The Efficacy of Export Trading Companies and Related Legislation and Regulations

Joseph Jude Norton
Southern Methodist University, Dedman School of Law, jnorton@smu.edu

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THE EFFICACY OF EXPORT TRADING COMPANIES AND RELATED LEGISLATION AND REGULATIONS

JOSEPH JUDE NORTON*

ARTICLE OUTLINE

I. INTRODUCTION

II. HISTORICAL BACKDROP
   A. U. S. Economic and Trade Policies
   B. Export Trading Companies (ETC's)
      1. U. S. trading companies
      2. Japanese trading companies (sogo shosha)

III. THE EXPORT TRADING COMPANY ACT
   A. Legislative History
   B. Summary of the ETCA Provisions
   C. The Banking Provisions
      1. Use of the bank holding company vehicle
      2. Investment limitations
      3. Approval procedure
      4. Scope of activities
      5. Interfacing with the U.S. Eximbank
         a. Working Capital Guarantee Program
         b. Broader possible financing innovations
      6. Liberalizing rules on bankers' acceptances

* LL.B., LL.M., S.J.D.; Professor of Law and Co-Director, Institute on International Finance, Southern Methodist University, Dallas, Texas; Special Counsel — Locke, Purnell, Boren, Laney & Neely, Dallas, Texas. The writer wishes to thank his student research assistant, Ms. Nikki Hurst, at the S.M.U. Law School, for her substantial efforts on this manuscript. The date of this article is March 15, 1984, except as may be otherwise indicated. A brief summarization of subsequent events and developments is contained in footnote 146 infra.
D. The Antitrust Provisions
   1. The Export Certificate Review
   2. Evaluation

IV. RECENT USES OF THE ETCA PROVISIONS
   A. FRB Applications
   B. Commerce Department Applications

V. A MORE GENERAL USAGE: THE SEARS MODEL
   1. The apparent rationale
   2. Three major business decisions
   3. The initial growth
   4. The three business dimensions

VI. CONCLUDING OBSERVATIONS

I. INTRODUCTION

The United States' share of world trading markets has declined for more than the past decade. This decline has been linked to a continuing increase in imports into the United States. The result of such linkage has been enormous U.S. trade deficits, with the 1984 figures indicating a U.S. merchandise trade deficit of $123.3 billion. Yet, while the United States struggled to maintain a rough trade balance in the 1970's and struggles to fight off staggering deficits in the 1980's, other industrialized countries, which face many of the same internal and exter-

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1 In 1970, the U.S. share of the total world market was 15%; in 1980, it was 12%. For this time period, the U.S. share of the manufactured goods total dropped from 21.3% to 17.4%. Yet despite this decline, the relative importance of exports to the U.S. Gross National Product rose from 4.2% to 7.5%. See S. REP. NO. 17, 97th Cong., 1st Sess. 10 (1981); 128 CONG. REC. 3622-29 (1981).
2 See supra note 1. Imports of manufactured goods increased nearly four times as rapidly as exports during the 1970s. Because imports have expanded since 1972 from a higher base than exports, the trade deficit has expanded sharply.
3 Source: U.S. Commerce Department. This figure is based on f.a.s. exports - c.i.f. imports.
4 The U.S. has been able to sustain these large deficits primarily due to surpluses of investment income. However, a very real possibility exists that in the near future, the U.S. may find itself in an international net debtor position. See, e.g., Trade Deficit and the Economy: Hearing Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. 2 (1984) (statement of Hon. Henry C. Wallich, Member, Board of Governors of
nal economic pressures as the United States, have maintained substantial trade surpluses.\(^5\)

None of the economic reports are conclusive concerning the exact causes of the recent U.S. trade problems or how they are to be remedied. However, a primary focus in the area of recent U.S. trade legislation has been on the need for an alteration of domestic export policies rather than on the valuation of the dollar, which is seen by most politicians as an unattractive policy option because it may well give rise to renewed inflation.\(^6\)

The Export Trading Company Act of 1982 (ETCA) was passed by Congress in the wake of these growing economic concerns.\(^7\) The ETCA is viewed as an affirmative export policy measure designed to promote and to expand the position of American manufacturers and producers on the international front. This legislation represents a departure from protectionist attitudes that, in recent years, have influenced restrictive U.S. policies such as the imposition of import quotas and tariffs.\(^8\)

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\(^5\) For example, by 1979, Japan and Germany had respective annual manufactured goods surpluses of $70 billion and $60 billion. See S. REP. NO. 27, 97th Cong., 1st Sess. 4 (1981). In fact, a recent International Monetary Fund Report indicates that in 1982 Japan ran a trade surplus of $10.4 billion, and Germany a trade surplus of $16.5 billion. 20 U.S. EXPORT WEEKLY (BNA) 757 (Mar. 1984).

\(^6\) See 128 CONG. REC. S3622 (1981) (statement of Sen. Heinz). One leading expert, Hon. Henry C. Wallich, has listed four specific causes: (i) the substantial cumulative appreciation of the U.S. dollar internationally, (ii) the cyclical behavior of U.S. and foreign economies, (iii) the external financing problems of certain countries, which has led to shrinking export markets in those countries, and (iv) the failure of U.S. industries to adjust adequately to the pressures of international competition. But looming as the overriding problem is the continuing enormous U.S. budget deficits. Wallich Statement, supra note 4. See also, Bergsten, The Effects on Trade of Exchange Rates and National Economic Policies, comprising Chapter 1 to WORLD TRADE AND TRADE FINANCES (J. Norton, ed.) (to be published by Matthew Bender in the Fall of 1985) [hereinafter cited as Norton].


\(^8\) The steel and auto industries particularly have maintained protectionist atti-
addition, the Act largely removes, at least as to interna-
tional operations, the statutory barrier that has long been
maintained between banking and commerce. More sig-
ificantly, the ETCA provides a new framework for im-
proving the United States export industry through the
cooperative efforts of the government (federal and state),
the domestic banking community, and those U.S. based
companies engaged in or interested in competing in inter-
national markets.

This article, after considering the historical background
for and the legislative history of the ETCA, will examine
the main provisions of the Act and related regulations of
the U.S. Commerce Department (Commerce) and the
Federal Reserve Board (FRB). Consideration will then be
given to recent users of the ETCA provisions and to more
general uses of export trading companies (ETC) in the
United States.

II. HISTORICAL BACKDROP FOR THE ETCA
A. U.S. Economic and Trade Policies

Internally, significant changes have occurred in the U.S.
marketplace since World War II. These changes have re-
sulted in a shift from a marketplace that was for the most
part dominated by U.S. manufactured goods to one that
provides the consumer with cheaper and more varied
goods of foreign origin. While this has meant more free-
dom for the American public to enjoy the use of goods
that were previously considered luxuries, it has caused
U.S. manufacturers to experience a shrinking domestic
market.  

studes and have pushed for restrictive trade policies. See, e.g., Feketekuty, Trade in a
Protectionist Environment, comprising chapter 4 to Norton, supra note 6.
9 Senators Heinz and Proxmire discuss the traditional separation of banking
and commerce and the compromises necessary to maintain some separation as
well as to further growth of the U.S. export industry in S. Rep. No. 17, 97th
search Rep. 173-88 (1983)). Although the U.S. is less dependent upon foreign
The dislocations in the U.S. economy have also taken a
toll in human terms, in the form of unemployment.\textsuperscript{11} For
U.S. businesses to maintain a consistently high level of
employment the market must be expanded to provide an
increase in demand beyond the U.S. borders. In analyzing
this problem, the Secretary of Commerce estimated
that each billion dollars in manufactured goods supports
approximately 32,000 jobs.\textsuperscript{12} Another report recently re-
vised by the Chase Econometrics indicated that one out of
eight U.S. jobs depends in one way or another on ex-
ports.\textsuperscript{13} Furthermore, it is estimated that by 1986 effec-
tive use of the ETC vehicle could add 275,000 new jobs
for American workers.\textsuperscript{14}

Despite the apparent need to expand the U.S. export
market, access to this market traditionally has been lim-
ited to large enterprises.\textsuperscript{15} Of the approximately 300,000
U.S. manufacturing firms, only 20,000 to 30,000 export
their products. Furthermore, while the figures vary to
some degree, a liberal estimate indicates that only ten per
cent of the exporting firms account for approximately
eighty-five per cent of all exports from the United
States.\textsuperscript{16} Yet, the Department of Commerce estimates
that another 20,000 small and medium-sized, non-ex-
trade than many industrialized nations, the strength of some domestic industries
depends on exports (e.g., agricultural), while other industries (e.g., automobiles
and steel) are highly vulnerable to foreign imports. See H.R. REP. No. 629, 97th
\textsuperscript{13} According to U.S. Trade Representative Ambassador William E. Brock, III:
"In the recent years four out of five of new U.S. jobs in manufacturing have been
created in international trade." \textit{Administration's Assessment of 1982 Meeting of the
Ministers to the GATT: Hearings Before the Senate Comm. on Finance,} 98th Cong., 1st
Sess. 42, 42 (testimony of W. Brock, III).
\textsuperscript{14} H.R. REP. No. 629, 97th Cong., 2d Sess. 4, 7, \textit{reprinted in} 1982 U.S. CODE
CONG. & AD. NEWS 2467, 2470.
\textsuperscript{15} See \textit{Chase Econometrics Sees a Massive Potential For ETCA}, \textit{AM. BANKER}, Feb. 17,
1982, at 14, which revises a prior 1981 study.
\textsuperscript{16} \textit{Id.} See also, Acheson, \textit{The Export Trading Company Act: A Year Downstream}, 18
\textsuperscript{16} See \textit{Note, The Export Trading Company Act of 1982: Export Trade Comes of Age in the
porter manufacturers and agricultural producers offer goods and services that could be traded successfully in the international market.  

It is ironic that while these small and medium-sized firms are considered to be the companies with the greatest export opportunities and the firms that create most of America's jobs, they have suffered the greatest challenges to entering the export market. General economic conditions in recent years, in addition to limited personnel and financial resources, have made it difficult for them to compete successfully.

More generally, a small or medium-sized firm interested in entering the export market must overcome other significant obstacles. According to the head of Commerce's Foreign Commercial Service, the export trade procedures and practices are overwhelming, particularly for a mid-size firm that is not well-versed in international finance and trade. Based on its investigation of Commerce's conclusions regarding the number of small and medium-sized firms barred from entering the export market, the Senate Committee on Banking, Housing and Urban Affairs identified and evaluated the obstacles. This Committee concluded that small and medium-sized firms did not compete significantly in the international market because of their traditional focus on the domestic markets and because of real or perceived barriers too difficult to overcome. These include different customs rules, licensing standards, languages, unfamiliar marketing practices, and

19 The head of Commerce's Foreign Commercial Service, Erland Heginbotham, stated: "The obstacles to foreign trade are incredible. You have 150 different markets, currency fluctuations, unstable regimes, unknown customs, unknown credit reliability and totally different documentation systems and customs clearance processes. How is a poor guy out of Peoria, Ill., to undertake any of this kind of stuff." Statement of Erland as cited in Gordon, Exporters Look Enviously at Japan in Pressing for New U.S. Export Laws, 12 NAT'l. J. 1018, 1020 (1980); see also, Busbee, Rationale for a Coherent National Export Program, comprising chapter 9 to Norton, supra note 6.
financing difficulties.\textsuperscript{20} It is precisely these impediments that the ETCA is designed to address by relaxing banking and antitrust regulations and otherwise by encouraging the expanded use of ETC's.\textsuperscript{21}

B. Export Trading Companies (ETC's)

ETC's have traditionally served two basic functions that enable business entities of varying size and geographic location to engage in trade in an expanded market. First, these companies serve as trade intermediaries, that is, companies that facilitate the movement of goods between buyers and sellers. Second, these companies are trade developers, or companies that function to create new markets and to ensure both the supply and demand for specific products.

The principle impact of export trading companies is the removal of the very barriers that have deterred firms from engaging in export opportunities. The services provided by trading companies may include obtaining necessary foreign exchange, arranging insurance coverages, providing market information and research, and supplying efficient and dependable transportation of goods, in addition to a variety of other services addressing specific needs.\textsuperscript{22}

1. U.S. trading companies. The use of ETC's in the United States is not a new phenomenon: the ETCA merely alleviates certain U.S. antitrust concerns and otherwise makes the vehicle available to the commercial banking community.\textsuperscript{23} Continental Grain Co. and Cargill, Inc. are examples of firms that operated on a limited scope as export trading firms before the passage of the


\textsuperscript{21} See Acheson, \textit{supra} note 14.


\textsuperscript{23} With the exception of the allowance for bank holding company participation and the antitrust provisions under the ETCA, export trading companies operate under traditional business laws (e.g., corporate, partnership, commercial, etc.).
ETCA in 1982.\textsuperscript{24} In fact, under the 1918 Webb-Pomerance Act,\textsuperscript{25} which provides immunity from certain antitrust restrictions on export trading of goods, but not services, thirty-three exporting firms are registered in the United States.\textsuperscript{26}

Although these exporting firms account for $3.3 billion in exports annually, they have failed to stimulate export trading as was originally anticipated.\textsuperscript{27} Today, these associations account for only 1.5\% of all U.S. exports, a decline from about 19\% in 1935. Many producers of goods regard the Webb-Pomerance Act as providing insufficient protection from antitrust penalties. Amendments to this Act were considered and then deleted from the ETCA.\textsuperscript{28}

The federal government has also attempted to provide assistance to American exporting firms through the State Department and, more recently, the Commerce Department.\textsuperscript{29} However, in its efforts to assure firms flexibility and freedom from unnecessary regulation, the government has often imposed additional burdens on or overlooked specific needs of small and medium-sized firms. As an example, U.S.-sponsored international trade fairs are often inadvertently closed to these firms because of the regulations imposed on exporters interested in displaying their merchandise.\textsuperscript{30} In view of these past problems, Congress determined that it could address two major areas through legislation — undercapitalization and antitrust uncertainties.\textsuperscript{31}

\textsuperscript{24} Gordon, \textit{supra} note 19, at 1019.
\textsuperscript{27} See Pinegar, \textit{supra} note 16, at 14.
\textsuperscript{29} Gordon, \textit{supra} note 19, at 1020.
2. Japanese trading companies (sogo shosha). There is little doubt that Congress was influenced by the mammoth Japanese trading companies (the sogo shosha) in determining the most effective way to promote exporting and to utilize the resources necessary to engage successfully in export trading. These trading companies engage in both internal and external trade and operate on a high volume, low profit margin basis. They developed largely because of the dependence of the Japanese economy on foreign raw materials and foreign markets, the problems encountered by individual companies in developing the necessary skills for themselves, the inadequate worldwide purchasing and selling networks, and the relative scarcity of commercial capital. In fact, today over half of all of the imports and exports of Japan are facilitated through large export trading companies that derive support from both the banks and government.\(^{32}\) While the sogo sosha could not be recreated in their entirety in the United States, due to cultural and legal obstacles, they are indicative of the functional possibilities available to export trading firms.\(^{33}\)

The Japanese trading companies (such as the Mitsubishi and Mitsui trading companies) enjoy substantial support from the Japanese government and benefit from local banking laws that are favorable to high risk international operations.\(^{34}\) In essence, the Japanese government com-
bines forces with the local financial institutions (generally each sogo shosha is centered around its own bank) to provide a cohesive international trading operation. It is this substantially cooperative effort that enables the sogo shosha to provide the necessary export services.

In a series of surveys conducted by the Economic Consulting Services of Washington, D.C., non-exporting merchants in the United States indicated their desire to receive the types of services provided by Japanese export trading companies. In the United States, however, these services were either too costly for one firm to provide or were prohibited because of antitrust and banking regulations.

The legislative history of the ETCA indicates that Congress, although cognizant of certain limitations intrinsic to the United States system, was well aware of the Japanese model in designing the ETCA as a tool to promote United States participation in international trade.

III. THE EXPORT TRADING COMPANY ACT

A. Legislative History

Substantive hearings on U.S. trade policy began as early as 1978 in the Senate Subcommittee on International Finance; it was not until nearly four years later, however, that legislation was finally signed into law. These and other hearings revealed that federal banking laws, ensuring the separation of banking and commerce, and antitrust regulations impeded the growth and development of U.S. export trade. With respect to these findings, the Subcommittee recommended that legislation be introduced to provide incentives to form export trading companies.

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35 See Unkovic & La Mont, supra note 22, at 210.
37 See supra note 9 for references to legislative history of ETCA.
Senator Adlai Stevenson, III, responded in August of 1979 by introducing S. 1663, a bill that would permit bank involvement in ETCs. During the hearings regarding S. 1663 held in September 1979, the Federal Reserve Board of Governors (FRB) and the Federal Deposit Insurance Corporation (FDIC) particularly expressed concerns about maintaining a division between the functions of financial institutions and the activities of commercial industries. The bill, as introduced, would have allowed a bank holding company (BHC) to invest up to ten percent of its capital stock in ETC's. Banks were to be limited, however, to investments resulting in only twenty percent ownership of an ETC. Additional provisions barred ownership by foreign investors.

Following the initial hearings, this bill was revised and reintroduced by Senator Stevenson as S. 2379 on March 4, 1980. The revised bill provided tighter regulatory control over a bank's ability to invest in ETC's. Under S. 2379 investments of banks and BHC's in ETC's were permitted, without review by a regulatory agency, if such investments did not exceed five percent of the voting stock of an ETC. Where investments exceeded these limits, a required sixty-day prior notice to the appropriate federal bank regulatory agency was necessary before proceeding with the intended investment. Yet, despite these additional constraints on the merging of banking and commerce, S. 2379 continued to be revised due to the repeatedly expressed concerns of the FRB and certain

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39 There has been a long tradition of separating banking and commerce. As a result of practices evident in the period leading up to the crash of 1929 and the bank closings in the 1930's, legislation was enacted which created a wall between the operations of depository institutions and other fields of commercial enterprise. This wall was believed necessary to assure that the institutions which hold the financial deposits of U.S. industry and commerce were operated in a safe and sound manner. H.R. REP. No. 629, 97th Cong., 2d Sess. 9, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2467, 2472. See J. Norton & S. Whitley, BANKING LAW MANUAL § 4.06 (1982).

members of Congress. On May 15, 1980 a compromise bill, S. 2718, was reported by the Senate Banking Committee. Under S. 2718 banks and BHC's were still permitted a five percent investment of their consolidated capital and surplus in an ETC; however, the review procedures were altered.

The Senate passed S. 2718 on September 3, 1980 by a vote of 77-0. Despite the Senate's approval of this ETC legislation, the House of Representatives was unable, during the 96th Congress, to pass similar legislation. Although five bills were introduced in the House, none of them reached the floor for vote. Accordingly, comprehensive ETC legislation remained an important issue for the next Congress in 1981.

At the start of the 97th Congress in 1981, Senator Heinz and others introduced S. 144, a bill that was substantially the same as S. 2718. However, on March 18, 1981 the Senate Banking Committee reported an original bill, S. 734, that contained four amendments to the previously introduced S. 144:

(i) a prohibition against banking organization-owned ETCs engaging in manufacturing, agricultural, and securities activities;

(ii) an allowance for an ETC to share the name of the banking entity owning a majority interest in the ETC;

(iii) a provision granting the authority to federal banking

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43 Ten million dollars could be invested in an ETC without regulatory approval, as long as no one banking entity acquired twenty-five percent or more of the voting stock of an ETC, and banking entities in the aggregate did not acquire more than fifty percent of the stock of the ETC. Investments not meeting these limitations were subject to a ninety-day prior-approval procedure. Federal banking regulators were also entitled to impose conditions on investments in ETC's to prevent unsound banking practices. See S. Rep. No. 735, 96th Cong., 2d Sess. (1980).
45 See Unkovic & La Mont, supra note 22, at 211.
regulators to exempt bank extensions of credit to affiliated ETCs from applicable collateral requirements; and

(iv) an authority for states to regulate investments in ETCs by state banks.\(^{47}\)

Following discussion led by Senators Heinz, Proxmire, and Tsongas reiterating the need to promote export operations while retaining some limitations on the banking industry, the Senate passed S. 734 on April 8, 1981.\(^{48}\)

The process by which the House and Senate ultimately passed the Export Trading Company Act of 1982 involved the consideration of three House bills and the Senate bill S. 734 by a House-Senate Conference. On March 31, 1982 the House Banking Committee Chairman, St Germain, introduced H.R. 6016, the Bank Export Services Act of 1982 (BESA).\(^{49}\) In view of the preceding bills, H.R. 6016 attempted to retain the safeguards separating banking and commerce, while at the same time encouraging the expansion of U.S. exports.\(^{50}\) The expressed objective of this bill was to ensure “profitable participation of banking organizations in export trading . . . without disregarding the traditional policy of separating banking and commerce in the interest of preserving the safety and soundness of the banking system and the openness of our markets.”\(^{51}\)

The second piece of House legislation, H.R. 1799, the Export Trading Company Act of 1982, passed the House on July 27, 1982. H.R. 6016, the Bank Export Services Act, was passed as Title I of H.R. 1799.\(^{52}\)

After two series of modifications and amendments, the end result was legislation governing the bank organiza-

\(^{51}\) Id. at 2468 (testimony of Deputy Secretary of the Treasury Richard McNamar).
tion investment provisions of the ETCA. Briefly stated, H.R. 6016, BESA, authorized investments by BHC's and by bankers' banks in ETC's, but not directly by banks. In addition, investments in bank-related ETC's were not to exceed five percent of the investor's consolidated capital and surplus. The bill further amended section 23A of the Federal Reserve Act dealing with affiliated transactions and defined the types of activities in which ETC's were permitted to engage. These activities included financing, marketing, advertising, and taking title to goods, if those services facilitated exports. Furthermore, while ETC's were designed to operate exclusively for exporting U.S. goods, the bill authorized any bank-related ETC's to engage in import services, barter transactions, and other activities, if they were related to an export transaction.53

One week after passage of H.R. 1799, the House passed the third piece of legislation, H.R. 5235, the Foreign Antitrust Improvement Acts of 1982.54 This bill, as it was reported and passed, amended the Sherman Act and the Clayton Act. It also restricted the application of certain Federal Trade Commission antitrust regulations to export trading firms.

Following the passage of H.R. 1799 (which incorporated H.R. 6016), H.R. 5235, and S. 734, there was a Senate-House Conference in which S. 734 was amended to contain significant portions, if not all of the text of, the House bills.55 On October 1, 1982, the Export Trading Company Act of 1982 was approved by the full Congress and was signed into law on October 8, 1982.56

B. A Summary of the ETCA Provisions

The purpose of the Export Trading Company Act of 1982, as stated in the House-Senate Conference Report,

53 See H.R. REP. No. 629, supra note 50.
is "to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally."\textsuperscript{57} The Act is composed of four titles, each representing a distinct but interrelated piece of legislation:

(i) Title I sets forth the general provisions of the ETCA including the findings of Congress, its declaration of purpose and definitions pertaining specifically to Title I with respect to such terms as "export trade," "export trade services" and "export trading company."\textsuperscript{58} Also contained in Title I is a provision directing the Secretary of Commerce to establish an office to promote and to encourage the formation of export trading companies and to provide services to further this goal.\textsuperscript{59}

(ii) Title II, the Bank Export Services Act (BESA), is intended to "provide for meaningful and effective participation by bank holding companies, bankers' banks and Edge Act corporations, in the financing and development of export trading companies in the United States."\textsuperscript{60} Title II authorizes the investments of banking organizations and sets forth the guidelines that are to be followed by each entity. More specifically, the Act amends section 4(c)(14) of the Bank Holding Company Act of 1956 (BHCA),\textsuperscript{61} and

\textsuperscript{57} H.R. REP. NO. 924, 97th Cong., 2d Sess. 3, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2501 and in 128 CONG. REC. H8341-50 (daily ed. Oct. 1, 1982). The ETCA itself (in section 102), after stating eleven Congressional findings, expresses its purpose to be:

"to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular... to promote the formation of export trade associations and export trading companies by permitting bank holding companies, bankers' banks, Edge Act corporations and agreement corporations to invest in export trading companies, by reducing restrictions on trade financing provided by financial institutions, and by modifying the application of the antitrust laws to certain export trade."

ETCA, \textit{supra} note 7, § 102(b).

\textsuperscript{58} ETCA, \textit{supra} note 7, § 103.

\textsuperscript{59} Id. § 104.

\textsuperscript{60} Id. § 202.

\textsuperscript{61} Id. § 203.
certain provisions of the Federal Reserve Act\textsuperscript{62} and the Export-Import Bank Act of 1945.\textsuperscript{63}

(iii) Title III provides for the issuance of Certificates of Review that serve as limited exemptions for all export trading companies from antitrust violations.\textsuperscript{64} This advance certification procedure enables ETC's to enter into agreements and transactions without the threat of criminal and civil sanctions for antitrust violations.\textsuperscript{65}

(iv) Title IV, the Foreign Trade Antitrust Improvement Act of 1982, amends portions of the Sherman Act and the Federal Trade Commission Act.\textsuperscript{66} This title provides exemptions from these acts for the purposes of export trade unless "such conduct has a direct, substantial, and reasonably foreseeable effect on domestic or import trade, or commerce opportunities."\textsuperscript{67} Title IV did not provide the protection H.R. 5235, its predecessor, provided from the Clayton Antitrust Act. Only under the Certification of Review procedure under Title III is such protection afforded.\textsuperscript{68}

C. The Banking Provisions

Title II to the ETCA (BESA) represents a radical departure from past perceptions concerning the necessary division between banking and commerce. BESA is indicative of Congress' realization of the need to and intent to utilize the resources special to the banking industry to promote export trading. Undercapitalization and inexperience in dealing with problems associated with international finance were identified during Congressional hearings as significantly hindering the expansion of the growth of export trade operations in the United States.\textsuperscript{69}

The ETCA exemplifies Congress' belief that banks are a

\begin{itemize}
  \item \textsuperscript{62} Id. §§ 203(3)(E), 207.
  \item \textsuperscript{63} Id. § 206.
  \item \textsuperscript{64} Id. §§ 306-312.
  \item \textsuperscript{65} Id. § 306.
  \item \textsuperscript{66} Id. §§ 402, 403.
  \item \textsuperscript{67} See 15 U.S.C. § 6a (1982).
  \item \textsuperscript{68} ETCA, supra note 7, §§ 302, 303.
  \item \textsuperscript{69} S. REP. No. 27, 97th Cong., 1st Sess. 4 (1981).
\end{itemize}
necessary component in an export trade transaction. Due to their broad multinational contacts with domestic manufacturers interested in exporting their goods and their familiarity both with foreign markets and finance, banking organizations are thought to be able to contribute far more than money to export trade transactions. While there remain some limitations restricting and regulating banking practices in the export area, the opportunities are now numerous for bank-related entities to contribute, directly or indirectly, to United States export trade operations.

1. Use of the bank holding company vehicle. The bank holding company (BHC) was chosen by Congress as the primary vehicle for facilitating the development of export trading companies through banking units. As the House-Senate Conference Report states:

   By placing the ETC within the bank holding company structure, rather than within the bank, as the Senate bill provided, the conferees believe that adequate safeguards will continue to exist to minimize potential risk to the bank or banks within the holding company structure and that adequate separation will exist between a bank's involvement in export trade activities and its deposit taking function.

In addition to BHC's, BESA permits Edge Act subsidiaries (Edges) of BHC's, Agreement corporation subsidiaries of BHC's, and bankers' banks to own and to

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71 H.R. REP. NO. 924, supra note 57.
72 Edges are federally chartered international banking corporations in which state, national, and foreign banks subject to the FRB may invest. See, e.g., Kelley, Edge Act Corporations After the International Banking Act and New Regulation K: Implications for Foreign and Regional or Smaller Banks, 20 VA. J. INT'L L. 1 (1979). See also Robinson, The Use of Edge Act Corporations Formed under the Laws of the United States of America by Foreign Banks, 17 INT'L L. W. 407 (1983).
73 Agreement corporations are state or federally chartered international banking corporations that are historical predecessors to Edges. Due to the more comprehensive federal scheme for Edges, agreement corporations are not widely utilized today. See J. NORTON & S. WHITLEY, supra note 39, at § 14.03[9].
74 A bankers' bank is a bank whose only clients are other banks. Small banks
control an ETC. The strong preference expressed in the House-Senate Conference for using the bank holding company structure restricted the previously active participation of Edges in overseas banking business.\(^7\) Despite the traditional use of Edges as a mechanism for domestic banks to engage in foreign transactions, the conferees agreed that in order to maintain effectively sound banking practices and to protect the integrity of banking and non-banking enterprises only Edges that are subsidiaries of BHC's (and not of a bank) would be eligible to invest in ETC's.\(^7\)

BESA is designed, in part, as an amendment of the Bank Holding Company Act of 1956 (BHCA).\(^7\) As such, the general definitions and general constraints on BHC's activities, already in the BHCA, would apply automatically to investments in ETC's. However, the ETCA expanded the traditional definition of a BHC to include a bankers' bank.\(^7\)

Under the BHCA, the FRB has general authority over bank holding company activities.\(^7\) Given the expressed opposition of the FRB to BHC investment in ETC's, the conferees thought it was necessary to include a special section in the ETCA regarding the purpose of the ETCA and the role of the FRB. Accordingly, the Act states:

The Congress hereby declares that it is the purpose of this title to provide for meaningful and effective participation by bank holding companies, . . . in the financing and development of export trading companies in the United

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\(^7\) See Waxman, *supra* note 70, at 17.

\(^7\) While Edge Act corporations can be owned by either banks or bank holding companies, they are almost always subsidiaries of banks. Therefore, if certain limitations were not imposed, permitting an export trading company within an Edge Act corporation would effectively place it within the bank itself.


\(^7\) *Id.* § 1843(c)(14)(F)(iii).

\(^7\) On BHCA regulation generally, see, J. NORTON & S. WHITLEY, *supra* note 39, at 15.
States. In furtherance of such purpose, the Congress intends that in implementing its authority under 4(c)(14) of the Bank Holding Company Act of 1956, the Board of Governors of the Federal Reserve System should pursue regulatory policies that:

1) provide for the establishment of export trading companies with powers sufficiently broad to enable them to compete with similar foreign owned institutions in the United States and abroad;

2) afford to United States commerce, industry, and agriculture, especially small and medium-size firms, a means of exporting at all times;

3) foster the participation by regional and smaller banks in the development of export trading companies; and

4) facilitate the formation of joint venture export trading companies between bank holding companies and non-bank firms that provide for the efficient combination of complementary trade and financing services designed to create export trading companies that can handle all of an exporting company's needs.\textsuperscript{80}

The conferees also included a special provision in the Conference Report entitled "Guidance to the Federal Reserve Board" that outlines more fully the objectives of the ETCA.\textsuperscript{81}

While substantively agreeing with the thrust of the House legislation to channel the risks of ETC's through BHC's, the conferees attached additional safeguards to the final ETCA to reduce potential risks to depositors and to appease the FRB.\textsuperscript{82} The conferees' approach was to ensure the growth of export trading without endangering the banking industry through too many or too few limitations. In addition to providing directives to the FRB regarding its role in ETC expansion, the legislation sets forth specific instructions to banking organizations and

\textsuperscript{80} ETCA, \textit{supra} note 7, at § 202.

\textsuperscript{81} See H.R. REP. No. 924, \textit{supra} note 57.

\textsuperscript{82} Id.
the procedures that must be followed before engaging in an export trading transaction.

2. Investment limitations. In its effort to limit the aggregate financial exposure of banking organizations, the ETCA sets a statutory limit for an investment by a BHC, Edge, or Agreement corporation of five percent of its consolidated capital and surplus in one or more ETCs. This limit applies in the aggregate regardless of whether the investment is in one or several ETCs. Limits are also imposed on the amount of direct or indirect credit that a BHC may extend to an ETC or its affiliate. Extensions of credit are limited to a total of ten percent of the BHC's consolidated capital and surplus.

Extensions of credit are also subject to affiliated transaction restrictions of section 23A of the Federal Reserve Act. The ETCA addresses the FRB's concerns about preferential treatment or conflicts of interest with respect to such loans by prohibiting BHCs or their bank subsidiaries from extending credit to an affiliated ETC under terms that are more favorable than those offered to borrowers with no relationship to the lender. In addition, a nonbanking Edge or Agreement corporation subsidiary of a BHC may invest up to twenty-five percent of its consolidated capital and surplus in an ETC. This amount is subject to a restriction of five percent, in the aggregate, which the BHC parent may invest in ETCs.

3. Approval procedure. Prior to a BHC, Edge, or Agreement corporation investment in an ETC, notice must be given to the FRB. The ETCA gives the FRB sixty days to disapprove of a notice of a proposed investment, subject

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83 ETCA, supra note 7, § 203 (as codified in 12 U.S.C. § 1843(c)(14) (1982)).
84 Id. (as codified in 12 U.S.C. § 1843 (c)(14)(B)(i) (1982)).
85 Id. (as codified in 12 U.S.C. § 1843(c)(14)(F)(iii) (1982)). The ETCA in section 203 exempts extensions of credit from any collateral requirement in effect on October 1, 1982; since an amendment to section 23A became effective on October 15, 1982 as part of the Garn-St Germain Depository Institutions Act of 1982, credit by both subsidiaries to ETC affiliates is inhibited.
86 Id. (as codified in 12 U.S.C. § 1843(c)(14)(B)(iii) (1982)).
87 Id. (as codified in 12 U.S.C. § 1843 (c)(14)(E) (1982)).
to a thirty day extension if the Board determines that the information submitted was (i) insufficient, or (ii) substantially inaccurate. If the FRB does not issue a disapproval within the time period, the BHC may proceed with the investment.88

The conferees were concerned that if they did not specify a reasonable time period in which the FRB was required to act, unnecessary delays might result. The approval process insures that investments are subject to review while restricting the FRB to a specified period beyond which it cannot delay the BHC's investment without issuing a disapproval. Given the initial reluctance of the FRB to any bank participation in ETCs, this provision was viewed as important for preventing intended or unintended administrative logjams.89

The ETCA, as it amends the BHCA, allows for disapproval of proposed investments in an ETC only if the FRB determines:

(i) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;
(ii) the FRB finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company; or
(iii) the bank holding company fails to furnish the information required by FRB regulations.90

The legislative history of the amendment makes it clear that Congress intended the FRB to "focus on risk to the bank, as opposed to other affiliates, and on the specific impact the proposed investment will have on the bank."91 Without imposing unduly severe restrictions, Congress

88 Id. (as codified in 12 U.S.C. § 1843(c)(14)(A) (1982)).
89 See Seberger, supra note 10, at 488.
demonstrated its aim to provide adequate regulatory provisions for ensuring the stability of the banking industry.

The FRB has recently liberalized the application process for BHCs wishing to establish ETCs. Under these new regulations, an application may be eligible for review at the local Federal Reserve Bank level if it meets certain criteria:

(i) the proposed ETC will be a wholly-owned subsidiary or a joint venture with an individual or individuals involved in the operation of the ETC;
(ii) the BHC investor and its lead bank are in acceptable financial condition;
(iii) the ETC proposes to take title to goods only against firm orders, except that it may carry an inventory of goods whose value is no more than $2 million;
(iv) the ETC does not propose to engage in product research or design, product modification or activities not specifically listed in 12 U.S.C. § 1843(c)(14)(ii) of the BHCA, which defines "export trade services;"
(v) the assets to capital ratio of the export trading company will not exceed 10:1; and
(vi) the notice presents no significant policy issues on which the Board has not previously expressed its view.92

If these criteria are not met, then the application will be reviewed by the FRB in Washington; failure to meet the criteria does not indicate that the FRB will necessarily disapprove the application. However, the use of such delegation criteria by the FRB appears to be an indirect means for encouraging such conditions as the 10:1 leverage ratio.

4. Scope of Activities. The ETC's in which BHC's may invest are defined in BESA (Title II of the ETCA). The final version of this title allows bank-affiliated ETC's to operate "principally" for purposes of exporting goods instead of "exclusively" as the House version required. The Conference Report indicates that this alteration does not reflect a relaxed commitment to export expansion but rather an

acknowledgement by the conferees that ETC’s will have to engage in “importing, barter, third party trade and related activities” to further the purpose of the ETCA.\textsuperscript{93} Under the amended provisions of the BHCA, an export trading company is defined as:

[A] company which does business under the laws of the United States or any State, which is exclusively engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods and services produced in the United States or for purposes of facilitating the exportation of goods and services produced in the United States by unaffiliated persons by providing one or more export trade services.\textsuperscript{94}

In addition to defining the term “export trading company,” BESA offers a list of export trade services that an ETC may provide. These services include, but are not limited to:

(i) consultation;
(ii) international market research;
(iii) advertising;
(iv) marketing;
(v) insurance (other than acting as principal, agent or broker in the sale of insurance on risks resident or located, or activities performed, in the United States, except for insurance covering the transportation of cargo from any point of origin in the United States to a point of final destination outside the United States);
(vi) product research and design;
(vii) legal assistance;
(viii) transportation, including trade documentation and freight forwarding;
(ix) communication and processing of foreign aid to and for exporters and foreign purchasers;

\textsuperscript{93} The Conference, however, did not expect the preponderance of ETC activity to involve importing. See H.R. Rep. No. 924, \textit{supra} note 57, at 2506.

\textsuperscript{94} ETCA, \textit{supra} note 7, § 203 (adding new 12 U.S.C. § 1843 (c)(14)(F)(i) (1982)).
warehousing.

(xi) foreign exchange; and

(xii) financing, and taking title to goods provided such services are offered "to facilitate the export of goods or services produced in the United States".95

The FRB has, however, been resistant to an expansive interpretation of the term "export trade services" and is presently refusing to permit the direct export of services generally.96

Further, BESA contains express provisions restricting a bank-related ETC's involvement in manufacturing and agricultural production. BESA does, however, permit such an ETC to undertake "incidental product modification including repackaging, reassembling or extracting byproducts" where these functions are necessary to promote the product sale in foreign markets or conform to foreign standards.97

Additional restrictions contained in the ETCA are based on general banking policy considerations; as such, amendments to the BHCA expressly provide that investments in ETC's cannot be used to avoid restrictions that apply to BHCs. For example, an ETC may only engage in underwriting, selling, or distributing of securities to the extent that the BHC owning the ETC may do so.98 In addition, an ETC may not take a position in a commodity, a commodity futures contract, a security or foreign exchange unless it is a necessary component of business activities. Violations of this latter provision may result in termination by the FRB of a BHC's investment in an ETC

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95 ETCA, supra note 7, § 203 (adding new 12 U.S.C. § 1843(c)(14)(F)(ii) (1982)). The Senate bill used the phrase "including but not limited to" to make clear that the list is a non-exclusive one. H.R. REP. No. 924, supra note 57, at 2507.
96 In practice the FRB has refused to permit bank-related ETCs directly to export their services. This is contrary to the Commerce Department's interpretation of the ETCA.
that is not in compliance.99

5. Interfacing with U.S. Eximbank. While for the most part BESA amends the BHCA, it also contains provisions directed at the United States Export-Import Bank (Eximbank). Under the ETCA, the Eximbank is to provide guaranties for loans extended by financial institutions to ETC’s and to other exporters when inadequate financing is available in the private markets or when such guaranties are necessary to promote export trading.100

Prior to passage of the ETCA, parties receiving exported goods could secure loans and guaranties but there was no mechanism for exporters to receive the same benefits. The ETCA ensures that both the exporters and the buyers can take full advantage of the services offered by the Eximbank.101

Eximbank has instituted a new export trading company loan guaranty program. In fact, the first two guaranties under this program have been used to finance United States companies’ sales to The People’s Republic of China, although the recipients are not actual trading companies but are “other exporters” as permitted by the legislation.102

a. Working Capital Guarantee Program. Relevant to the ETC is Eximbank’s new Working Capital Guarantee Program (WCGP).103 This program provides exporters with access to working capital loans that (i) would not be provided without Eximbank’s assistance, and (ii) without which, the exporter would not be able to export. Most of the working capital loans guaranteed by Eximbank are contemplated ultimately to support exports from small or medium-size, minority, or agricultural exporters, especially “new-to-market” producers.

99 Id. (adding new 12 U.S.C. § 1843(c)(14)(D) (1982)).
100 Id. § 206.
102 See 19 U.S. Export Weekly (BNA) 421-22 (June 14, 1983).
103 On this program, see generally Summary of Eximbank Programs, comprising Chapter 21 to Norton, supra note 6.
The ETC and “other exporters” are eligible exporters under the WCGP. The Eximbank guaranty, however, will cover only loans used for export-related activities and normally will have a term of one to twelve months (as requested by the lender). The guaranty will be only for ninety percent of the principal amount of the loan and will cover interest up to the lesser of (i) the stated rate of the loan, or (ii) one percent above the U.S. Treasury borrowing rate for comparable maturities up to the date of default. Under the WCGP, Eximbank requires that the “eligible lender” is secured with inventory of exportable goods or accounts receivable on goods or services already exported or other collateral determined appropriate by Eximbank. This security must have a value, as determined by the lender and Eximbank, of not less than 110 percent of the outstanding loan balance.

b. Broader possible financing innovations. The whole area of Eximbank financing generally is undergoing considerable reevaluation. Eximbank is aggressively pushing private bank involvement in export financing, even at the earliest stage, while the commercial banks are pushing Eximbank to provide more competitive and innovative financing techniques. For example, one leading private banker in the trade financing area has recently suggested that Eximbank consider the following innovations for assisting U.S. exporters to compete more effectively in world markets (i.e., to utilize U.S. capital markets’ capabilities to support American exporters):

First, are the long-dated forward transactions. Simply stated, a long-dated forward allows a borrower to obtain long-term funding in a particular currency by borrowing in another currency where the market is broader or interest rates are lower. The proceeds of the borrowing are converted into the desired currency, and the foreign exchange exposure involved in the borrower’s interest and principal payments is hedged with a series of forward exchange contracts.

Long-dated forwards are particularly useful in export financing, where most official export credits are subsidized. By using a long-dated forward, an importer can borrow
such subsidized funds and convert them into almost any necessary currency — and generally end up paying a below-market interest rate.

Second, . . . is the foreign currency option. This is a contract that gives the customer an option to buy — or sell — a specified amount of currency at a fixed exchange rate. One of the most obvious uses of options in export transactions is in the bidding process.

From the moment an exporter submits a bid until the contract is awarded, it can be a long time — not just in days but also . . . [psychologically] because during that period the exporter has an exposure of unknown dimensions. When an exporter bids in a foreign currency, he can be certain that the exchange rate will move before the contract is awarded, so that he may have a “loss” even before he wins the contract. But he can protect himself against such a loss — of dollars and of sleep — by entering into an option contract at the time of the bid.

[Third, is an] interest rate swap. An interest rate swap is an agreement between a commercial bank and a borrower under which the bank agrees to exchange interest payments on a national principal amount of debt. [One] can swap fixed interest into floating or floating interest into fixed, because banks in this market need to work both sides.

This technique can be a very useful tool for an exporter. For example, suppose an exporter’s national export-credit agency has quoted a fixed interest rate to the exporter’s potential customer. By using an interest rate swap, the exporter can offer an alternative in the form of a floating interest rate. And if the fixed rate charged by the export agency is below the market rate for that currency, the floating rate could also be below market.104

These three techniques — long-dated forwards, currency options, and interest rate swaps — may offer the possibilities for reducing costs and risks, especially where very long time periods are involved, where the uncertainty is extreme, or where the competition is intense.

Each of the techniques was developed in the private financial markets. Many U.S. bankers, exporters, and Congressmen would like to see these capabilities put to work by Eximbank to help American exporters. If this can be done, the financing possibilities for eligible ETC’s and other U.S. exporters might be significantly enhanced. The Eximbank is presently considering implementing the techniques referred to above and other innovative financing techniques.  

6. Liberalizing rules for banker’s acceptances. Finally, the ETCA amends the Federal Reserve Act by liberalizing the amount of bankers’ acceptances that a bank can issue. A bankers’ acceptance is a draft drawn on, and accepted by, a bank (not necessarily the drawee bank). Bankers’ acceptances are widely used in export trading activities to provide advance payment to an exporter of an amount due on exported goods.  

The regulation of bankers’ acceptances is governed by the seventh paragraph of section 13 of the Federal Reserve Act. The ETCA amends this paragraph to permit a banking institution to make such acceptances, or to be obligated for participation shares in such acceptances, in an amount not to exceed at any time the aggregate amount of 150 percent of the bank’s capital and surplus. The FRB was given, and has exercised, its statutory discretion to increase the amount of acceptances a banking institution may make (or be obligated for participating shares) in an amount not to exceed 200 percent of the bank’s capital and surplus. Ineligible acceptances are subject to FRB reserve requirements.

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111 See id. at 28,971.
The ETCA requires the Federal Financial Institutions Examination Council to report to the Congressional banking committees, within eighteen months of enactment of the ETCA, the results of its current study on bankers' acceptances.\textsuperscript{112} The effect of the ETCA provisions is to free up this form of financing, enabling small and medium exporters to benefit from the use of bankers' acceptances.

D. The Antitrust Provisions

As mentioned above, the ETCA contains various provisions related to antitrust matters.\textsuperscript{113} For example, the ETCA makes certain amendments to the Sherman Act and to the Federal Trade Commission Act to take into account the objectives and provisions of the ETCA.\textsuperscript{114} But perhaps the main antitrust significance concerns the procedures for the issuance of an Export Certificate of Review.

1. The Export Certificates of Review. The ETCA authorizes the Commerce Department to issue, with the concurrence of the Justice Department, an Exportation Certificate of Review to bank and non-bank related ETCs.\textsuperscript{115} Upon filing the prescribed application and information required by regulations, a Certificate of Review will be issued according to statutory standards. The applicant must establish that its specified export trade activities will:

(i) result in neither a substantial lessening of competition nor restraint of trade within the United States, nor a sub-


\textsuperscript{113} See ETCA, supra note 7, §§ 402, 403.


\textsuperscript{115} ETCA, supra note 7, § 301.
substantial restraint of the export trade of any competition of the applicant;
(ii) not unreasonably enhance, stabilize or depress prices within the United States of the goods, wares, merchandise or services of the class exported by the applicants;
(iii) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant; and
(iv) not include any act that may reasonably be expected to result in the sale or consumption or resale within the United States of the goods, wares, merchandise or services exported by the applicant. 116

The Secretary of Commerce, with the concurrence of the Attorney General, has ninety days after receipt of the application to determine if these standards have been met. 117

The Certificate of Review, when issued, will specify:
(1) the export trade, export trade activities and methods of operation to which the Certificate applies
(2) the person to whom the Certificate of Review is issued and
(3) any terms and conditions the Secretary of Commerce or the Attorney General deems necessary to assure compliance with the [statutory] standards. . . . 118

If an application is denied, the Secretary of Commerce must notify the applicant of this determination and the reasons for it. 119 In such instances, an applicant may, within thirty days of receipt of such notification, request the Secretary of Commerce to reconsider the determination within thirty days of receipt of the request. 120 Administrative decisions concerning applications for export trade Certificates of Review are subject to judicial review before an appropriate district court of the United States in

116 Id. § 303(a).
117 Id. § 303(b).
118 Id.
119 Id. § 303(d)(1).
120 Id. § 303(d)(2) and (e).
a suit brought by an aggrieved party.\textsuperscript{121}

2. Evaluation. An Export Trade Certificate of Review provides a broad immunity for an ETC from criminal or civil antitrust actions, including immunity from class actions and treble damages.\textsuperscript{122} However, any person who has been injured as a result of conduct engaged in pursuant to a Certificate of Review may bring a civil action for injunctive relief, actual damages, the loss of interest in actual damages, and the cost of suit (including reasonable attorney’s fees) for failure of the ETC to comply with the statutory standards.\textsuperscript{123} Such action must be brought within two years from the date the plaintiff has notice of the failure to comply with the statutory standards, but in any event within four years after the cause of action is approved.\textsuperscript{124} In any action, there will be a statutory presumption that the conduct specified in, and that complies with, a Certificate of Review, satisfies the statutory standards.\textsuperscript{125} In addition, if the plaintiff is unsuccessful, a court may award the defendant its costs and reasonable attorneys’ fees incurred in defending the suit.\textsuperscript{126}

In addition to the disclosure required in the initial application, every person to whom a Certificate of Review is issued must submit to the Secretary of Commerce a prescribed annual report.\textsuperscript{127} Furthermore, every such person must promptly notify the Secretary of Commerce of any relevant changes in the information supplied in the original application.\textsuperscript{128} This overall disclosure requirement may provide numerous problems for the applicant.

The Certificate of Review procedure is not without its limitations. First, it only offers advantages where the conduct of the ETC would otherwise violate the antitrust

\textsuperscript{121} Id. § 305.
\textsuperscript{122} Id. § 306(a).
\textsuperscript{123} Id. § 306(b)(1).
\textsuperscript{124} Id. § 306(b)(2).
\textsuperscript{125} Id. § 306(b)(3).
\textsuperscript{126} Id. § 306(b)(4).
\textsuperscript{127} Id. § 308.
\textsuperscript{128} Id. § 304(a).
laws. Even if this procedure provides a threshold advantage, it may be outweighed by such other factors as:\textsuperscript{129}

(i) the effect of public disclosure upon confidential business relations and competitive position;\textsuperscript{130}
(ii) the effect of public disclosure upon giving rise to private civil lawsuits;
(iii) the adverse effect of a refusal for a Certificate; and
(iv) the general possibility of litigation under the new cause of action created by Title III of the ETCA for single damages, prejudgment interest, and attorneys' fees respecting unfair competition or foreseeable resale to U.S. customers.\textsuperscript{131}

Thus, careful planning needs to be undertaken by ETC management before becoming embroiled in the Certificate of Review procedure. To assist in such planning Commerce has issued guidelines.\textsuperscript{132} One expert suggests the following situations, for bank-related ETC's, that might warrant applying for a Certificate of Review:

(i) competing banks participating in the same ETC joint venture (although here total market share would be relevant factor);
(ii) a bank-related ETC joint venture involving two or more competing manufacturers;
(iii) a bank-related ETC being supplied by two or more competitors; or
(iv) a bank-related ETC that is involved in price-fixing, tying goods and services, long-term exclusive agreements, or joint bidding among competitors.\textsuperscript{133}

\textsuperscript{129} See Bruce & Pierce, supra note 114, at 1014-1016.
\textsuperscript{130} Section 309 of the ETCA does provide confidentiality under the Freedom of Information Act if the information is confidential or privileged and if the disclosure would "cause harm to the person who submitted the application." ETCA, supra note 7, § 309.
\textsuperscript{131} See ETCA, supra note 7, § 306a. However, class action and treble damage treatment are precluded.
\textsuperscript{133} See, e.g., Bankers Begin to Learn Ways to Set Up Export Trading Company Ventures, 20 U.S. EXPORT WEEKLY (BNA) 13 (Oct. 4, 1983).
V. RECENT USES OF THE ETCA PROVISIONS

As already discussed, the primary administrative uses of the ETCA are (i) application with the FRB for a bank-related ETC, and (ii) application with Commerce by any exporter for an antitrust Certificate of Review. To date, private availment of such uses has been far below original expectations, though in recent months an increase in private interest appears to be developing.\(^\text{134}\)

A. FRB Applications

During the first five months following issuance of the FRB Final ETC Rules in June 1982,\(^\text{135}\) out of approximately 15,000 banking organizations in the United States eleven bank-related ETC applications were received by the FRB: since that time, additional banking organizations have applied but only in limited numbers (in the 25-30 range).\(^\text{136}\) There are a number of possible reasons for the slowness of the banks to jump into the ETC arena, including the general unfamiliarity of banks with export trade business and the attendant risks and small profit margins, the present unfavorable world environment for new trade markets, the apparent lack of flexibility on the part of experts of the FRB on certain matters (e.g., treatment of services), and the general conservative approach of banks.\(^\text{137}\)

Those banks whose applications have been approved include Security Pacific, Citibank, Bank of America, Citicorp, Ranier Bancorporation, and U.S. BanCorp. In addition, as will be mentioned below, Sears and First Chicago have established a joint venture ETC. Furthermore, three New Jersey banks have applied for a joint ven-

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\(^{135}\) See 48 Fed. Reg. 26,455 (June 8, 1982). For updated information on applications, see infra note 146.

\(^{136}\) For detailed information on current involvent of banking organizations with ETC's, see American Banker, Sept. 21, 1984, at 20.

\(^{137}\) See Bankers Begin to Learn Ways to Set Up Export Trading Company Ventures, supra note 133.
ture ETC, Shawmut Corp. has acquired an existing non-bank ETC, and Society Corp. has formed a joint venture ETC with a multi-national metal working concern. While certain of these ETCs have limited service objectives and some have focused geographic objectives, many appear to be considering offering a full package of export services.\footnote{Information abstracted from weekly reports of U.S. Export Weekly And Wash. Fin. Rep.}

B. Commerce Department Applications

As of February 1, 1984, Commerce had issued approximately nine Certificates of Review. The applicants include:

(i) U.S. Farm-Raised Fish Trading Company, Inc., a Mississippi corporation, engaged in export sale of farm-raised catfish in Europe and the far East,
(ii) International Marketing and Procurement Services, Inc., a Pennsylvania firm representing U.S. manufacturers of sporting goods and leisure equipment and services;
(iii) Intex International Trading Co., Inc., a Connecticut corporation, representing specialized consulting engineering firms;
(iv) International Development Institute, which will operate through a Washington D.C. office to identify foreign buyers and to make referrals for exporting services, and to provide other export consulting services;
(v) DMT World Trade, which intends to enter into exclusive agreements with U.S. manufacturers and suppliers of construction, mining and farm machinery and equipment, motors and generators, motor parts and accessories, and pumping equipment;
(vi) Barlar International Inc. of Dallas, which will export a wide range of products to markets worldwide;
(vii) Universal Trading Group Ltd. of St. Louis, which will export health care goods and services, foodstuffs, and vehicle tires worldwide;
(viii) Trade Development Corp. of Chicago, which will export phonograph records and prerecorded tapes, used air-
liners and aircraft equipment, screws, bolts and nuts, and computer software, with major export markets in Asia, Australia, New Zealand and Oceana; and (ix) Texas First International Trading Company of Dallas, which will export a broad range of products worldwide.159

V. A MORE GENERAL USAGE: THE SEARS MODEL

Irrespective of the ETCA and related regulations, the significance of the ETC vehicle may only become far-reaching in the coming decade, particularly as the prospects for any dramatic improvement in the international economic and trade situation remain rather dim. Take for example the recent venture of Sears into the export trading business through its Sears World Trade, Inc. (SWT), an entity that is financed by banks and is a financier in trade in its own right.140 In addition, SWT is a recent joint-venturer with First Chicago Corp. in an ETC formed under BESA (i.e., Title II of the ETCA).141 The example of SWT is used in this article merely to illustrate the very broad possibilities for trading companies; although, it should be noted that to date SWT apparently has encountered substantial difficulties in converting its overall strategies into business and financial success.142

1. The Apparent Rationale. The primary reasons for Sears deciding to undertake this venture three years ago (with SWT commencing operations a little more than a year ago now) were:

(i) that Sears imports about a billion dollars a year into the Sears retail stores and concluded that it was an untenable situation politically in the United States over the long run

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159 Information abstracted from weekly reports of U.S. EXPORT WEEKLY.
140 See Hessler, Full Service Trading Companies - The Sears Model, comprising chapter 15 to Norton, supra note 6.
142 Recent events in the SWT saga indicate that at least during its initial stages, the Sears entry to the export trading area has not been as successful as had been anticipated. See Falling Short: Export-Trading Firms in U.S. Are Failing To Fulfill Promise, Wall St. J., May 24, 1984, at 1 col. 6.
to be such a massive importer, and clearly that importing position would increase over time;
(ii) that those imports provided a type of leverage, even if it was only a vague moral leverage, to begin to move the other direction, not only in terms of exports out of the United States but also in terms of third country trade; and
(iii) that generally, something needed to be done to diversify the trade flows within Sears.

The event that actually triggered the movement of Sears into becoming a trading company in its international operations was the overall diversification of Sears into financial services generally. In 1978 and 1979 Sears bought Dean Witter and Coldwell Banker, the former a large brokerage operation and the latter a very large real estate company. At that time Sears already owned Allstate Insurance, one of the major personal insurance companies in the United States. Thus, virtually overnight, Sears became a very strange looking company, dealing in everything from “stocks to socks”.

Although Sears’ management realized there would be perception problems in the United States, they also realized that, internationally, trading companies have been employed by the Phoenicians, the Venetians, the British and Dutch traders, and, more recently the Japanese. When one strips it to the bone, a trading company is merely a mixture of financial and commercial services. Sears was already committed to this domestically and, now, internationally with the start up of a trading company.

2. Three major business decisions. Three major decisions were taken in the first year of SWT’s operations that determined the place of this trading company in the Sears strategy and that also gave Sears a particular “window” on the problems that the international trade and financial systems face today.

First was the decision to become a general trading company, as distinguished from a consumer products trading company. Instead of turning around or attempting to
turn around the consumer products trade flows and to en-
gage in third country trade and U.S. exports in consumer
goods, the decision was made to embark on general trad-
ing. In essence, SWT would not exclude itself from trad-
ing anything in particular.

Second, the decision was made to establish SWT orga-
nizationally as the fifth business group of Sears. The
other four groups are: the Merchandise Group (i.e., retail
stores), Allstate, Coldwell Banker, and Dean Witter. As
such, Sears is now organized as a holding company in the
five major operational divisions (actually subsidiaries),
each with a considerable amount of independence under a
chairman-president structure. Each of these divisions is
required to report to the corporate parent and to the
other divisions. Thus, SWT was not designed as a service
entity for the rest of the Sears organization, but was
designed to be an independent profit center as quickly as
possible. As a counterpoint, the Sears Merchandise
Group has approximately $23 billion in sales, while SWT
obviously started at zero. This presents quite a pres-
surized challenge to SWT in its start-up operations.

Third, the decision was made to encourage SWT to
grow through acquisitions, joint ventures, and very ag-
gressive outside hiring and not to become a duplicate of
any particular Sears company in terms of culture or uni-
formity. While SWT is and apparently will remain a U.S.-
based trading company, it has been very active in acquir-
ing and building non-U.S.-based companies.

3. The initial growth. In terms of business operations,
SWT inherited a consumer products trading business.
However, it quickly embarked upon (i) forming a counter-
trade unit (which is now doing business based in Wash-
ington, D.C.), (ii) purchasing a very large consulting
company (which is doing international consulting in a
wide range of areas from defense consulting to manufac-
turing consulting in LDCs), and (iii) acquiring a forest
products trading business. All this seems incongruous,
but there may be a method to SWT’s madness.
Geographically, SWT is already in about ten different countries outside the United States, with a heavy emphasis in eastern Asia. SWT has an office in almost every major trading center in east Asia. Usually, the operations are locally incorporated with a local general manager reporting directly to the Washington D.C. corporate office. Additionally, SWT is in Europe (London, Frankfurt, Italy, and France) and Latin America (Brazil and Mexico).

4. The three business dimensions. SWT divides its trading business into three dimensions:

(i) industries in which one trades (e.g., agribusiness, wood, or large engines); (ii) the services provided, which can be sourcing or marketing, spot trading, consulting, or cargo management; and (iii) the geographic dimensions.

On the industry side, as already mentioned, SWT decided to become a general trading company. The mercantilist and protectionist obstacles were viewed as making it impossible for any company to specialize in only a few commodities or only a few products. As to the approach SWT would offer in a particular product line, SWT made a tentative choice to source goods more often than to market them.

In the services area, SWT, as a trading company, has undertaken cargo management. This function includes door-to-door transportation covering insurance of the goods, freighting, and freight forwarding. Sears has a very low rate shore-to-shore transport service in the United States, but did not have the same service internationally. Therefore, SWT entered a joint venture with the world's third largest international freight forwarder, Shanker International, to offer door-to-door cargo management throughout the world.

SWT also developed a sector of the company to provide consulting services and technical advisory services that match the particular complexity of world trade today. As an example, a large manufacturing consulting operation is run out of Chicago, staffed by consulting engineers who can advise a light industrial plant or some heavy industrial
and agribusiness operations that are susceptible to trade problems. The advice includes: how to set up the plant technically, how to set up the inventory systems, and how to assure product quality control to world market standards. Apparently there has been a large demand for this service. SWT has a similar set of consulting services in those sectors in which it intends to concentrate its conventional trading, such as the health sector. SWT will offer systems for advising foreign governments in health care options.

SWT is also beginning to develop a series of financing services respecting countertrade.\[^{149}\] SWT has set up a countertrade management unit for SWT which offers, among other things, a consulting service to U.S. and foreign heavy equipment exporters (defense exporters, heavy agricultural equipment exporters, etc.), who can move their goods only if they accept heavy offset obligations from foreign governments, and syndications of countertrade operations. In such a syndication (which has many similarities to a syndicated loan), one goes in and "takes off", for example, one hundred million dollars of countertrade obligation, and then shares that obligation with a number of other trading companies. Each company takes a ten million dollar slice, asserting that it can at least move that many goods.

Furthermore, SWT has a series of trade development services for advising both companies and countries on export development. These services are offered through a series of consulting companies, some of which Sears has purchased, some of which Sears has developed, and one of which has been set up under a joint venture with the First National Bank of Chicago (called Sears - First Chicago Trading Company). This joint venture ETC will be

\[^{149}\] Countertrade is a broad term embracing various forms of international trade transactions where deliveries to a foreign country are linked to imports from that country. See, e.g., Salacuse, Countertrade, comprising chapter 12 to Norton, supra note 6; Raemy-Dirks, Countertrade: Linked Purchases in International Trade, TRADE FINANCING (C.J. Dmur ed. 1981).
used primarily to generate clients for the export development services in the United States from the client base of First Chicago, chiefly in the Midwest.144

In the third business dimension, the geographic dimension, SWT does not yet appear to have a well defined strategy. The heaviest concentration of its business activities, however, is currently in Southeast Asia.

SWT is pessimistic about the world trading and financial environment for at least the remainder of the decade. Thus, its strategy seems to be to build a company that is capable of dealing for others with severe financial dislocations all over the world and to assist with substantial, new, and complicated political impediments to trade flows. SWT is sailing in a very competitive sea. Even the Japanese trading companies are seen as facing severe structural adjustment problems this decade, as they were built for high volumes of trade financed in rather simple terms with fairly low margins.145

VI. CONCLUDING OBSERVATIONS

There are several ways of looking at the ETCA and related legislation and regulations. On a short-term basis, they appear to be "much ado about nothing". Clearly, in the short-term, ETC's will not balance the U.S. trade deficit and will not significantly increase employment, even if the world economy were receptive to an expansion in world trade, which it is not. Also, bankers (by their nature, training, and recent exposure in the international arena) will be slow to become embroiled in export trade. If Sears has found difficulty in starting up its trading company operations, most banks will move slowly in this area. There are some short-term advantages, however, of the ETCA. Primarily these include a minimization of antitrust risks and the possibility of linking the banking community and its resources to the export trade industry.

144 See supra note 139.
145 On sogo shosha, see Young, supra note 32, and Dzuibla, supra note 32.
But, if one looks at the longer-term significance of what the ETCA may accomplish, the prospects appear brighter. In a positive and non-protectionist effort, a statutory and regulatory framework for a new "partnership" is being provided for the U.S. banking community, export industry, the Commerce and Justice Departments, the U.S. bank regulators, the Eximbank, and Congress for attacking the U.S. export trade problem. The ETCA is clearly only one step in the right direction, but it is a positive move.

More generally, outside its legal implications, the ETCA has brought a new focus to the general possibilities for ETCs. While the volume of the international flow of goods may not increase dramatically in this decade, the strain on one's ingenuity and skill in moving goods on an international scale will undoubtedly continue to increase. New services, new trading vehicles, and new financing techniques will, most assuredly, be required. If this new "partnership" can be successful in meeting these challenges, then the U.S. and the world economy will be benefited. The ETC, in this writer's view, can ultimately play a significant role in increasing U.S. exports.\textsuperscript{146}

\textsuperscript{146} Since the date of this article, March 15, 1984, the following additional developments have occurred:

Recently a Deputy Assistant Secretary of Commerce reported that he "has seen definite activity in the general export trading company area" since the passage of the ETCA. Fifty-five applications had been received by the Commerce Department since 1983 and more than two hundred companies have been advised. The Deputy Assistant Secretary predicted that thirty-eight certificates will be issued in 1984. In addition, he reported that twenty-four of the one hundred fifty U.S. banks with international operations have formed trading companies. See 20 U.S. EXPORT WEEKLY 907 (May 1, 1984). According to the Commerce Department, the U.S. trade deficit in 1984 was $123.3 billion.
