

Anti-Tying Considerations for Bank Lenders

February 2024

Real Estate Group

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A. What is Anti-Tying

(Section 106 of the Bank Holding Company Act Amendments of 1970)

1. Section 106 broadly prohibits banks from (i) extending credit, (ii) varying the price or terms of a loan or (iii) furnishing other products and services, on the condition that the customer:
 - a) obtain additional credit or services from the bank or any “Bank Chain Affiliate”;
 - b) agree to provide something of value to any Bank Chain Affiliate that is not typical of a loan transaction; or
 - c) agree not to obtain other credit or services from a competitor bank, except when such condition is needed to ensure soundness of the transaction

A. What is Anti-Tying

(Section 106 of the Bank Holding Company Act Amendments of 1970)

2. Because a prohibited tie can include all Bank Chain Affiliates, counsel should fully understand the ownership structure of the bank.
3. Since its enactment in 1970, Section 106 has not been a major focus of public debate and has suffered from poor enforcement



B. Policy Considerations

Congress recognized two rationales:

- FIRST, banks hold significant market power and economic leverage in considering loan requests. The policy goal of the regulations is to prevent banks from exploiting an unequal bargaining position.
- SECOND, because the government insures deposits (and may bail out banks), bank stability is a legitimate government interest.



B. Policy Considerations

Further, Congress intended Section 106 to permit claims beyond those available under general antitrust law:

- Any prohibited tie could result in the bank being fined. Worse, Section 106 grants a private cause of action to any person (e .g., a customer) affected by a violation of Section 106. A mere violation is enough.
- Section 106 does not require a showing of the bank's market power or that the customer was coerced.
- Section 106 provides aggrieved customers with (1) treble damages, (2) fees and (3) costs.



C. Anti-Tying Exceptions

1. Traditional Bank Product Exception:

- Banks can condition a transaction on the customer's purchase of a "traditional bank product".
- Permitted ties include (i) all types of extensions of credit (including lease transactions that are the equivalent of lending), (ii) financial guaranty arrangements, (iii) acquiring, arranging and syndicating loans for the customer, (iv) the customer's deposit account business, (v) trust and escrow services and (vi) cash management services.



C. Anti-Tying Exceptions

2. Non-U.S. Customers:

- Section 106 generally does not apply if the customer is a non-U.S. entity.

3. Customer Initiated Ties:

- It is possible for a customer to voluntarily tie the bank. The bank should document the request in the bank's records and avoid a 'reverse tie'.



C. Anti-Tying Exceptions

4. Joint Offerings that Are Not Tied:

- A bank can offer a customer two products so long as the customer can choose, and the availability or pricing of the traditional bank product or service is not conditioned on buying the non-traditional bank product or service.

5. One Product Exception:

- A tie within a single product is, of course, fine.

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C. Anti-Tying Exceptions

6. Corporate Chain Exception:

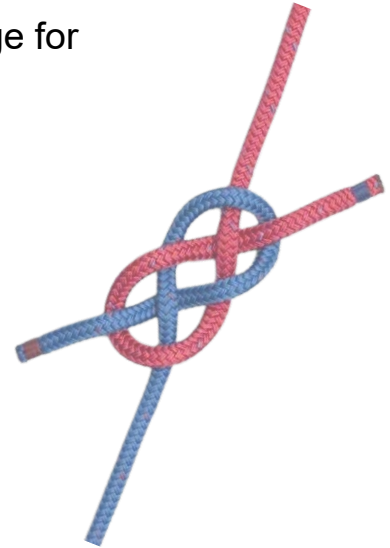
- If there is a potential prohibited tie and no exception is available, then the arrangement may be made by a non-bank affiliate not subject to Section 106.
- Major banks may have Bank Chain Affiliates and “corporate chain” entities.



D. Legal Drafting Tip

Most Favored Nation Provisions:

- When a borrower grants “most favored nation” treatment to a bank with respect to beneficial terms that the borrower gives any other lender (e.g., in exchange for participating in a loan), that provision could trigger an anti-tying violation.
- Counsel should keep this in mind while drafting commitment papers.



E. Case Law

Halifax Center, LLC, et al. v. PBI Bank:

- A customer requested financing from PBI Bank to purchase an existing commercial loan.
- PBI Bank agreed to make the loan only if the customer purchased an unrelated property on which PBI Bank held a mortgage that was in default.
- This was a prohibited tie.



E. Case Law

Sharkey v. Security Bank Trust Co.:

- The bank conditioned the making of a mortgage loan to the borrower on the borrower's purchase of an unrelated property from the bank.
- This was a prohibited tie.



Majestic Bldg. Maint., Inc. v. Huntington Bancshares Inc.:

- The bank agreed not to commence collection actions on a loan in default on the condition that the borrower provide additional collateral.
- This was not a prohibited tie because the condition was not unusual.



E. Case Law

Elements of a Prohibited Tie (from the Halifax case):

1. Did the bank condition the extension of credit upon the borrower obtaining or offering additional credit, property or services to or from the bank or its holding company?
2. Was the arrangement unusual or untraditional in the banking industry?
3. Did the Bank receive a benefit?



D. Final Thoughts

Be Vigilant. Prohibited ties may not be readily apparent, especially when the tie on its face meets a bank's otherwise valid business purposes.

Non-bank lenders have a clear advantage in this space due to not being subject to the Bank Holding Company Act.



**Thank you
for joining us!**



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