02-029
CHAPTER 135
Regulation #35
PERMISSIBLE TIE-IN ARRANGEMENTS

SUMMARY:

Title 9-B MRSA Section 243(1) generally prohibits a financial institution authorized to do business in Maine from tying a product, service or the price of either to another product or service offered by the financial institution or any of its affiliates. The statute provides certain specific exceptions to the general anti-tying provisions and permits rule-making to further define exceptions to the anti-tying provisions that will not be contrary to the public interest and the purposes of the statute. The Maine statutory language parallels language in the Federal Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971 et seq.), which gives the Board of Governors of the Federal Reserve Board ("FRB") authority to permit by regulation or order exceptions to the general anti-tying prohibitions.

This regulation is being promulgated to provide Maine financial institutions the same authority to tie products, services or their price that has been authorized to federally-chartered banks. While the Bureau recognizes that FRB regulations and interpretations do not govern the activities of all types of financial institutions (i.e. credit unions), the Bureau has applied the provisions of this rule to all financial institutions authorized to do business in this state in order to permit certain tying arrangements regardless of charter type. This approach assures the broadest spectrum of benefits to Maine consumers and financial institutions, and promotes competition in the financial services system.

I. AUTHORITY

- Title 9-B MRSA Section 111 declares that it is the policy of the state to supervise financial institutions in a manner to assure their strength, stability, and efficiency and encourage development and expansion of financial services advantageous to the public welfare.
- Title 9-B MRSA Section 215 gives the Superintendent the power to implement, by rule or regulation, any provision of law relating to the supervision of financial institutions.
- Title 9-B MRSA Section 243(2) gives the Superintendent the power to permit, by regulation, exceptions to the tie-in prohibitions that are not contrary to the public interest and the purposes of the tie-in prohibitions.

II. PURPOSE

This regulation permits a financial institution authorized to do business in Maine to tie products, services and their price to other products and services offered by the financial institution or its affiliate to the same extent as a financial institution is permitted to do under federal law and regulation. Recent federal rulings have permitted tying certain products and services (i.e., bundling products and offering relationship pricing). Absent specific authority under Maine laws or rules, a financial institution authorized to do business in this State is very limited in offering Maine consumers bundled products or relationship pricing. This also places Maine's financial institutions at a competitive disadvantage with nonbank providers of financial services.

III. DEFINITIONS

For purposes of this regulation, the following terms have the following meanings:

A. "Affiliate" has the same meaning as set forth in Title 9-B MRSA §131(1-A).

B. "Financial institution authorized to do business in this State" has the meaning set forth in Title 9-B MRSA §131(17-A) and includes "credit unions authorized to do business in this State" as defined in Title 9-B MRSA §131(12-A).

IV. GENERAL PROVISIONS OF THE REGULATION

A. A financial institution authorized to do business in this State or any of its affiliates may not tie a product, service, or the price of either to another product or service offered by the financial institution or by any of its affiliates, except as provided in Title 9-B MRSA §243 or in accordance with the following exceptions. Exceptions #1 through #4 are identical to those adopted by the FRB in its Regulation Y, 12 CFR 225.7(b)(1) through (b)(4); exception #5 provides a means for the Bureau to adopt future exceptions, if any, authorized by the FRB.

   1. Traditional bank products. See 12 CFR 225.7(b)(1) for details.
   2. Securities brokerage services. See 12 CFR 225.7(b)(2) for details.
   3. Discounts on tie-in arrangements not involving financial institutions. See 12 CFR 225.7(b)(3) for details.
   4. Safe harbor for combined-balance discounts. See 12 CFR 225.7(b)(4) for details.
   5. The tying of products or services or the price of either by a financial institution or any of its affiliates, as authorized by the FRB under section 106 of the Bank Holding Company Act of 1970 or Regulation Y, that the Superintendent finds is consistent with the public interest and is not contrary to the purposes of Title 9-B MRSA §243.

B. The exceptions granted in IV(A) shall only apply if all products involved in the tying arrangement are separately available for purchase.

C. Any exception to the tying granted pursuant to this rule shall terminate upon a finding by the Superintendent that the arrangement constitutes an anticompetitive or deceptive trade practice under Title 9-B MRSA Chapter 24.

D. The exceptions granted in Paragraph A do not give financial institutions authorized to do business in this State authority to engage in any activity or offer any product or service that is not permissible under State law.

V. FEDERAL/STATE REGULATIONS

It is recognized that the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the National Credit Union Administration have promulgated, or may promulgate in the future, regulations governing the manner in which a financial institution or a credit union may tie a product or service to another product or service offered by the financial institution or any of its affiliates. It is further recognized that there may exist differences in scope and coverage between this regulation and those promulgated by federal and state regulatory agencies. It is not the intent of this regulation to permit any practice which is not permitted by the appropriate regulatory agency. To the contrary, besides any other restriction or limitation stated herein, each financial institution must fully comply with the laws and regulations of the appropriate regulatory agency.

VI. EFFECTIVE DATE: August 21, 1996

BASIS STATEMENT

The Maine Bankers Association requested the Bureau to promulgate a regulation adopting the Board of Governors of the Federal Reserve System ("FRB") exceptions to the anti-tying provisions of Title 9-B MRSA §243.1. The Maine statute generally prohibits a financial institution authorized to do business in Maine from tying a product, service or the price of either to another product or service offered by the financial institution or any of its affiliates. The statute also provides for certain specific exceptions and permits the Superintendent to authorize by regulation further exceptions. Maine's statutory language is virtually identical to federal language, including the same general prohibitions, specific exceptions, and the ability to grant additional exceptions, by regulation, that are not contrary to the public interest or the purpose of the statute.

The FRB, recognizing the evolution of the financial services industry and the increased range of financial services now offered by banks and their affiliates since the statute was enacted, has in recent years loosened the anti-tying rules. FRB Regulation Y now permits any bank or nonbank subsidiary of a bank

holding company to offer a discount for customers maintaining a combined minimum balance in specified products ("combined-balance discount"). This allows banks to now bundle products and offer relationship pricing, resulting in more efficient marketing and a more competitive product; both consumers and banks benefit. These exceptions have become increasingly important with the proliferation of nonbanks, which are not subject to these anti-tying laws (although they are subject to anti-trust laws).

This regulation grants financial institutions authorized to do business in Maine the same anti-tying exceptions that the FRB has granted to banks. It adopts the provisions of a federal regulation that has recognized the changes in consumer demands and in the financial services industry and the need for financial institutions to remain competitive with nonbank competitors. The regulation does not affect the ability of the Bureau to initiate action in the event it determines a specific tying arrangement is an anti-competitive practice nor does it permit a financial institution authorized to do business in this State to engage in any activity or offer any product or service that is not permissible under State law.

Notice of this proposed rule was published on or about June 5, 1996 and comments were solicited through July 15, 1996. Written comments were received from the Maine Association of Community Banks ("MACB") and the Maine Credit Union League ("MECUL"). The Maine Bankers Association verbally advised this office that it had no objections to the rule as proposed.

MACB's only comment was that the definition of affiliate as proposed in **Section III(A)** is different from the definition used by the Federal Reserve Board in Regulation Y (12 CFR 225.2(a)). At the time the proposed regulation was drafted, the Bureau did not have a statutory definition of affiliate. The Bureau did have, however, a definition which had been used in Regulations 29 and 30; the definition of affiliate in the proposed regulation was identical to that used in those prior regulations. However, Public Law 628, "An Act to Implement the Recommendations of the Maine Task Force on Interstate Banking and Branching," effective July 4, 1996, included a definition of affiliate (at 9-B MRSA §131.1-A), which is essentially identical to the definition provided for in Regulation Y. Accordingly, the definition of affiliate has been changed to refer to the new statutory definition.

MECUL requested that the regulation not be applied to credit unions inasmuch as there are no comparable regulations by the National Credit Union Administration ("NCUA") relating to tie-ins. This rule is an empowering rule, granting expanded powers to financial institutions operating in Maine; the rule, however, does not require any institution to bundle products and offer relationship pricing. The Bureau does not foresee any harm to credit unions from this rule nor is the absence of a rule by the NCUA viewed as a basis for not applying this rule to credit unions. While the competitive benefit to financial institutions is an influencing factor in the promulgation of this regulation, an

equally influencing factor is the benefit to consumers in the form of lower costs and higher returns. Therefore, the Bureau is not incorporating MECUL's request and the regulation will apply to all financial institutions, including credit unions, authorized to do business in Maine, as set forth in **Section III(B)**.