

1983

The Export Trading Company Act of 1982: Are Banks the Answer to Our Export Trading Problems

Donna M. Petkanics

Recommended Citation

Donna M. Petkanics, *The Export Trading Company Act of 1982: Are Banks the Answer to Our Export Trading Problems*, 1 INT'L TAX & BUS. LAW. 197 (1983).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol1/iss1/7>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

The Export Trading Company Act of 1982: Are Banks the Answer to Our Export Trading Problems?

by
Donna M. Petkanics*

I INTRODUCTION

Since 1975 the United States has accumulated a merchandise trade deficit of approximately \$150 billion.¹ This deficit has precipitated much congressional debate² over measures to improve American export performance. Although American business has been exporting at a rate of more than \$200 billion per year recently,³ only about ten percent of an estimated 250,000 United States manufacturing firms currently export their products, and a mere 250 firms account for eighty

* B.A., 1980, Northwestern University; J.D. Candidate, 1985, University of California, Berkeley.

1. *The Bank Export Services Act: Hearings on H.R. 6016 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 97th Cong., 2nd Sess. 193 (1982) (Statement of Malcolm Baldrige, Secretary of Commerce) [hereinafter cited as *Hearings on H.R. 6016*]. Over the last decade United States imports as a percentage of Gross National Product (GNP) have increased at a faster rate than exports. Between 1970 and 1981 imports increased from 4.1 percent of GNP to almost 9 percent, while exports grew to only 7.8 percent of GNP from 4.3 percent. *Id.* at 244 (Statement of Lawrence A. Fox, National Association of Manufacturers). The major reason for this trade deficit has been the huge increase in oil prices since the 1970's. *Export Trading Companies and Trade Associations: Hearings on S. 864, S. 1499, S. 1663 and S. 1774 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 3 (1979) (Statement of Luther H. Hodges, Jr., Undersecretary, Dept. of Commerce) [hereinafter cited as *Hearings on S. 864*]. Other contributing factors include the decline in the competitiveness of the U.S. auto industry and the decreasing competitiveness of U.S. exports. Note, *The Proposed Export Trading Company Act of 1980: Bank Ownership Provisions*, 15 J. INT'L L. & ECON. 493, 493 (1981). [hereinafter cited as Note].

2. Legislation to encourage Export Trading Companies was first discussed at hearings on U.S. export policy held in 1978 by the Senate Subcommittee on International Finance, and the first Export Trading Company Act (S. 1663) was introduced by Senator Adlai Stevenson in the Summer of 1979. S. REP. NO. 735, 96th Cong., 2d Sess. 1 (1980).

3. During the first six months of 1982, the U.S. exported at an annual rate of \$221,850 million, while it imported at an annual rate of \$243,045 million. *United States Foreign Trade, Summary of U.S. Export and Import Merchandise Trade: Seasonally Adjusted and Unadjusted Data*, (June 1982), U.S. Dept. of Commerce, Bureau of Census (1982). See also *The Export Trading Company Act: An Overview of Export Trading in the United States*, AM. BANKER, Feb. 17, 1983 (*International Banker*), at 26 [hereinafter cited as *Overview of Export Trading*].

percent of all United States exports.⁴ The Department of Commerce estimates, however, that there are an additional 20,000 potential United States exporters⁵ largely comprised of small and medium size firms that lack the initiative, expertise, and necessary resources to enter the exporting market.⁶

While a variety of United States enterprises provide some of the trade services these small exporters need, most do not provide the full range of services required for a complete export transaction.⁷ Moreover, the few full range American trading companies currently operating are generally privately held and asset poor,⁸ making it difficult to secure the financing necessary to run a growing and successful business. In contrast, Japan and most European countries possess sophisticated full-scale general purpose trading companies that supply all necessary export services. In Japan alone export trading companies now number more than eight thousand and are credited with much of the country's exporting success.⁹ In fiscal year 1981 the nine largest

4. *Hearings on H.R. 6016, supra* note 1, at 64 (The New England Congressional Institute's Export Trading Company Task Force: Legislative Recommendations).

5. *Hearings on S. 864, supra* note 1, at 178 (Statement of Ky Ewing, Jr., Deputy Asst. Atty. Gen., Department of Justice).

6. Cole, *Establishing American Trading Companies*, 2 NW. J. INT'L LAW & BUS 277, 279-80 (1980). Small and medium size firms face significant obstacles in gaining adequate financing, locating and analyzing potential foreign markets, and arranging for effective foreign sales representation. In addition the average firm fears the risks of credit and collection. International trade also involves major costs in handling red tape. One study found that documentation costs for all U.S. exports and imports totals almost 7.5 per cent of the value of the shipments. Study by the Nat'l Comm. on Int'l Trade Documentation, cited in Muller, *Export Promotion: Legal and Structural Limitations on a Broad United States Commitment*, 7 LAW & POL'Y INT'L BUS. 57, 74-75 (1975).

7. There are currently four types of enterprises that conduct most of the American export trading business: 1) the giant commodity traders who deal exclusively in fungible commodities, including the Phillips Brothers division of Phibro Corp., Cargill, and Continental Grain; 2) export management companies, which perform many of the functions of an ETC, but are generally small, undercapitalized, and product or area-specific; 3) multinational manufacturing companies, which have their own export departments, and 4) foreign trading companies, such as the Japanese *sogo shosha* (See *infra* text accompanying note 13). Two thirds of the nation's exporting is done directly by manufacturers. *Overview of Export Trading, supra* note 3, at 26. Both Sears and General Electric recently opened trading companies. *Banks Weigh Entry into the World of Commerce*, AM. BANKER, Jan. 21, 1982, at 1, 16. Other enterprises that provide export services include freight forwarders, brokers, shippers, insurance companies, commercial banks, and trade lawyers. S. REP. NO. 735, 96th Cong., 2d Sess. 3 (1980).

8. *Hearings on S. 864, supra* note 1, at 541 (Hay Associates Study). ETCs typically command the lowest loan ratings of any of the categories of businesses seeking loans. H.R. REP. NO. 637 (Part I), 97th Cong., 2d Sess. 11 (1982).

9. JAPANESE EXTERNAL TRADE ORGANIZATION, THE ROLE OF TRADING COMPANIES IN INTERNATIONAL COMMERCE 6 (1982) [hereinafter cited as THE ROLE OF TRADING COMPANIES IN INTERNATIONAL COMMERCE]. The modern general trading company is a uniquely Japanese innovation that predates World War II. *Hearings on S. 864, supra* note 1, at 58. (Statement of Frederick W. Huszagh, School of Law, University of Georgia) In the 1850's Japan opened the door to foreign trade after more than 200 years of isolation. By 1870 perceptive businessmen realized that

Japanese trading companies, called *sogo shosha*, accounted for forty-nine percent of Japanese exports.¹⁰

Inspired by the success of these Japanese trading companies¹¹ and goaded by the United States trade deficit, Congress recently enacted the Export Trading Company Act of 1982.¹² The Act amends banking and antitrust laws to encourage investment in export trading companies (ETCs) which are viewed as a vital link between potential exporters and foreign markets. ETCs perform such intermediary functions as collecting information on possible export markets, providing financial services, completing paperwork associated with export transactions, and providing warehousing and transportation services.¹³ By servicing a multitude of small and medium size firms, ETCs make exporting more cost efficient. Both their size and the variety of products they handle enable ETCs to diversify trade risk and develop economies of scale that a small exporter cannot.¹⁴ In addition, firms that export through ETCs avoid remote and unfamiliar foreign markets, exchange

Japan faced major trade difficulties, including language barriers and unfamiliarity with foreign trade practices. To improve trade competitiveness most efficiently, trading functions were concentrated in a limited number of specialized companies that employed specialists familiar with the customs, laws, and marketing procedures of most of the major nations of the world. *THE ROLE OF TRADING COMPANIES IN INTERNATIONAL COMMERCE*, *supra*, at 4.

10. In the fiscal year ending March 31, 1981 they had \$334 billion in transactions, a figure 1.7 times the size of Japan's national budget. *L.A. Times*, Feb. 21, 1982, § 5 (Business), at 1, col. 1. Some of America's biggest exporters are Japanese trading companies which buy goods in the U.S. and resell them in Japan and other nations. In 1981 it was estimated that Japanese trading companies handle approximately ten percent of all U.S. exports. Mitsui & Co. and Mitsubishi Corp. subsidiaries are among the biggest U.S. handlers of grain, minerals, chemicals and machinery. *Wall St. J.*, Nov. 11, 1981, § 2, at 27, col. 1 (Western ed.)

11. Although inspired by the success of Japanese ETCs, Congress did not intend to duplicate them for a number of reasons. First, a vital element in the success of Japanese ETCs has been their close relationship with government. These companies simultaneously influence and carry out Japanese government policy, a relationship that is not conducive to American business or governmental practices. In addition, these Japanese trading companies are integrated with banking, shipping and production companies whereas U.S. ETCs will only perform the trading function. Furthermore, Japanese trading companies' close relationships with banks often result in preferred credit rates, *Hearings on S. 864*, *supra* note 1, at 29, a type of credit discrimination specifically prohibited under the Export Trading Company Act, Pub. L. No. 97-290 § 203(3) (14)(B)(iii) 96 Stat. 1233, 1237 (codified at 12 U.S.C. § 843) [hereinafter cited as ETCA].

12. ETCA, *supra* note 11. President Reagan signed the law on October 8, 1982. The export trading company concept was originally introduced in Senate legislation during the 96th Congress. The Senate passed S. 1663 with a 77-0 vote on September 3, 1980, but the House adjourned without passing a bill. Early in the 97th Congress, the Senate again unanimously passed a similar bill, S. 734, by a vote of 93 to 0 on April 8, 1981. Five export trading company bills were introduced on the House side during the 97th Congress and H.R. 1799 was passed as amended on July 27, 1982. Both Houses agreed to a compromise bill on October 1, 1982. *EXPORT TRADING COMPANIES ISSUE BRIEF NO. IB8004*, CONGRESSIONAL RESEARCH SERVICE 1 (1982).

13. *Hearings on S. 864*, *supra* note 1, at 58 (Statement by Frederick W. Huszagh, School of Law, University of Georgia).

14. *THE ROLE OF TRADING COMPANIES IN INTERNATIONAL COMMERCE*, *supra* note 9, at 19.

risks, and the expense and complexity of documentation.¹⁵

The Export Trading Company Act consists of four titles with two distinct sections, banking and antitrust. Title I defines the general terms of the Act and establishes an Office of Export Trade in the Department of Commerce to promote the establishment of ETCs.¹⁶ The role of this office is to advise persons interested in establishing ETCs and to act as a liaison between producers of exportable goods and services and firms offering export trade services.¹⁷

The banking section of the Act is embodied in Title II, and is called the Bank Export Services Act.¹⁸ It amends banking laws to provide for "meaningful and effective" bank participation in the financing and development of ETCs. This title permits certain banking organizations to invest directly in ETCs, a significant breach in the wall that has separated banking and commerce since the 1930s.¹⁹ The traditional separation and the specific provisions of this title are discussed in detail in section II of this Article.

Titles III and IV embody general changes in the antitrust laws. Title III, called Export Trade Certificates of Review,²⁰ allows an ETC to obtain advance certification from the United States Department of Commerce that its trading ventures will not violate the antitrust laws. This certification will prevent the United States government from litigating antitrust suits against certified activities. Although private litigants are not prohibited by Title III from bringing suit under United States law, they are limited to actual damages rather than the treble damages normally available in antitrust litigation.²¹

Title IV, called Foreign Trade Antitrust Improvements,²² exempts trade and/or commerce with foreign nations from the Sherman Act²³ and the Federal Trade Commission Act,²⁴ unless such trade "has a direct, substantial, and reasonably foreseeable effect" on domestic commerce or "export commerce with foreign nations, of a person engaged in such trade or commerce in the United States."²⁵

15. S. REP. NO. 735, 96th Cong., 2d Sess. 8 (1980).

16. ETCA, *supra* note 11, at §§ 101-104 (codified at 15 U.S.C. §§ 4001-4003).

17. *Id.*

18. ETCA, *supra* note 11, at §§ 201-207 (codified at 12 U.S.C. §§ 1841, 1843, 30 U.S.C. § 181, 12 U.S.C. § 635a-4, 12 U.S.C. § 372).

19. Glass-Steagall Act, The Banking Act of 1933, Ch. 89 § 16, 48 Stat. 162, 184 (1933), 12 U.S.C. § 24, para 7, 12 U.S.C. § 335. (See *infra* text accompanying notes 42-43).

20. ETCA, *supra* note 11, at §§ 301-312 (codified at 15 U.S.C. §§ 4011-21, 15 U.S.C. § 15, 26).

21. ETCA, *supra* note 11, at § 306(b)(1) (codified at 15 U.S.C. §§ 15-26).

22. ETCA, *supra* note 11, at § 401-403 (codified at 15 U.S.C. §§ 1, 6a, 15 U.S.C. § 45(a)).

23. Sherman Act, 15 U.S.C. § 1 et seq.

24. 15 U.S.C. § 45(a).

25. ETCA, *supra* note 11, at §§ 402, 403 (codified at 15 U.S.C. § 6a and 15 U.S.C. § 45(a)).

This Article focuses on the banking provisions of Title II. Specifically, it reviews the traditional separation of banking and commerce, evaluates the compatibility of banking with export trading, and analyzes the general strengths and weaknesses of the banking provisions as export promoting measures.

II

BANK EXPORT SERVICES ACT—AN ANALYSIS

A. *Breaching the Wall between Banking and Commerce*

The traditional policy of separating banking and commerce began in the early part of this century and is embodied in three principal acts: the Edge Act of 1919,²⁶ the Glass-Steagall Act of 1933,²⁷ and the Bank Holding Company Act of 1956.²⁸ One concern underlying the policy of separation is that, if left unchecked, a relatively few large banks would buy up United States commercial concerns, form cartels, and exert an undue influence on the United States economy.²⁹ A more defensible basis for the separation, however, lies in the belief that there is an inherent conflict of interest between the roles of an investor and a lender. An investor generally seeks to maximize profits, while a lender seeks to minimize risks. When a lender plays both roles, it may not assess the risks objectively, tending to treat companies in which it has invested more favorably than their financial status may warrant.³⁰ Such treatment has the potential to jeopardize the integrity of our depository institutions³¹ and undermine the banker's principal role as an impartial arbiter of credit.³² Accordingly, bank regulatory authorities seek to minimize this conflict of interest.

Congress enacted the Edge Act of 1919 with the former concern uppermost in mind.³³ The purpose of the Act is to afford United States

26. 12 U.S.C. §§ 611-32, particularly § 615(c) (1976).

27. Glass-Steagall Act, *supra* note 19.

28. 12 U.S.C. § 1843(a) (1976).

29. *Export Trading Company Act of 1980: Hearings before the Senate Subcommittee on International Finance of the Committee on Banking, Housing, and Urban Affairs, on S. 2379, S. 864, and Amendment No. 1674 to S. 864, 96th Cong., 2d Sess. 131* (1980) (appendix: Summary of Banking Organization Investment Prohibitions Related to S. 2379) [hereinafter cited as *Hearings on S. 2379*].

30. Note, *supra* note 1, at 502 n. 51.

31. It is believed that the nature of competition for funds would be compromised if banks undertook the risks inherent in commercial and industrial ventures. See H.R. REP. NO. 629, 97th Cong., 2d Sess. 5 (1982); Ahearn & Jackson, *Background Information on U.S. Export Trade Associations and the Separation of Banking and Commerce*, CONGRESSIONAL RESEARCH SERVICE 16 (1980).

32. H.R. REP. NO. 629, 97th Cong., 2d Sess. 5 (1982). Banks can better exercise independent judgment on whether to make a loan if they are prohibited from holding a stake in the management of actual or potential borrowers. S. REP. NO. 27, 97th Cong., 1st Sess. 11 (1981).

33. *Hearings on S. 2379, supra* note 29, at 131.

exporters and importers a means of financing international trade.³⁴ Accordingly, the Act permits banks to form Federal Reserve Board chartered corporations³⁵ (Edges) to provide financial services for international transactions.³⁶ But, to prevent Edges from using their broad investment powers to control United States commerce, Congress added a specific provision prohibiting them from investing in any corporation "engaged in the general business of buying or selling goods...in the United States."³⁷

The next major step in separating banking from commerce came in 1933 with the enactment of the Glass-Steagall Act. Glass-Steagall was designed to ensure the sound operation of depository institutions in the aftermath of the stock market crash of 1929 and the bank closings in the 1930s. It is widely believed that heavy bank participation in commercial investments in the twenties led to excessive exposure, impartial lending, and the eventual collapse of the market and bank failures.³⁸ Consequently, Glass-Steagall prohibits all commercial banks from acquiring for their own account "any shares of stock of any corporation."³⁹

Finally, in 1956 Congress enacted the Bank Holding Company Act to remove the incentive for preferential lending to customers of bank affiliates and to preclude banks and bank-owned companies from unfairly competing with other businesses in the commercial area.⁴⁰ The Act allows bank holding companies more leeway in investments than banks in that the former are allowed to start or acquire nonbanking activities that are so "closely related to banking as to be a proper incident thereto."⁴¹ However, because the assets, liabilities and earnings of bank holding companies are predominantly those of their bank subsidiaries, the Federal Reserve Board has consistently restricted their "non-banking" activities to specified financial, fiduciary and insurance fields.⁴² To mitigate potential conflicts of interest and the associated risks where a banking organization is linked with a commercial venture, the Bank Holding Company Act strictly prohibited bank holding

34. 12 U.S.C. § 611a (1978).

35. 12 U.S.C. § 611-614 (1913).

36. 12 U.S.C. § 611a (1978).

37. 12 U.S.C. § 615(c) (1976). See *Hearings on S. 2379, supra* note 29, at 131.

38. Note, *supra* note 1, at 502 n. 51.

39. 12 U.S.C. § 24, para. 7 (1976). Edge Act corporations and Bank Holding Companies are exempt from the requirements of the Glass-Steagall Act. 12 U.S.C. § 615(c), 12 U.S.C. § 1843(c) (13)(1976).

40. Note, *supra* note 1, at 501.

41. 12 U.S.C. § 1843(c)(8) (Dec. 31, 1970) Pub. L. 91-607, § 103-4.

42. Ahearn & Jackson, *supra* note 31, at 21. The Bank Holding Company Act of 1956 was amended in 1970 (P.L. 91-607) to restrain investment in nonbanking enterprises by all bank holding companies. *Id.* at 20.

companies from engaging in *any* other nonbanking activities or buying more than five percent of the stock of a corporation that was not a bank.⁴³

Although all three of these laws separate commerce and banking to some extent, the separation is not absolute. Edges can invest in foreign corporations, and both Edges⁴⁴ and bank holding companies⁴⁵ are exempt from the Glass-Steagall Act.

The Export Trading Company Act is yet a further example of a limited exception to the traditional separation policy. By allowing 100 percent bank holding company ownership of ETCs, however, the Act makes a major departure from the five percent commercial investment restriction in the Bank Holding Company Act. This change in banking law may be the most radical departure from the traditional policy separating banking from commerce to date. The main issue concerning this change is whether Congress succeeded in achieving the proper balance between the traditional concerns for bank safety and the desire to promote United States export trade.

B. The Role for Banks Under Title II

Banks are expected to contribute their financial resources, international marketing networks, and trade financing experience to the formation and promotion of ETCs. Many larger banks have overseas branch networks, including extensive operations and communications facilities which are a natural asset to any ETC. In addition, banks can offer established foreign and domestic customer bases and a solid image to foreign purchasers.⁴⁶ Perhaps even more importantly, bank participation is expected to enhance the ability of ETCs to obtain the necessary capital to finance their transactions.⁴⁷

Banking institutions stand to gain from ETC investment as well, for such investment offers a favorable opportunity to diversify risks and

43. 12 U.S.C. § 1843(a)(6) (1970). The ETCA amends the Bank Holding Company Act to allow bank holding companies to invest up to 5 percent of their consolidated capital and surplus in ETCs, which are authorized to take title to goods. 12 U.S.C. § 1843(c) para. 14. *See infra* text accompanying note 91.

44. 12 U.S.C. § 615(c)(1919); 12 C.F.R. § 211.4(e) (1979).

45. 12 U.S.C. § 1843(c)(13) (1970).

46. 128 CONG. REC. H4644 (daily ed. July 27, 1982) (remarks of Rep. LaFalce). *See also* S. REP. NO. 27, 97th Cong., 1st Sess. 10-11 (1981).

47. H.R. REP. NO. 637 (PART I), 97th Cong., 2d Sess. 9 (1982). A number of foreign banks now operate some of the largest trading companies. "For example, Hong Kong and Shanghai Banking Corp. owns a 33 percent controlling interest in Hutchinson Whampoa Limited; Midland Bank Limited owns controlling interests in at least three trading companies; Barclay's Bank International owns 24.5 percent of Tozer, Kernsley and Millbourn; Credit Lyonnais owns 80 percent of Essor PME; and Banco de Brazil owns 100 percent of Beke Company." S. REP. NO. 735, 96th Cong., 2d Sess. 7-8 (1980).

enhance bank profitability.⁴⁸ The new business opportunities granted to bank holding companies are sweeping. A bank affiliated ETC may take title to goods and offer such trade services as consulting, research, advertising, marketing, insurance, and communication and processing of foreign orders.⁴⁹ By expanding the range of services offered, bank ETC involvement is expected to not only solidify many existing bank customer relationships, but also to bring in new conventional banking business such as cash management, foreign exchange, and letter of credit transactions.⁵⁰

Banking institutions, however, are not given free reign in making their ETC investment decisions. The Federal Reserve Board may terminate a bank-affiliated ETC's investment if it takes "positions in commodities or commodity contracts, in securities, or in foreign exchange, other than as may be necessary in the course of the export trading company's business operations."⁵¹ The Board has interpreted this provi-

48. Through affiliation with ETCs, banks will be able to earn added fee income for transactions, such as handling letters of credit and documents. Barovick, *NFTC Conference Spotlights Export Trading Companies*, BUSINESS AMERICA (U.S. Dept. of Commerce) Oct. 18, 1982, at 7, 9-10. This is particularly attractive to banks, for profitability from services priced for a fee is not dependent on accurate interest rate forecasts as is much of traditional banking business. Recent economic and regulatory changes in the structure of banking have blurred the distinction among banks and nonbanks, creating a more broadly defined and increasingly competitive financial industry. The encroachment of such nonbanks as Sears, Merrill Lynch, and American Express, on traditional banker's territory has led to the passage of the Depository Institutions Deregulation and Monetary Control Act, P.L. 96-221 and the Depository Institution Act, P.L. 97-320. Among other landmark reforms, the former piece of legislation deregulates deposit interest rate controls while the latter allows banks to offer money market accounts to compete with those offered by investment bankers. Consequently, the cost structure of banking institutions has dramatically changed, threatening low interest savings accounts with obsolescence and forcing banks to seek new and innovative ways to earn profits. Naturally, the ETCA was viewed by Congress as an alternative area of bank investment. For information on the deregulation of the banking industry, see generally *Homogenization of Financial Institutions: The Legislative and Regulatory Response*, 38 BUS. LAW. 241 (1982); Lafalce, *Banking in the Eighties*, 37 BUS. LAW. 839 (1982).

49. ETCA, *supra* note 11, at § 203(3)(14)(F)(ii), (codified at 12 U.S.C. § 1843(c)).

50. Address by Donald Nelson, Vice President and Manager, Corporate Development and Strategic Planning, Crocker National Bank, at the Export Trading Company Conference at the U.S. Dept. of Commerce, San Francisco Regional Office (Jan. 19, 1983). Trade financing has always been among the most fundamental of all commercial banking functions and because of its generally short term, secured and self-liquidating nature, it is considered one of the soundest forms of credit. It is also one of the most attractive and competitive forms of financing because trade flows offer the bank multiple income sources as a continuum of transactions and goods change hands. The bank generates interest income on the credit extended and commission income on letters of credit opened between the parties as well as exchange income on foreign exchange sold by the bank to the importer. The ETCA also creates additional opportunities for bank involvement in financing the acquisition, processing or storage of goods before they are exported, as well as financing further processing, storage and sale at the point of destination. *Export Trading Company Legislation: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 2d Sess. 5 (1980) (Statement of P. Howell, Vice President Citibank) [hereinafter cited as 1980 Hearings].

51. ETCA, *supra* note 11, at § 203(3)(14)(D) (codified at 12 U.S.C. § 1843(c)).

sion as a prohibition on speculation but not on *bona fide* hedging.⁵² The statute also prohibits ETCs from engaging in agricultural production or manufacturing, except for incidental product modification or repackaging of goods to be exported.⁵³ This latter prohibition could hinder a joint venture with an industrial firm unless the joint venture is kept legally distinct from the manufacturer.⁵⁴

Furthermore, a bank affiliated ETC must be "*exclusively* engaged" in international trade, as well as "*principally* engaged" in export related activities.⁵⁵ While Congress chose the term "exclusively" to ensure the export promotion character of the legislation,⁵⁶ it adopted the term "principally" to allow ETCs the necessary flexibility to engage in importing, barter and trade between other nations.⁵⁷ The ability to offer such services is considered essential to maintain a competitive position *vis-a-vis* foreign trading companies.⁵⁸ Because many East Bloc and developing nations lack the hard currency necessary to secure trade with western nations, in recent years foreign trading companies have relied on a mix of direct sales and product trades to develop profitable worldwide business.⁵⁹

Nevertheless, to ensure that the congressional intent to promote exports is achieved, the Federal Reserve Board's proposed regulations specify that an ETC must derive "*more than one-half of its annual reve-*

52. 48 Fed. Reg. 3375, 3379 (1983) (to be codified at 12 C.F.R. § 211) (Proposed Jan. 25, 1983). The Board's proposed regulations define bona fide hedging as it has been applied in connection with forward and financial futures contracts or by the Commodities Future Trading Commission in connection with commodity contracts. *Id.* at 3377.

53. ETCA, *supra* note 11, § 203(3)(14)(i)(ii) (codified at 12 U.S.C. § 1843(c)(14)(c)(ii)).

54. *Search and Destroy: An In-Depth Look At the Trading Company Legislation*, AM. BANKER, February 17, 1983 (International Banker), at 26 [hereinafter cited as *Search and Destroy*].

55. ETCA, *supra* note 11, § 203(3)(14)(F)(i).

56. H.R. REP. NO. 924, 97th Cong., 2d Sess. 22 (1982).

57. *Id.*

58. *See Hearings on H.R. 6016, supra* note 1, at 190.

59. Schwartz, *Plea for "Countertrade" as U.S. Economic Weapon*, PAC. SHIPPER, Nov. 22, 1982 at 172. The Japanese *sogo shosha* are heavily engaged in countertrade. There are three main types: "switch" trade, in which imports from one foreign country are paid for in the goods or currency of another; barter trade, where goods are exchanged for goods without currency; and offshore or third-country trade in which neither the supplier nor the market is in Japan. An example helps illustrate the usefulness of countertrade: "One *sogo shosha* was asked for polyester fibers by a Brazilian textile maker. The *sogo shosha* went to a large American chemical company, which was willing to supply the fibers but was short of an essential raw material, ethylene glycol. A French firm was willing to supply the ethylene glycol, but only if it could get benzene. The *sogo shosha* procured benzene from firms in the U.S. and Holland, the French firm produced the ethylene glycol, and the American textile maker was finally able to provide the polyester fibers for the textile manufacturer in Brazil." Cole, *supra* note 6, at 282. In this transaction alone, the trading company developed relationships with three firms who more than likely would return to that company for their import needs from Japan. THE ROLE OF TRADING COMPANIES IN INTERNATIONAL COMMERCE, *supra* note 9, at 23.

nues from the export of goods and services produced in the United States by persons other than the export trading company and its subsidiaries"⁶⁰ (emphasis added). As ETCs may initially have to struggle to gain a clientele, this requirement may prove too restrictive at the outset, for it may not allow an ETC the flexibility to concentrate on building up good will through engagement in importing and countertrade. The ability to perform such functions may be essential to developing relationships with foreign firms that later would turn to the ETC for its United States imports. A more reasonable interpretation of the "principally engaged" requirement, therefore, would be to demand that one-half the company's revenue be derived from exporting after a five year start-up period.⁶¹

C. *The Eligible Investors*

Recognizing that both banks and ETCs would benefit from bank involvement in ETCs, Congress modified existing banking laws to provide for the "meaningful and effective" participation of banking organizations in the financing and development of United States export trading companies.⁶² Thus, Title II amends the Bank Holding Company Act of 1956⁶³ to allow bank holding companies,⁶⁴ Edge Act and Agreement Act subsidiaries of bank holding companies⁶⁵ and bankers' banks⁶⁶ to make equity investments in ETCs, up to 100 percent ownership.

The decision on how to structure bank involvement in ETCs entailed the delicate task of balancing a bank's function as a depository

60. 48 Fed. Reg. 3375, 3379 (1983) (to be codified at 12 C.F.R. § 211.32(a))(proposed Jan. 25, 1983).

61. Douglas F. Stuckey, Vice President of First Wisconsin Bank in Milwaukee predicts it will take five years to develop a business and generate sufficient returns on fixed expenses to make a profit. Barvovick, *supra* note 48, at 10. In addition, the House Foreign Affairs Committee stated that ETCs "should have the widest possible latitude to engage in activities other than exporting, provided that such activities facilitate exports and that the export trading companies achieve in the aggregate over a reasonable period of time (*such as 5 years*), a surplus of total exports over imports." (emphasis added) H.R. REP. No. 637 (Part I), 97th Cong., 2d Sess. 13 (1982).

62. ETCA, *supra* note 11, at § 202.

63. ETCA, *supra* note 11, at § 203.

64. A bank holding company owns at least twenty-five percent of any bank subsidiary, 12 U.S.C. § 1841, and is registered with the Federal Reserve Board under the Bank Holding Company Act.

65. An Agreement Act corporation is a federally or state chartered corporation that has entered into an agreement or undertaking with the Federal Reserve Board that it will not exercise any power that is impermissible for an Edge Act corporation. It operates subject to section 25 of the Federal Reserve Act (12 U.S.C. 601-604(a)) (1913)).

66. A banker's bank is organized solely to do business with other banks. Small banks often form bankers' banks to offer a variety of services they could not offer independently. For the purposes of this Act the term "bank holding company" includes bankers' banks. ETCA, *supra* note 11, at § 203(c)(14)(F)(iii).

institution against its role as an investor in a potentially high risk endeavor.⁶⁷ Congress chose the bank holding company structure, rather than allowing direct bank investment, in order to ensure adequate safeguards for bank deposits while permitting sufficient flexibility and incentives for capital investment.⁶⁸ Since the assets and liabilities of each subsidiary are segregated,⁶⁹ this restriction permits the ETC to benefit from the bank's marketing network and existing infrastructure while insulating the affiliated bank from any loss the ETC may incur.⁷⁰

Placing the trading company activities in a bank holding company also ensures uniform regulatory oversight by the Federal Reserve Board⁷¹ and automatic application of various Bank Holding Company constraints to bank investment in ETCs,⁷² except where those constraints are modified by the ETC Act. A bank holding company must submit written notice to the Board of Governors of its intent to invest in an ETC and may automatically proceed with the investment after 60 days if the Board has not disapproved. If more information is necessary to evaluate the application, the Board may extend the notification period an additional 30 days.⁷³

Congress attempted to provide the Board with explicit guidance on how the Act should be implemented in order to avoid overzealous oversight which might undermine the export promotional intent of the Act.⁷⁴ Specifically, the Board may only disapprove proposed investments 1) to prevent unsafe or unsound banking practices, undue con-

67. *Hearings on H.R. 6016, supra* note 1, at 350 (Statement of Henry C. Wallich, Member, Board of Governors, the Federal Reserve System).

68. See generally H.R. REP. NO. 924, 97th Cong., 2d Sess 19 (1982) and *Hearings on H.R. 6016*, *supra* note 1, at 190. The Senate version of the legislation placed the ETC within the bank. See S. REP. NO. 734, 97th Cong. 1st Sess. (1981).

69. Under corporation law, the Bank holding company investor is considered the parent company, and the ETC is the subsidiary. Each is a separate and distinct legal entity from the other, even though the parent owns all the shares of the subsidiary. To maintain their separate legal status, the parent and the subsidiary may not intermingle their business transactions, property, employees or their bank and other accounts and records. H. HENN, LAW OF CORPORATIONS 258 (1970).

70. *Hearings on H.R. 6016, supra* note 1, at 190 (Statement of Malcolm Baldrige, Secretary of Commerce).

71. *Id.* at 350 (Statement of Henry D. Wallich, Board of Governors, Federal Reserve System).

72. H.R. REP. NO. 924, 97th Cong., 2d Sess. 20 (1982).

73. ETCA, *supra* note 11, at § 203(3)(14)(A)(ü).

74. See H.R. REP. NO. 924, 97th Cong., 2d Sess. 21-22 (1982). Section 202 was added at the beginning of Title II specifically to formulate the policy objectives the Federal Reserve Board should follow in implementing the legislation. "These objectives, along with the purpose set forth in Title I of the Act, if properly pursued by the Federal Reserve Board, will guarantee the development of effective, 'full-service' trading companies with bank holding company involvement that will effectively and aggressively market American products and will not be disadvantaged or limited in competing with foreign-owned export trading companies or with ETCs owned by nonbank firms." *Id.* at 21.

centration of resources, decreased or unfair competition or conflicts of interest; 2) to prevent material adverse effects on bank subsidiaries of bank holding companies; or 3) when the bank holding company does not provide the information required under the Board's regulations.⁷⁵

Neither the legislative history nor the Board's proposed regulations hint at the interpretation to be given to the "unsafe or unsound banking practices" described in the first criterion for investment disapproval. Rather than providing specific guidance, the general language of that criterion seems to leave broad discretion to the Board.⁷⁶ The legislative history makes it clear, however, that the Board should focus on the risk to banks, as opposed to the other bank holding company affiliates, and on the specific impact the proposed investment will have on the bank.⁷⁷

In addition to bank holding companies, Congress logically included Edge Act and Agreement corporations as eligible investors in ETCs because of their expertise and experience in international trade matters. Congress also included bankers' banks with the intent to facilitate the involvement of smaller banks in ETC development.⁷⁸ But, since these banks are generally formed by cooperatives of small banks to realize economies of scale,⁷⁹ they are neither equipped to handle international trade transactions nor suitably structured to provide their investors the same kind of controlled operations as a bank holding company. Thus, the bankers' bank provisions are likely to be used only in exceptional cases.⁸⁰

The banks that have the most to contribute to the ETC business are the largest ones with global networks, the so-called "money-center" banks. Yet, these larger banks have historically preferred customers with at least \$50 million in corporate assets,⁸¹ not the smaller manufacturers that are the main source of business for ETCs. The vast majority of the United States manufacturers currently served by ETCs have total sales of \$10 million or less.⁸² Even if a bank has a substantial

75. ETCA, *supra* note 11, at § 203(3)(14)(A)(iv).

76. The Board must provide a written statement of the basis for disapproval, ETCA, *supra* note 11, at § 203(3)(14)(A)(v), so any clear abuse of discretion would be readily discernible. However, the legislation makes no provision for appeals of Board disapproval, suggesting that the Board is the final arbiter. The Bank Holding Company Act, 12 U.S.C. § 1844(e) (1978) contains similar language regarding banking practices.

77. H.R. REP. NO. 924, 97th Cong., 2d Sess. 21 (1982).

78. *Id.* at 24.

79. *Search and Destroy*, *supra* note 54, at 18.

80. According to Federal Reserve Board staff members, there are only a "handful" of bankers' banks that are eligible to invest in ETCs. *Search and Destroy*, *supra* note 54, at 18.

81. Barrett & da Palma, Esq. The U.S. Export Trading Company Legislation—A Tip of the Export Expansion Iceberg 11 (Mar. 1, 1982) (unpublished paper available from the National Foreign Trade Council, N.Y.C.) [hereinafter cited as Export Expansion Iceberg].

82. *Hearings on S. 864*, *supra* note 1, at 537 (Hay Associates Study).

amount of small company accounts, those accounts are probably managed by a banking division whose personnel are generally not experienced in using the bank's international resources.⁸³

By contrast, the small and regional banks typically maintain corporate relationships with the companies the Act is intended to aid. However, these banks rely largely on their correspondent bank networks for foreign market information and personnel to facilitate international trade transactions. It is unlikely that the correspondent bank will regularly provide this service for a regional bank without remuneration.⁸⁴ One of the key advantages of using an ETC for exporting is its ability to provide cost-effective market coverage. If a smaller bank-affiliated ETC must pay a correspondent bank for trade services, this advantage could be severely compromised, perhaps leaving the needs of some potential exporters unmet.

Whether banks possess the requisite entrepreneurial expertise to manage an exporting enterprise is a further issue surrounding bank involvement. While export trade is entrepreneurial and risk prone by nature, bankers are organizational and risk averse. Quick decision-making characterizes a good trader, whereas bankers are traditionally deliberative and bureaucratic.⁸⁵ More importantly, bankers are trained to market financial products, not goods, and although a typical bank's customer base includes manufacturing companies, bankers deal mainly with the company's financiers, not with product buyers.⁸⁶

While the differences between banking and trading may be great, the holding company investment structure affords ample opportunity for bankers to overcome their inexperience. Rather than starting its own wholly-owned subsidiary, a bank holding company may take over an existing ETC or enter the export market with a manufacturer or other partner. In this way bank holding companies can secure the personnel required for ETC entrepreneurial needs, while the bank affiliate provides the marketing and financial functions for which it is best equipped.

D. Restrictions on Bank Involvement

Along with limiting the types of banking organizations that may invest in ETCs, the Export Trading Company Act contains several other restrictions designed to balance the need for increased exports

83. Export Expansion Iceberg, *supra* note 81, at 11.

84. *Id.* at 12.

85. Address by Donald G. Nelson, *supra* note 50. See also U.S. CHAMBER OF COMMERCE, THE EXPORT TRADING COMPANY ACT 11 (1983).

86. Jacobs & Coene, *Business Responds to the New Export Trading Law*, PAC. SHIPPER, NOV. 22, 1982, at 137.

with the maintenance of a safe banking system. An eligible banking organization may not invest more than five percent of its consolidated capital and surplus in one or more ETCs,⁸⁷ except that an Edge Act corporation not engaged in banking may invest up to twenty-five percent of its consolidated capital and surplus.⁸⁸ Furthermore, bank investors are precluded from extending credit on preferential terms to an affiliated ETC and from extending more than ten percent of their consolidated capital and surplus to an ETC.⁸⁹ An extension of credit, however, does not include investment in shares of an ETC.⁹⁰

While the Act makes it clear that the five percent limit on capital investment in one or more ETCs is absolute, the wording of the limit on credit extensions is ambiguous. It states that the "total amount of extensions of credit by a bank holding company which invests in an export trading company...to an export trading company shall not exceed at any one time ten per centum of the bank holding company's consolidated capital and surplus"⁹¹ (emphasis added). One possible interpretation of this provision is that a bank holding company could lend up to ten percent of its capital to *each* affiliated ETC. The Federal Reserve Board's proposed regulations, however, limit the total credit extensions to affiliated export trading *companies* to ten percent.⁹²

Fearful that joint ventures between banking and nonbanking organizations "create serious potential for conflicts of interest and concentration of economic resources,"⁹³ the Federal Reserve Board is seeking to further restrict the terms under which a bank holding company can grant credit to its affiliates. The Board's proposed regulations expand the prohibition on preferential credit treatment to include not only the ETC and its customers, but also affiliates of the ETC's customers. In addition, the regulations extend this restriction to include any co-investor with at least ten percent interest in an ETC and any affiliates of the co-investor.⁹⁴ Prudent lending practices would have dictated the same policy, but the inclusion of this language in the regulation will allow the Board greater leverage in enforcing such practices.

The limits on bank holding company investments in ETCs should provide more than adequate protection for the safety of depository institutions. In 1981 the total capital of all banks in the United States

87. ETCA, *supra* note 11, at § 203 (codified at 12 U.S.C. 1843(c)(14)).

88. *Id.* (codified at 12 U.S.C. 1843(c)(14)(E)).

89. *Id.* (codified at 12 U.S.C. 1843(c)(14)(B)(i)).

90. *Id.*

91. *Id.*

92. 48 Fed. Reg. 17, 3375, 3379 (to be codified at 12 C.F.R. Part 211) The regulations were proposed on Jan. 25, 1983 and the comment period ended on Mar. 14, 1983.

93. *Id.* at 3377.

94. *Id.*

was roughly \$105 billion.⁹⁵ If every bank invested the maximum five percent of capital, the total investment would be \$5.25 billion. If, in addition, every bank were to extend credit to the maximum ten percent of capital, the total of all investments and loans would be \$15.75 billion. Realistically, members of Congress estimate that bank investments and loans during the first five years of this legislation will be about \$1 billion.⁹⁶ In an economy with a GNP of over \$1 trillion, such an investment is not likely to significantly tighten the credit market or alter bank capital. Indeed, when compared to the fact that some banks have more than half their capital exposed in loans to borrowers in a single developing country,⁹⁷ the fifteen percent limit on combined investments and loans is quite conservative.

There is some concern that this limit may prove to be too restrictive, for the profitability of an ETC is directly related to its ability to obtain financing. In the highly competitive world of international trade, the ability to offer credit to foreign buyers will frequently be the determining factor in securing export sales.⁹⁸ Credit is also important to the supplier of goods, particularly for small and medium size businesses, because the time between shipment of goods and receipt of payment may run 180 days or more.⁹⁹ Thus, the ability to offer credit terms to both buyer and seller is crucial to the ETC seeking to serve their needs.

Significantly, the inability to obtain operating capital and financing is considered the major obstacle to expanded sales by American ETCs.¹⁰⁰ United States banks generally determine creditworthiness by the level of a company's net worth.¹⁰¹ Since ETCs are primarily marketing firms, their main assets are their sales personnel rather than capital assets. Thus, ETCs necessarily have a relatively low net worth.

95. S. REP. NO. 27, 97th Cong., 1st Sess. 15 (1981).

96. *Id.* (Report of the Committee on Banking, Housing, and Urban Affairs). As investment in a commercial venture is new to bankers, the Board has provided those who wish to be cautious the flexibility to invest in incremental stages. Each time the activities of a bank affiliated ETC expand beyond those described in the initial Notice (*See infra* text accompanying notes 50-51), the investor must give the Board 60 days written notice. 48 Fed. Reg. 3379 (1983) (to be codified at 12 C.F.R. Part 211) (proposed Jan. 25, 1983).

97. S. REP. NO. 27, 97th Cong., 1st Sess., 16 (1981).

98. *Hearings on S. 864, supra* note 1, at 491-92 (Hay Associates Study) As other industrial nations have become more competitive with the U.S., the ability of exporters to sell for cash with order or on a confirmed irrevocable letter of credit basis has been substantially reduced. Exporters must, therefore, offer flexible payment plans, such as cash on arrival of goods or installment payments. *Id.*

99. *Id.* at 492.

100. H.R. REP. NO. 97-637(I) at 11 (FOR. AFF. COM.) (1982) *reprinted in* 1982 U.S. CODE CONG. & AD NEWS NO. 9, 2433.

101. *Hearings on S. 864, supra* note 1, at 512 (Hay Associates Study) Net worth is the amount of money a firm's owners have invested in the business and the sum of its retained earnings.

One study found that most United States ETCs have an equity capital base of less than \$500,000.¹⁰² Unless banks change their credit granting techniques, there is not likely to be substantial increases in credit available to ETCs,¹⁰³ particularly since the Export Trading Company Act prohibits granting credit on preferential terms to an affiliated ETC.¹⁰⁴

The Federal Reserve Board's proposed regulations create yet another obstacle to increasing the credit available to ETCs. Under these regulations credit extensions to an affiliated ETC by a holding company's subsidiary bank are subject to the collateral requirements of Section 23A of the Federal Reserve Act.¹⁰⁵ This section requires that any credit extension from a bank to an affiliated ETC be secured in amounts from 100 percent if the collateral is in the form of government securities, to 120 percent for accounts receivable, and to 130 percent for real or personal property.¹⁰⁶ Since most ETCs lack substantial assets to use as collateral for loans, they will be forced to use their accounts receivable, necessitating 120 percent collateralization. This requirement will have the practical effect for many ETCs of limiting export sales to the ETC's leverage on its capital base during the start-up phase when the ETC is struggling to gain accounts receivable. Although this requirement may eliminate the risk to any affiliate bank, it will also severely inhibit the ETC's ability to expand.¹⁰⁷

The collateral requirements will have a particularly detrimental effect on the ability of smaller bank holding companies to set up an

102. *Hearings on S. 864, supra* note 1, at 541 (Hay Associates Study). American banks generally will not lend more than two or three times the firm's capital, while more trade-oriented European banks often lend up to 7 times capital. The major Japanese trading companies are usually leveraged to 15 to 20 times capital. *Overview of Export Trading, supra* note 3, at 27.

103. One study found that without the ability to create credit greater than a net worth position would justify, a viable ETC cannot exist in the U.S. Two major factors led to this conclusion: 1) the size of the trading company will be severely limited; and 2) the ability to create credit is essential to prevent manufacturers from eventually exporting on their own without the ETC as middleman. *Hearings on S. 864, supra* note 1, at 513 (Hay Associates Study).

104. ETCA, *supra* note 11, at § 203 (codified at 12 U.S.C. 1843 (B)(iii)).

105. 48 Fed. Reg. 17, 3377. Section 23 has recently been amended in the Depository Institutions Act, Pub. L. No. 97-320, 96 Stat. 1516 (to be codified at 12 U.S.C. 371c) (1982). The purpose of this section is to safeguard the resources of banks against the misuse of their resources for the benefit of organizations under common control with the bank. *Hearings on H.R. 6016, supra* note 1, at 351 (Statement of Henry Wallich, Board of Governors, The Federal Reserve System).

106. 12 U.S.C. 371c (A), (C), (D) (1982).

107. As the legislation was considered by Congress, the 23A collateral requirements were seen as one way of reducing bank exposure through ETCs investment, while the five percent and ten percent capital limitations were seen as another, alternative method. "The Senate ceded to the House on the exemptions of bank affiliated export trading companies from the provisions of Section 23A." H.R. REP. NO. 290, 97th Cong. 2nd Sess. 24 (1982). Concerned that ETC could not provide collateral to meet the requirements of 23A, Congress included the latter restrictions but exempted ETCs from 23A. But, as the final wording of the legislation was being decided upon, a bill liberalizing the collateral requirements under Section 23A, The Depository Institutions Act, Pub. L. 97-320, 96 Stat. 1515, § 410 [§ 23A of the Federal Reserve Act (12 U.S.C. 371c)] also

ETC. Larger bank holding companies can lend directly to the ETC, thus side-stepping the 23A requirements which apply only to loans from a bank affiliate. But a smaller bank holding company which cannot raise capital through sales of its commercial paper or long-term debt as readily as a larger bank holding company may find it difficult to extend enough credit to start a rapidly growing ETC.¹⁰⁸ Since one purpose of the Act is to involve smaller banks and businesses in export trading, the 23A limitation seems inherently inconsistent.¹⁰⁹

Likewise, the burden of the five percent equity investment limit falls disproportionately on smaller bank holding companies. If these smaller companies are unwilling or unable to form a joint venture ETC¹¹⁰ with other bank holding companies or nonbank firms, the five percent restriction may prevent them from adequately capitalizing a solely-owned ETC. Thus, the smaller eligible investor may choose not to invest at all. Even if it does invest, the ETC's sales capabilities would be handicapped by its inability to attain maximum economies of scale.¹¹¹

There is no clear rationale for placing a five percent limitation on a bank investor's equity contribution to ETCs. Under the Edge Act, investment in other nonbanking businesses is subject to a ten percent limit, even though the risks may be commensurate with those of an ETC.¹¹² A further concern with the five percent limit is that consolidated capital of a nonbanking institution, such as a bank holding company, can vary dramatically from year to year,¹¹³ thus jeopardizing the

neared passage. (It was passed Oct. 15, 1982). Accordingly, the Act was written to exempt ETCs from the old 23A requirements, but to allow the new ones to apply.

The exact wording in the ETC Act is: "No provision of any other Federal law in effect on October 1, 1982, relating specifically to collateral requirements shall apply with respect to any such extension of credit." ETCA, *supra* note 11, at § 203(3)(B)(ii). Under the new 23A, the Federal Reserve Board has the authority to grant exemptions at its discretion. Pub. L. 97-320, 196 Stat. 12514, 12 U.S.C. 371(c), § 23 A(e)(2).

108. *Hearings on H.R. 6016, supra* note 1, at 178 (Letter from Alden M. Anderson Pres. Hospital Trust Corp.).

109. ETCA, *supra* note 11, at §§ 202(2), § 202(3). In response to this problem, Rep. Douglas Barnard, Jr. (D-Georgia) submitted a bill last December to make a technical correction to the law that would exempt ETC subsidiaries from all 23A collateral requirements. However, the bill did not go anywhere during the lame duck session. *Search and Destroy; supra* note 54, at 19.

110. Since ETCs are perceived as a risky business, bank holding companies may be reluctant to enter into a joint venture arrangement. A joint venture is similar to a partnership, is usually taxable as a partnership and liability is unlimited. H. HENN, *supra* note 69, at 77.

111. The current sales to equity ratio for existing U.S. export management companies is approximately ten to one, but most companies are unable to attain that ratio because their limited equity does not permit them to grow to a size sufficient to attain maximum economies of scale. *Hearings on H.R. 6016, supra* note 1, at 162-63.

112. *Hearings on H.R. 6016, supra* note 1, at 155 (Statement of George Taylor).

113. *Hearings on H.R. 6016, supra* note 1, at 385 (Statement of R.T. McNamara, Deputy Secretary of the Treasury).

stability of a bank-affiliated ETC's capital base.

In an attempt to blunt the sharp restrictions on bank holding company financing of an ETC affiliate, the Act contains two provisions designed to increase available financing from non-affiliated banks. The first provision raises the limit on the amount of banker's acceptances¹¹⁴ a bank may issue from 100 to 150 percent of the capital and surplus of a bank holding company or bank, and gives the Federal Reserve Board discretion to raise the limit to 200 percent.¹¹⁵ This provision should allow more customers to use this high quality, low cost type of financing, thus reducing credit rates for smaller United States exporters.¹¹⁶

The second provision directs the Export-Import Bank to develop a loan guarantee program for loans extended by creditors to ETCs.¹¹⁷ The loans must be secured by export accounts receivable or inventories of exportable goods. The program is specifically geared to aid small, medium-size and minority or agricultural concerns. The Ex-Im bank is directed to implement the program whenever, in its judgment, such guarantees would fulfill a need not being met in the private credit market.¹¹⁸ Since under Section 23A of the Federal Reserve Act any bank loan to an affiliate must also be secured, most likely to 120 percent of the credit amount, there is not likely to be much need for such a guarantee program. This provision simply does not address the fundamental need of new ETCs for start-up financing to acquire accounts receivable.

E. Remaining Concerns

A further concern for a bank entering the ETC business is the possible alienation of its current trade financing customers through conflicts of interest. The most common instrument of international trade is the letter of credit which specifies both the buyer's and seller's names and addresses, as well as the terms of the sale.¹¹⁹ Clearly, this information would be invaluable to any bank-owned trading company trying to lure business away from competitors. Under bank holding company law, sensitive competitive information cannot be passed on to a subsid-

114. The bankers acceptance is a predominant form of international trade finance. It is a device which allows a seller of a good or service to complete a sale to a buyer whom the seller may not know. The bank uses its credit standing to substitute for that of the buyer and guarantees payment to the seller. H.R. REP. NO. 629 (II) 97th Cong., 2d Sess. 14 (1982).

115. ETCA, *supra* note 11, at § 207 (codified at 12 U.S.C. § 372).

116. H. REP. NO. 798, 97th Cong., 2d Sess. 30 (1982).

117. ETCA, *supra* note 11, at § 206 (codified at 12 U.S.C. § 635a-4).

118. *Id.*

119. Export Expansion Iceberg, *supra* note 81, at 15.

iary without the bank customer's permission.¹²⁰ If, however, the subsidiary is partially staffed with former loan officers who are experienced in dealing with the export trading company segment of the bank's customer base, they will bring with them detailed knowledge of the non-bank trading company's relationships with domestic suppliers and overseas buyers.¹²¹ Even if the bank affiliated trading company were not to use this information to its competitive advantage, its ready availability may cause cautious trade customers to take their banking to a bank unaffiliated with an ETC.

Finally, aside from seeking to encourage bank investment in ETCs, the Export Trading Company Act does nothing to free American exporters from the morass of government regulations that many entrepreneurs believe inhibits their ability to compete in foreign markets.¹²² For example, Federal Maritime Regulations prohibit United States trading companies from receiving commissions on freight brokerage if the company takes title to the goods. A government commissioned study indicated that the standard freight forwarder commission could yield a significant increase in the profitability of trading companies, creating more interest among potential investors.¹²³ In addition, the industry is restricted by regulations relating to foreign corrupt practices, foreign boycott reporting, and American trade embargoes to certain foreign nations on particular United States goods and services.¹²⁴

120. *Banks Should Plan Joint Ventures as They Enter Export Trading Field*, AM. BANKER 4, 6 (January 7, 1983), at 6.

121. *Id.*

122. Chew, *Export Trading Companies: Current Legislation, Regulation and Commercial Bank Involvement*, 16 COLUM. J. OF WORLD BUS., 42, 43 (1981).

123. *Hearings on S. 864*, *supra* note 1, at 517-518 (Hay Associates Study) Major exporters estimate that freight costs average between fifteen and twenty percent of merchandise value, but can amount to seventy to eighty percent of value. Two examples show how the standard commission could increase a textiles exporter's profitability by six percent, and a furniture exporter's profitability by sixteen percent.

Case I. The Textile Exporter

Merchandise Value	\$100,000
Shipping Costs (15% of merchandise value)	15,000
Brokerage Commission (2% of 15,000)	300
Average pretax return on sales (5%)	5,000
Return with commission on freight brokerage	5,300
Increase in profitability	6%

Case II: The Exporter of Juvenile Furniture

Merchandise Value	\$100,000
Shipping Costs (40% of merchandise value)	40,000
Brokerage Commission (2% of 40,000)	800
Average pretax return on sales (5%)	5,000
Return with commission on freight brokerage	5,800
Increase in profitability	16%

Id. at 519.

124. Chew, *supra* note 122, at 43.

Nevertheless, Congress did not intend for this Act to remedy all our nation's exporting problems. Rather, it is expected to be one step in a series of legislation to improve United States export performance.¹²⁵

III CONCLUSION

Title II of the Export Trading Company Act of 1982 represents an important deregulatory initiative which allows the banking industry to use its resources to aid in solving our national economic problems. While the Act breaches the wall between banking and commerce, Federal Reserve Board oversight and the specific restrictions on bank exposure should adequately safeguard bank deposits. Although these safeguards may be overly restrictive, perhaps excluding many smaller banks from participation in ETC development, they should not be regarded as a fatal flaw in the legislation. Larger banks are still afforded sufficient room to become involved in ETCs. Once these banks begin investing and the Federal Reserve Board becomes more familiar with the risks involved, Congress may be persuaded to allow more liberal bank investment.

The economic climate, rather than the investment restrictions, may be the determining factor in the success or failure of this Act. In the six years since it was first discussed in Congress, world economic conditions have worsened, choking off many trading opportunities and leaving the international lending arena in disarray.¹²⁶ Meanwhile, United States regulatory reforms,¹²⁷ which have opened the door for banks to offer new types of financial services, have at the same time dramatically increased the cost of doing business.¹²⁸ These increased costs threaten the very stability of the banking industry itself.¹²⁹ In the end, therefore, whether banks choose to invest in ETCs will depend on the industry's

125. *Export Trading Companies: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 5 (1980) (Statement of Sen. Stevenson).

126. In September 1982 Mexico was rescheduling \$10 billion of debt, while banks braced themselves for the rescheduling of Argentina's \$24.8 billion bank debt and Peru's \$4.4 billion in bank debt. *Worry at the World's Banks*, *BUSINESS WEEK*, Sept. 6, 1982, at 80. For an in-depth analysis of the international lending situation, see *Symposium: Default of Foreign Government Debtors*, 1982 U. ILL. L. REV. 1.

127. The Depository Institutions Deregulation and Monetary Control Act, provided for a six-year phase out of deposit rate controls, the permanent authorization of NOW (negotiable order of withdrawal) accounts and share drafts and a Federal Reserve requirement for all financial institutions. Depository Institutions Deregulation and Monetary Control Act of 1980, PUB. L. 96-221, tit. II, § 203-210, 96 Stat. 142. The Depository Institutions Act authorized banks to offer money market accounts. Depository Institutions Act of 1982, PUB. L. 97-320, § 327, 96 Stat. 1501 (codified at 12 U.S.C. 3503).

128. LaFalce, *supra* note 48, at 840.

129. *Id.*

comparative evaluation of the risks and profits to be gained from ETCs versus traditional banking services with which bankers are more familiar.¹³⁰

130. Bankers by nature are conservative and may be waiting until the first ETC succeeds before investing. See Jacobs & Coene, *supra* note 86. In January, Security Pacific Corporation notified the Federal Reserve Board of its plans to form an ETC, and Bank America Corp. has indicated its intentions of forming an ETC subsidiary in 1983. Norton, *Banks Weigh Entry into the World of Commerce*, AM. BANKER, Jan. 21, 1983, at 1.