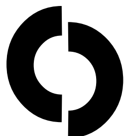

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #982
February 2004
12 USC 1972

September 29, 2003

Re: **[** **]** (“Bank”) (Consumer Case Number **[** **]**)

Dear **[** **]**:

Thank you for your inquiry to the Office of the Comptroller of the Currency’s (“OCC’s”) Customer Assistance Group (“CAG”) concerning a proposal by a national bank, that you were concerned may involve tying under Section 106 of the Bank Holding Company Act, 12 U.S.C. § 1972. As you may recall, the CAG representative forwarded your inquiry to the Law Department for resolution. In the meantime, the OCC and the Board of Governors of the Federal Reserve System (“FRB”) have focused considerable attention on tying matters. The OCC and FRB recently conducted a joint review of tying practices at large banking organizations. Various other regulatory reviews also are on-going.[1] We provide the following response based on the information you submitted and our subsequent review of the matter involving the Bank and School.

You indicated you are an investment banker from **[** ***Inc.*** **]** (“consumer”) and that you were involved in a tax-exempt bond underwriting for a private school in **[** ***state*** **]** in the spring of 2002. The school requested proposals for underwriting services and letter of credit facilities. The Bank submitted a proposal. Specifically, the Bank’s letter stated: “**[** ***Bank’s*** **]**’s proposal to serve as underwriter requires that the [School] utilize a **[** **]** letter of credit to secure its bond issue.” We understand that neither the Bank nor its securities affiliate received any of the proposed underwriting or letter of credit business. You inquired whether the practice described in the Bank’s letter was a violation of the federal tying statute.

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[1] For example, the National Association of Securities Dealers, Inc. is conducting an investigation focusing on broker-dealers affiliated with commercial banks and seeking to determine whether tying of investment banking services and commercial credit has occurred in possible violation of their rules. Additionally, the General Accounting Office expects to issue a report concerning tying practices by banks in October 2003.

The federal tying statute, 12 U.S.C. § 1972, provides in part:

> A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement--
>
> > (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

Section 1972 generally prohibits a bank from tying a product or service to another product or service offered by the bank, with certain exceptions. A bank engages in a tie by conditioning the availability of, or offering a discount on, one product or service (the "tying product") on the condition that a customer purchase another product or service offered by the bank or an affiliate (the "tied product"). Some tying arrangements are permissible under statutory and regulatory exceptions. Congress enacted the anti-tying provisions to keep banks from using bank credit and other services as a means to coerce customers and reduce competition. The FRB may permit exceptions to the anti-tying prohibitions and has interpretive authority over section 1972.[2]

Section 1972 contains an explicit exception (the statutory "traditional bank product exception") that permits a bank to tie any product or service to a loan, discount, deposit, or trust service offered by that bank. This exception applies only if the "tied product" is a traditional bank product. The availability of the exception does not depend on the type of "tying product" involved, however. Section 1972 is premised on the notion that the "tying product," also called the "desired product," is the product the customer really seeks. For example, the FRB has explained that a bank could condition the use of its messenger service on a customer's maintaining a deposit account at the bank.[3] However, a bank could not condition maintaining a deposit account on a customer using the bank's messenger service. For this reason, a tie is permissible in one direction but not in the other direction. Thus, a bank might be engaging in a prohibited tying practice if the bank would not extend credit to a customer unless the customer also engaged the bank for certain products not within the scope of a traditional bank product, such as securities underwriting.[4] This example illustrates a tying arrangement outside the traditional bank product exception because the "tied product" is not a traditional bank product.

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[2] Recently, the FRB issued a proposed interpretation and supervisory guidance providing comprehensive discussion on many aspects of the federal tying restrictions applicable to banks, including examples of conduct, actions, and arrangements by banks that are prohibited and permissible under section 1972. *See* Board of Governors of the Federal Reserve System, *Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970* (Aug. 25, 2003) ("Fed Tying Release"). The FRB's release requests public comments by Sept. 30, 2003.

[3] 62 Fed. Reg. 9290, 9314 (1997) (FRB amendments to its tying regulation).

[4] *See, e.g.,* Fed Tying Release, at 13. The FRB has indicated for purposes of section 1972 that a "nonbanking product" or "non-traditional" banking product is anything other than a "loan, discount, deposit, or trust service." *See, e.g.,* 12 U.S.C. § 1972(1)(A); Letter from William W. Wiles, Secretary of the Board, FRB (Sept. 19, 1997); 60 Fed. Reg. 20186, 20188 (1995).

The information here indicates the Bank offered a non-traditional product, *i.e.*, the securities underwriting, conditioned on the use of the traditional bank product, *i.e.*, the letter of credit. Under the statutory exception, traditional bank products include "loans." National banks have long-provided "letters of credit" as part of their expressly authorized lending function under 12 U.S.C. § 24(Seventh).[5] The direct advance of funds to a borrower through a letter of credit is well recognized in the industry as a traditional bank product.[6]

Accordingly, for this particular situation, based on the Bank's letter, the OCC's review, the language of the statute, and the FRB's precedent, the arrangement described was not a prohibited tying arrangement because it was within the statutory traditional bank product exception of 12 U.S.C. § 1972(1).

If you have any questions regarding this letter, please contact Suzette H. Greco, Special Counsel, Securities and Corporate Practices Division at (202) 874-5210.

Sincerely,

-signed-

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

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[5] *See American Insurance Ass'n v. Clarke,* 656 F. Supp. 404 (D.D.C. 1987), *aff'd*, 865 F.2d 278 (D.C. Cir. 1988); R. Trimble, *The Implied Power of National Banks to Issue Letters of Credit and Accept Bills*, 58 Yale L.J. 713 (1949).

[6] In its recent release, the FRB specifically recognizes letters of credit as a product within the scope of a defined traditional bank product. *See* Fed Tying Release, at 17.