section 106, it is possible the Court would defer to any reasonable interpretation of Section 106.

105. See generally Proposed Interpretation, supra note 15.

106. Proposed Interpretation, supra note 15, at 52,024.

107. See infra notes 133–136 and accompanying text.

108. See infra notes 137–151 and accompanying text.

109. See infra notes 152–159 and accompanying text.

110. See Proposed Interpretation, supra note 15, at 52,024.
express congressional pressure, but request, it is plausible the FRB wanted to act prior to action by any other governmental entity. According to the proposed interpretation, Section 106 is "intended to prevent banks from using their ability to offer bank products, credit in particular, in a coercive manner to gain a competitive advantage in markets for other products and services." An expansive reading of the proposed interpretation reveals a willingness of the FRB to allow an increasing level of tying, including the tying of non-traditional bank products.

A. The Elements of a Tying Violation

The "heart of an illegal tying arrangement" is requiring a customer to obtain an additional product from a bank or an affiliate. Banks are subject to a stricter standard in which there are only two essential elements to establish an illegal tying arrangement:

(1) a condition or requirement exists that ties the customer's desired product to another product;
(2) this condition or requirement was imposed or forced on the customer by the bank.

Without meeting these two requirements, no tying arrangement exists. The requirement of an additional purchase is essential; if the customer has an option to purchase the allegedly tied product no tying arrangement exists. According to the FRB, a tying violation would occur if a bank would only grant a loan if the "customer commit[ed] to hire the bank's securities

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111. Although not express, Rep. John Dingell said "federal regulators should examine how banks link loans to more lucrative services." Stein, supra note 45, at 3D. See also Davenport, supra note 46, at 1.
112. Davenport, supra note 46, at 1. According to one former general counsel at the FRB, it is always better to "beat a GAO report than to respond to it." Id.
114. Id.
115. Id. at 52,028.
116. Id.
affiliate to underwrite an upcoming bond offering...."  
This arrangement is a violation because the bank conditioned the availability of credit on the customer obtaining a non-traditional bank product.  

B. What is Not a Tying Violation

While a prima facie tying arrangement exists when any product is required to be purchased with a desired product, not every tying arrangement is illegal. Statutory exceptions to the general prohibitions include situations in which the tied product is "a loan, discount, deposit, or trust service;" "related to and usually provided in connection with a loan, discount, deposit or trust service;" or "a condition or requirement... reasonably impose[d] in a credit transaction to assure the soundness of credit." Additionally, the FRB may make exceptions that are "not contrary to the purposes of Section 106."

Section 106 does not prevent a customer from voluntarily choosing to award some non-traditional banking service to a bank, even if the customer is already involved in a lending relationship. Moreover, nothing in Section 106 prevents a bank from extending a loan out of a desire to further the banking relationship. A loan made in hopes of furthering the relationship is permissible, even when the bank makes known its intentions of securing future business. The FRB arguably encourages these types of activities by stating "Section 106... does not prohibit... cross-selling the full range of products offered by the bank or its affiliates to a customer or encouraging an existing customer to purchase additional products.... Cross-

118. Proposed Interpretation, supra note 15, at 52,028.
119. Id. at 52,027.
121. Id.
122. § 1972(1)(C).
123. § 1972(1)(E).
124. § 1972(1).
125. See Proposed Interpretation, supra note 15, at 52,028-29.
126. Id. at 52,028.
127. Id.
marketing and cross-selling activities, whether suggestive or aggressive, are part of the nature of ordinary business dealings . . . ."\textsuperscript{128}

Only a demand by the \textit{bank} of an additional purchase by the customer will result in an illegal tying arrangement.\textsuperscript{129} If the customer demands the bank provide it with an additional product as a condition of purchase, no tie occurs.\textsuperscript{130} It was \textit{not} the purpose of section 106 to "prohibit customers from using their own bargaining power to obtain a package of desired products from the bank."\textsuperscript{131} Therefore, corporate customers \textit{may} demand any product as a condition of making a purchase from a bank.

The FRB's proposed interpretation states "Section 106 specifically allows a bank to condition both the availability and price of any desired product on the requirement that the customer obtain a 'traditional bank product' (the tied product) from the bank."\textsuperscript{132} The FRB expands the category immensely by enumerating a broad list of "traditional banking products."\textsuperscript{133} Accordingly, so long as the tied product is a traditional bank product, the tying arrangement is legal.\textsuperscript{134} Through specific examples, the FRB shows a permissible tying agreement where the bank "condition[s] the availability or price of a particular loan on a requirement . . . the customer maintain a specified amount of deposits with the bank" or requiring a customer to employ cash management services in order to receive a loan.\textsuperscript{135} In both

\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.} Additionally, it is crucial to distinguish which party imposes the tie because the distinction is "embedded in [S]ection 106." \textit{Id.}
\textsuperscript{131} \textit{See Proposed Interpretation, supra} note 15, at 52,029.
\textsuperscript{133} Proposed Interpretation, supra note 15, at 52,030. The FRB includes the following in the definition of Traditional Banking Product: All types of extensions of credit (but expressly excluding underwriting, privately placements, and brokering of debt securities from the definition of "extension of credit"), letters of credit, lease transactions, credit derivatives, servicing loans, all forms of deposit accounts, safe deposit box services, escrow services, payment and settlement services, payroll services, traveler's check and money order services, cash management services, services provided in the administration of an estate, discretionary asset management services, custody services, and paying agent, transfer agent and registrar services. \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.}
instances, the tying arrangements are legal because the tied products are traditional bank products.136

C. Mixed-Product Arrangements

The FRB does not require compliance with Section 106 solely through traditional bank products, but recognizes “a bank may wish to provide a customer the freedom to choose whether to satisfy a condition imposed by the bank through the purchase of one or more traditional banking products or other ‘non-traditional’ products.”137 The resulting mix of both traditional and non-traditional bank products is known as a “mixed product arrangement.”138 In order to qualify as a mixed-product arrangement, both traditional and non-traditional banking products must be offered to the customer.139 By definition, if a product arrangement only includes traditional bank products it is not a mixed product arrangement; however, no tying concern would exist because of the traditional bank product exception.140 Ultimately, the mixed product arrangement benefits the customer through greater flexibility and increased choice.141 The presence of a mixed-product arrangement, however, does not guarantee compliance with Section 106.142 Indeed, further analysis is required to determine whether an illegal tying arrangement exists.143

In order for the mixed-product arrangement to satisfy the requirements of Section 106, the product arrangement must provide a meaningful choice to satisfy the bank’s conditions solely through the purchase of traditional bank products.144 The importance of meaningful choice cannot be overstated. Through

136. Id.
137. Id. (emphasis added).
138. Id. at 52,030.
139. See Proposed Interpretation, supra note 15, at 52,030 n.47.
140. Id. at 52,030; see also supra notes 132–136 and accompanying text.
142. Id. at 52,031.
143. Id.
144. See Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1416-17 (11th Cir. 1987); Proposed Interpretation, supra note 15, at 52,031 (emphasis added).
meaningful choice, banks can conceptually require the purchase of a non-traditional bank product or a similarly profitable mix of traditional bank products.\textsuperscript{145} Despite the required purchase, the arrangement is not illegal because it does not “require the customer to purchase any non-traditional product from the bank.”\textsuperscript{146} The bank has provided a meaningful choice to the customer.\textsuperscript{147} Moreover, “the bank’s inclusion of non-traditional products within the range of tied products may be viewed as giving the customer additional flexibility in determining how it may choose to satisfy a condition that the bank is permitted by law to impose.”\textsuperscript{148}

Alternatively, if the “customer does not have a meaningful option to satisfy the bank’s condition solely through the purchase of . . . traditional bank products . . . then the arrangement violates [S]ection 106 because the arrangement effectively requires the customer to purchase [a] non-traditional bank product . . . .\textsuperscript{149} Customer freedom is central to the mixed product arrangement; consequently, if the customer has no choice to satisfy the condition of purchase solely through the traditional bank products, no meaningful choice exists.\textsuperscript{150} Thus, as long as a bank customer is provided a meaningful choice between traditional and non-traditional bank products, the additional flexibility given to the customer by adding non-traditional products to the mix rationalizes the mixed product arrangement.\textsuperscript{151}

\section*{D \quad Meaningful Choice}

By providing an in-depth example, the FRB provides a template for a mixed product arrangement in a typical relationship banking situation.\textsuperscript{152} In the example, the bank holding company and its affiliates review the overall profitability of its customer

\begin{itemize}
\item \textsuperscript{145} Cf. Proposed Interpretation, supra note 15, at 52,030.
\item \textsuperscript{146} Id. at 52,031.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id. (emphasis added).
\item \textsuperscript{149} Id. at 52,031 (emphasis added).
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Proposed Interpretation, supra note 15, at 52,030.
\item \textsuperscript{152} See generally id. at 52,031.
\end{itemize}
relationships to determine whether the profitability of the existing relationships meet the bank's hurdle rate.\textsuperscript{153} Upon finding the profitability of a relationship does not satisfy the hurdle rate, the bank informs the customer it will not renew outstanding credit facilities unless the customer gives the bank sufficient additional business to meet the hurdle rate.\textsuperscript{154} The bank does not require any specific product purchases to satisfy the hurdle rate, but gives the customer the freedom to choose from the bank's entire product line, including a wide range of both traditional and non-traditional products, in determining how it will satisfy the hurdle rate.\textsuperscript{155} A meaningful option would exist if the customer could "reasonably obtain sufficient cash management services from the [bank] to permit it to meet the hurdle rate."\textsuperscript{156} By satisfying the condition solely through a traditional bank product, such as cash management, the customer is not \textit{required} to purchase any non-traditional bank products.\textsuperscript{157} The actual product purchased to meet the hurdle rate is irrelevant; the only factor considered is whether the condition could be satisfied through a traditional bank product. If, however, the customer could \textit{only} satisfy the hurdle rate by purchasing non-traditional bank products then the customer would "not have a meaningful option to satisfy the hurdle rate."\textsuperscript{158} Therefore, a product offering lacking a meaningful choice would not qualify as a mixed product arrangement and would constitute an illegal tying arrangement.\textsuperscript{159}

\textbf{E. Profitability}

The FRB's proposed interpretation specifically emphasizes a bank may weigh the profitability of its entire relationship with the customer in order to determine whether to continue or expand

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\textsuperscript{153} \textit{Id.} A hurdle rate is the bank's internal profitability threshold. \textit{Id.}
\textsuperscript{154} \textit{Id. at} 52,031.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id. at} 52,031, n.51 A meaningful option would exist provided Company could legally transfer its cash management to Bank. \textit{Id.} Additionally, cash management services would not be the only viable way to satisfy the condition. \textit{Id.}
\textsuperscript{157} Proposed Interpretation, supra note 15, at 52,031.
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\end{flushleft}
the relationship. 160 Bankers contend their business strategies require their corporate relationships to be profitable. 161 Indeed, one bank executive contends it is legal “to boost profit from corporate customers by charging more for loans or seeking additional business such as treasury management or bond underwriting.” 162 When the market rates for commercial lending fail to satisfy hurdle rates, it is common for the bank to market other bank products to the client in an attempt to make the relationship profitable. 163

The profitability of banking relationships was closely considered throughout the congressional debate surrounding Section 106. 164 The FRB implicitly approves the use of a hurdle rate by advocating its use in determining whether to increase the bank’s relationship with a customer. 165 Additionally, banking regulators have found the profitability focus is “within the bounds of the law as long as the bank customers have a ‘meaningful choice.’” 166 In making decisions throughout the relationship banking context, the customer may “negotiate with the bank on the basis of his entire relationship with the bank.” 167 Moreover, the parties may vary the consideration, and affect the profitability of the entire relationship based upon “the existence or extent of utilization” of the bank’s product line. 168

III. GOVERNMENT STANCE

A. The General Accounting Office Report

The GAO conducted an extensive investigation (1) to find any evidence suggesting banks engage in unlawful tying and (2) to determine what federal regulators have done to attack the

160. Id. at 52,030.
161. See GAO Report, supra note 2, at 25.
162. Stein, supra note 45, at 3D (quoting Kenneth Lewis, Bank of America Chief Executive Officer).
163. See GAO Report, supra note 2, at 25.
166. See GAO Report, supra note 2, at 25.
168. GAO Report, supra note 2, at 25.
problem. Based on the results of the investigation, which involved research through surveys and interviews with corporate borrowers, bankers, credit market experts, academic experts, and federal officials, the GAO determined the available evidence did not substantiate the allegations of banks tying the availability or price of credit to the purchase of securities underwriting services. The lack of empirical evidence, however, is not conclusive that tying does not occur. The absence of documentation may be explained by the nature of transactions in relationship banking where negotiations are generally conducted orally. In fact, according to the GAO, borrowers have shown substantial reluctance to report impermissible tying practices because of uncertainty as to the legality of the transaction, fear of adverse consequences for their company, or fear of adverse consequences to their individual careers.

The GAO report concluded banks generally comply with Section 106. The report, however included specific violations, such as a reduction of a corporate borrower’s credit by $70 million after the customer declined to purchase debt underwriting services, specific executives feeling pressured to purchase additional products, or corporate customers fearing future lending might be jeopardized unless additional services were purchased.

B. The Office of the Comptroller of the Currency

The Office of the Comptroller of the Currency (“OCC”) has supervisory and regulatory responsibility for national banks

169. See GAO Report, supra note 2, at 2. Additionally, the GAO report addressed what if any, competitive advantage accounting rules, capital standards and the federal safety net create for banks. See generally id.
170. Id. at 3.
171. Id. at 4.
172. Id. at 26.
173. Id.
174. Id.
175. GAO Report, supra note 2, at 5.
176. Id. at 15.
177. Id.
178. Id. at 16.
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and their subsidiaries. Additionally, the OCC is responsible for the administration and enforcement of transactions between national banks and affiliates. By stating there are a wide range of areas where "clarification of the application of Section 106 would be desirable," the OCC sides with the FRB that "adoption of the interpretation will assist banks and their customers in understanding the scope of the anti-tying restrictions." As a result of the extensive collaboration between the OCC and the FRB in formulating the proposed interpretation, the implicit approval of the OCC permeates the proposed interpretation. As the office vested with the administration of national banks, the OCC "will apply the guidance in assessing the anti-tying policies, procedures and systems of national banks during the supervisory process."

C. Congressional Response

In keeping with the current political spirit of Capitol Hill, the congressional response to the FRB's proposed interpretation as well as the GAO report is split along political lines. Representative Michael G. Oxley, Chairman of the House Financial Services Committee responded to the GAO report by stating: "All indications would lead one to the conclusion that banks are successfully following current law and regulation under the supervision of the federal banking regulators." Yet, bank compliance is not a given, and the GAO report only "underscores

179. *Id.* at 8.
180. *Id.*
182. See generally *id*.
183. *Id*.
the importance of continued vigilance” on the part of bank regulators to ensure compliance with Section 106.\textsuperscript{186}

Representative John Dingell,\textsuperscript{187} the Ranking Member of the House Committee on Energy and Commerce, chastised regulators for not doing enough to prevent banks from coercing buyers into purchasing multiple products.\textsuperscript{188} In a letter to both the FRB and the OCC, Dingell commended the FRB for the proposed interpretation, but his praise for the proposed interpretation went no further.\textsuperscript{189} According to Dingell, the proposed interpretation lacks “any strong statement that [the FRB and OCC] expect the banks to obey the law. The tone of the document appears to be tilted towards a ‘wink and nod’ approach to noncompliance.”\textsuperscript{190} Specifically, Representative Dingell distinguishes the proposed interpretation’s expansive definition of traditional bank product:

The scope of this term, and therefore this exception, continues to expand. Pretty soon, there will be no point to the prohibition. And in the financial services equivalent of the much-disavowed “don’t ask, don’t tell” policy, the interpretation outlines how banks can link loans to investment banking deals by setting a “hurdle rate” for customer relationships that forces the corporate customer to buy high-fee non-traditional products.\textsuperscript{191}

In conclusion, Dingell emphasizes that free competition was the motivating factor behind Section 106, and the passage of GLBA “greatly complicates” preserving that goal by creating

\textsuperscript{186} Id.
\textsuperscript{188} Craig Linder, \textit{In Brief: Dingell on Tying: Take This Seriously}, \textit{Am. Banker}, Oct. 21, 2003, at 17.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
“innumerable conflicts of interest and opportunities for abusive behavior.” In strong language the Ranking Member states, “[i]llegal tying is extortion, pure and simple. It is unclear to me that [the FRB and the OCC] take this matter seriously.”

Representative Dingell's response to the proposed interpretation is only the latest of a series of exchanges with banking regulators. Since July 11, 2002 Representative Dingell has publicly prodded the FRB, OCC and GAO to pursue the “pay to play” practices of banks. Indeed, Representative Dingell's concerns served as part of the basis for the proposed interpretation. Earlier correspondence from the Ranking Member show a marked difference in his opinion of the banking regulators.

IV. THE SOLUTION

How is a bank to comply with the theoretical applications of Section 106 and the FRB's proposed interpretation? Although

192. Id.
193. Id. Interestingly, Representative Dingell fails to mention WestLB, AG in alleging federal banking regulators do not take tying arrangements seriously. Id. On August 27, 2003, WestLB, AG entered into an agreement with the FRB surrounding alleged Section 106 violations and paid a $3,000,000 fine while neither admitting or denying wrongdoing. See generally Davenport, supra note 46, at 1.
each case requires an intensely factual analysis, it is possible to set a wide range of parameters to guide compliance.\textsuperscript{198} In an effort to help banks avoid future litigation, this section outlines a way for banks to legally tie both traditional and non-traditional bank products through the offering of mixed product arrangements.\textsuperscript{199} While realizing it will ultimately be a "trial lawyer's exercise to prove where the limits of the arrangement lie,"\textsuperscript{200} the following hypothesis provides guidance for banks to ensure compliance with the meaningful choice requirement of the mixed product arrangement. Through meaningful choice banks can offer a wide assortment of financial products and capitalize on increased profit margins provided by some non-traditional bank products.\textsuperscript{201} While better serving client needs and demands, banks will comply with the letter and spirit of the proposed interpretation and further the purposes of Section 106.\textsuperscript{202}

A. Preliminary Measures

First, banks should have "policies, procedures and systems... reasonably designed to ensure that the bank complies with the anti-tying prohibitions of [Section] 106."\textsuperscript{203} As necessary, bank employees should be educated and trained in the best ways of compliance.\textsuperscript{204} The education and training should focus on employees bearing the greatest risk of violating Section 106, including areas such as corporate relationships, syndicated lending, credit approval, marketing, and pricing policy.\textsuperscript{205} Additionally, a strong internal audit should ensure the institution’s compliance with Section 106.\textsuperscript{206} Recently, one bank created a loan division specifically for handling loans to investment banking clients.\textsuperscript{207} The

\begin{quote}
\textsuperscript{198} See supra notes 87–103 and accompanying text.  
\textsuperscript{199} See supra notes 137–151 and accompanying text.  
\textsuperscript{200} Davenport, supra note 46, at 1.  
\textsuperscript{201} See supra notes 3–5 and accompanying text.  
\textsuperscript{202} See supra notes 72–86 and accompanying text.  
\textsuperscript{203} Proposed Interpretation, supra note 15, at 52,034.  
\textsuperscript{204} Id.  
\textsuperscript{205} Id.  
\textsuperscript{206} Id. at 52,034–35.  
\textsuperscript{207} Avital Louria Hahn, What’s Behind UBS’s new Loan Unit? Some See a Link to Antitying Fervor; UBS Claims Purely Organizational Purpose. INVESTMENT
attempt to separate lending from investment banking may be intended to create the impression the two functions are not linked.\textsuperscript{208} Regardless of the motivation for creating the division, by centralizing an area dealing with risky relationships,\textsuperscript{209} the bank eases its burden of education, training, and risk management.\textsuperscript{210}

In addition to the education of employees, banks should seek to educate their customers about Section 106's requirements.\textsuperscript{211} The subtle distinctions between legal and illegal tying arrangements cause great confusion among bank customers. Moreover, the GAO acknowledges "[i]nformation from customers could be an important step in assessing both implementation of and compliance with a bank's policies and procedures."\textsuperscript{212} By ensuring its customers can play that vital role in enforcement, the bank could conceivably increase its credibility with regulators through its customers.\textsuperscript{213}

B. The Buffet of Meaningful Choice

Imagine the Sunday brunch buffet at your favorite local eatery. Just as each diner can satisfy his or her own desires by eating traditional brunch foods, such as omelets and hash browns, an occasional customer may desire the non-traditional brunch product of filet mignon, and the restaurant that is willing to provide the filet mignon will most likely obtain a competitive advantage based on its flexibility. Just as restaurants meet customers' demands, so may banks. At its foundation, meaningful choice is not difficult to satisfy. The bank must only provide its customers with legitimate, justifiable options to satisfy conditions

\textsuperscript{208} Id.
\textsuperscript{209} "Risky" is only used to describe the relationships as possibly giving rise to a tie.
\textsuperscript{210} See generally Proposed Interpretation, supra note 15 at 52,034-35.
\textsuperscript{211} See GAO Report, supra note 2, at 15.
\textsuperscript{212} Id. at 39.
\textsuperscript{213} See id. at 39-40 (noting customers are crucial to compliance).
placed on desired products through the purchase of traditional bank products (the “omelet”). So long as the condition may be satisfied through traditional bank products, the bank is free to include non-traditional bank products (the “filet mignon”) in the mix.

1. Traditional Bank Products

The FRB seized upon its power to regulate not “contrary to the purposes” of Section 106, and broadly defined what constitutes a traditional bank product. No longer relegated to a narrow definition, the FRB expanded its meaning to include items not expressly included in the letter of the statute, but all encompassing of its spirit. Indeed, in light of the wide reach of banks after GLBA, it might only be a matter of time before debt underwriting, insurance services, and financial advisory services are seen as traditional bank products. In order for the traditional bank product categorization to remain workable, it must remain a flexible standard.

Regardless of what is classified as a traditional bank product, in order to satisfy the requirements of a mixed product arrangement, the bank must place traditional bank products amongst the choice of tied products. Thus, a bank must place at least a wide enough selection of traditional bank products with non-traditional bank products to allow the customer to fulfill the obligation of the tying arrangement through the purchase of a traditional bank product.

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215. See supra notes 132–136 and accompanying text.
216. See supra notes 72–86 and accompanying text.
217. Dingell, supra note 189. Indeed, Representative Dingell alleges the term may eventually be defined so expansively as to be meaningless. Id.
219. See supra notes 137–151 and accompanying text.
220. See supra notes 137–151 and accompanying text.
2. Non-traditional Bank Products

The major benefit of the mixed product arrangement is the ability for banks to offer non-traditional bank products as a tied product. While requiring traditional bank products in the mix, the FRB grants banks the ability to also include non-traditional bank products in the product mix and allow customers the "freedom to choose whether to satisfy a condition imposed by the bank through the purchase of one or more traditional bank products or other 'non-traditional' products". By expressly including the phrase "or more" in the proposed interpretation, the FRB opens the door for banks to require a plurality of traditional bank products to satisfy a condition of sale, while at the same time only requiring a single non-traditional product.

Therefore, the bank may require the purchase of several low margin products or a single, high margin product. Thus, a bank can formulate a combination of traditional and non-traditional bank products to satisfy its hurdle rate. The conditions of sale may be satisfied by requiring the purchase of a checking account, safe deposit box, and cash management services jointly, or may be satisfied solely through the purchase of a commercial casualty insurance policy through a bank affiliate. Moreover, by focusing on the profitability of the entire relationship, the bank can better formulate a range of feasible product arrangements that are subject only to the good faith requirements. What suffices as an acceptable combination will be left wholly to the bank to determine based on its total relationship with the customer.

One could argue that a mixed product arrangement which provides a meaningful choice does not make any sense. Indeed, it could be possible for a bank to slant the product selection so

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221. See supra notes 137–141 and accompanying text.
222. See Proposed Interpretation, supra note 15, at 52,031 (emphasis added).
223. See supra notes 160–168 and accompanying text.
224. See supra notes 137–159 and accompanying text.
225. See supra notes 160–168 and accompanying text.
226. See infra notes 239–248 and accompanying text.
227. See infra notes 239–248 and accompanying text.
228. See supra notes 137–151 and accompanying text.
dramatically towards expensive, undesirable, or superfluous traditional products in order to make less expensive and useful non-traditional bank products more desirable; however, it is probable such an arrangement would effectively coerce the customer to purchase a non-traditional bank product and would therefore be illegal.\textsuperscript{229} Such a slanted and unbalanced product offering, however, would not satisfy the mixed product arrangement.\textsuperscript{230} The justification for the mixed product arrangement lies in the requirement that the choice be a meaningful choice.\textsuperscript{231}

3. Meaningful Choice

The FRB states: “the anti-tying policies... of a bank offering a mixed-product arrangement play a particularly important role in demonstrating and ensuring that the bank’s actions with respect to these arrangements are consistent with [S]ection 106.”\textsuperscript{232} In order to be consistent, the customer must possess a meaningful choice.\textsuperscript{233} To be “meaningful”, the mixed product arrangement must have a purpose.\textsuperscript{234} Meaningful choice is a meaningful option; the customer must be able to satisfy the conditions of purchase solely through traditional bank products.\textsuperscript{235} The meaningful choice arises because the customer \textit{may} satisfy the conditions of purchase through non-traditional products.\textsuperscript{236} Thus, in order for the choice to be meaningful, the customer must be able to fulfill its own purpose solely through traditional bank products.\textsuperscript{237} As a result, the product offering that is highly slanted to the bank’s advantage and only offers overpriced, unwanted

\begin{itemize}
\item \textsuperscript{229} See Proposed Interpretation, \textit{supra} note 15, at 52,028.
\item \textsuperscript{230} See \textit{infra} notes 232–238 and accompanying text.
\item \textsuperscript{231} See \textit{supra} notes 152–159 and accompanying text.
\item \textsuperscript{232} Proposed Interpretation, \textit{supra} note 15, at 52,034.
\item \textsuperscript{233} See \textit{supra} notes 152–159 and accompanying text.
\item \textsuperscript{234} \textit{WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY} 1399 (1993).
\item \textsuperscript{235} See \textit{supra} notes 152–159 and accompanying text.
\item \textsuperscript{236} See \textit{supra} notes 152–159 and accompanying text.
\item \textsuperscript{237} See \textit{supra} notes 152–159 and accompanying text.
\end{itemize}
traditional bank products will not qualify as a mixed product arrangement.\textsuperscript{238}

Where should the line be drawn to constitute a meaningful choice? According to the FRB, a bank’s policies must “establish a good faith belief that a customer offered a mixed-product arrangement would be able to satisfy the condition[s] . . . solely through the purchase of traditional bank products.”\textsuperscript{239} Therefore, the bank bears the burden of proving its good faith belief in the customer’s ability to satisfy the condition without purchasing any non-traditional bank products. What is necessary to establish the required good faith belief will vary with the “nature and characteristics of the [tying] arrangement and the types of customer(s) to which it is offered.”\textsuperscript{240} In fact, the FRB states that it will be much easier to prove the good faith belief when dealing with a large, complex company than with a smaller, less complex business.\textsuperscript{241} Also, the longevity of the bank’s relationship with the customer will make good faith easier to justify as the length of the relationship is longer.\textsuperscript{242} Furthermore, the bank “may not weight, discourage the use of, or otherwise treat traditional bank products in a manner that is designed to deprive customers of a meaningful choice.”\textsuperscript{243}

In considering any system designed to offer a meaningful option, a bank should consider the range and types of traditional bank products it offers.\textsuperscript{244} The bank should set a policy to determine when conditions have been satisfied in a tying arrangement. This analysis will require the bank to evaluate the types of products and profit levels typically required to satisfy its hurdle rate.\textsuperscript{245} While making these calculations, it is essential for the bank to keep the realistic needs of the customer as the focus.\textsuperscript{246}

\textsuperscript{238} See supra notes 137–151 and accompanying text.
\textsuperscript{239} Proposed Interpretation, supra note 15, at 52,034.
\textsuperscript{240} Id. at 52,035.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Id. at 52,034 n.75.
\textsuperscript{244} Id. at 52,031.
\textsuperscript{245} Proposed Interpretation, supra note 15, at 53,034-35.
\textsuperscript{246} See id. at 52,035.
In determining what product arrangements to present to customers to provide a meaningful choice, banks should ensure customer freedom is the focal point of the arrangement.\footnote{247}{See supra notes 150–151 and accompanying text.} In essence, so long as the customer is given the freedom to design and tailor its own banking relationship, the bank will not violate Section 106.\footnote{248}{See supra notes 150–151 and accompanying text.} Thus, the bank can offer the customer a list of hundreds of products from which to select the tied product without giving any requirements. And as the customer selects products it desires, the bank can determine whether the total mix of the relationship satisfies its hurdle rate. If it does not meet the hurdle rate, the bank can repeat the process and ask the customer to select an additional product, so long as a meaningful option is still available. This process may be repeated so long as a meaningful option remains. So long as the customer is willing to comply with the conditions the bank will obtain the business. Ultimately, when the customer refuses to comply with an additional purchase and the bank refuses the loan, another competitive bank will step in and attempt to foster a new banking relationship.

V. CONCLUSION

Clearly, the tying debate is not going to disappear in the near future. Yet, as one of the chief bank regulators in the nation states, "no one bank has dominance over bank credit."\footnote{249}{Mara Der Hovanesian, A Banking Rule for Another Era, BUS. WEEK, Oct. 27, 2003, at 104. (quoting John D. Hawke, Jr., Comptroller of the Currency).} If one bank refuses to extend credit to a customer, a worthy customer will be able to attain it elsewhere. In a competitive market the bank providing the highest customer satisfaction will ultimately prevail. Moreover, Section 106 "represent[s] a 33-year-old vestige of [the] high-water period of command–and-control regulation."\footnote{250}{Clyde Mitchell, Study Should Wrap Up Tying, AM. BANKER, Oct. 31, 2003, at 10.} The competitive forces of an open market limit the dominance of all players far better than would ever be possible through autocratic legislation. In the wake of GLBA, the competitive

\[\text{\footnotesize{\textsuperscript{247}}See supra notes 150–151 and accompanying text.}\]
\[\text{\footnotesize{\textsuperscript{248}}See supra notes 150–151 and accompanying text.}\]
\[\text{\footnotesize{\textsuperscript{249}}Mara Der Hovanesian, A Banking Rule for Another Era, BUS. WEEK, Oct. 27, 2003, at 104. (quoting John D. Hawke, Jr., Comptroller of the Currency).}\]
\[\text{\footnotesize{\textsuperscript{250}}Clyde Mitchell, Study Should Wrap Up Tying, AM. BANKER, Oct. 31, 2003, at 10.}\]
financial services market provides the necessary check. With
market forces effectively regulating any dominance, the command-
and-control legislation provided by Section 106 is superfluous. Indeed, it stifles competition.

In the twenty-first century, “are we to believe that big,
sophisticated borrowers are going to be coerced?”251 Or should we
believe when a company needs credit, “[c]hief financial officers are
smart enough to raise cash with bonds if they can’t get bank
loans.”252 Bullying may occur in a commercial lending transaction,
but it is unclear whether the bullying is initiated by the borrower
or the lender.253 As one commentator points out, “Enron . . .
executives may have bullied Wall Street into granting credit in
return for receiving investment banking business.”254

Some view the efforts of investment banks and certain
elected officials as a reactionary movement to block the efforts of
GLBA. Ironically, GLBA was intended to increase competition
by allowing head-to-head competition across all business lines and
has been incredibly effective in achieving that purpose. In every
competition there must be a loser. Losers complain.

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251. Der Hovanesian, supra note 249, at 104. See also Dingell, supra note 189
(noting that Comptroller Hawke’s belief is “very troubling”).
252. Der Hovanesian, supra note 249, at 104.
253. See generally GAO Report, supra note 2.
254. Der Hovanesian, supra note 249, at 104; see generally Vaughn K. Reynolds,
Note, The Citibank and J.P. Morgan Chase Enron Settlements: The Impact on the