

Fed asked to clarify bank tying position; OCC findings disputed

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The Association for Financial Professionals (AFP) has called upon the Federal Reserve Board to clarify its guidance on the anti-tying restrictions of the Bank Holding Company Act.

The association said it is particularly concerned with the board's use of the term "meaningful option" in defining whether an activity is considered tying.

"We are encouraged that the Federal Reserve has recognized this problem. However, the Fed needs to eliminate the ambiguity in the definition of the phrase 'meaningful option.' The interpretation of a 'meaningful option' is the linchpin that will determine whether the Board's proposal will be effective at clarifying the difference between relationship banking and impermissible tying," said AFP's President and CEO Jim Kaitz.

According to current Fed rules, a bank is allowed to provide the customer 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" bank products. This type of mixed-product arrangement would be allowed if the customer has a "meaningful option" to satisfy the bank's condition solely through the purchase of traditional bank products.

For a "meaningful option" to exist, it is crucial that a prudent corporate finance professional could reasonably choose a combination of traditional bank products that would satisfy the condition imposed by the bank.

Nearly a month ago, The Federal Reserve Board released proposed guidance on what is or is not permissible under the anti-tying restrictions contained in Section 106 of the Bank Holding Company Act.

During the same week, The Federal Reserve Board issued a cease and desist order and fined a German bank, WestLB AG, \$3 million for violating anti-tying restrictions.

The Office of Comptroller of the Currency (OCC) released a white paper last week, stating that there is no empirical evidence directly focusing on the tying of lending and underwriting activities by national banks.

But AFP says its surveys contradict the OCC's finding. AFP's March 2003 survey of financial professionals showed that commercial banks frequently make access to corporate credit contingent upon the purchase of other services. In the survey, 56 percent of companies with annual revenues greater than \$1 billion report that a commercial bank denied credit or changed the terms of credit after the company did not award other financial business, such as investment banking or strategic advisory services. Further, three out of five large companies report that the pressure to award additional business has increased over the last year.

"In light of recent Federal Reserve Board action and the results of our surveys, the OCC's findings are surprising," said Kaitz. □