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## Banks and the Export Trading Company Act of 1982

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# Banks and the Export Trading Company Act of 1982

Cary Ferchill

## **Abstract**

The changes in United States antitrust laws effected by the Export Trading Company Act of 1982 have received the greatest public attention, probably because of the highly unusual procedure for antitrust immunity certification and the changes in United States antitrust jurisdiction. Given the history of banking law in the U.S, however, the bank investment provisions may prove to be revolutionary. This article will address exclusively the changes in the U.S. banking laws under the Act [The Export Trade Company Act of 1982] and the relevance these changes have on the banking business.

# BANKS AND THE EXPORT TRADING COMPANY ACT OF 1982

*Cary Ferchill\**

## INTRODUCTION

The United States trade deficit for 1982 was \$42.69 billion.<sup>1</sup> The size of the trade deficit is believed to have a major impact on unemployment in the United States.<sup>2</sup> In times of economic recession and high unemployment, such statistics are understandably disquieting to congressmen whose constituents may believe they are suffering due to unfair foreign competition. As a result, Congress has, in recent months, focused an unusual amount of attention on issues of international trade.<sup>3</sup> Most congressional efforts have been highly publicized, strongly protectionist measures to prevent the importation of foreign goods into the United States.<sup>4</sup> However, at least one recent trade measure taken by Congress has been aimed at reducing the trade deficit, not by preventing the importation of foreign goods into the United States, but by encouraging the exportation of American goods to foreign markets.

The Export Trading Company Act of 1982<sup>5</sup> (the Act) is a broadly supported, bipartisan effort of the United States Congress to promote American exports and export-related jobs through the

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1. This figure was released by the United States Department of Commerce on February 28, 1983. *Wall St. J.*, Mar. 1, 1983, at 5, col. 1.

2. See H.R. REP. No. 629, 97th Cong., 2d Sess. 8 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2467, 2471.

3. See, e.g., *Bills Amending Export Administration Act Introduced by Three in the Senate*, 18 U.S. EXPORT WEEKLY (BNA) No. 18, at 721 (Feb. 8, 1983); *Heinz Introduces FCPA Amendments Bill As Passed by Senate in Last Congress*, *id.* at 731; *98th Congress Gets Ready to Tackle "Full Plate" of Trade Issues in 1983*, 18 U.S. EXPORT WEEKLY (BNA) No. 15, at 606 (Jan. 18, 1983).

4. See, e.g., H.R. 5133, 97th Cong., 2d Sess. (1982), 128 CONG. REC. H9856-9909 (daily ed. Dec. 15, 1982) (passed by the House of Representatives on December 15, 1982, requiring certain percentages of domestic content for all automobiles sold in the United States).

5. Export Trading Company Act of 1982, Pub. L. No. 97-290, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233. The Act is composed of four separate titles: "Title I - Export Trading Company Act of 1982," "Title II - Bank Export Services Act," "Title III - Export Trade Certificates of Review," and "Title IV - Foreign Trade Antitrust Improvements Act of 1982." Titles I, III and IV of the Act are to be codified at scattered sections of 15 U.S.C. Title II of the Act is to be codified at scattered sections of 12 U.S.C.

creation of export trading companies (ETCs).<sup>6</sup> One of the Act's purposes is to permit United States companies to emulate the highly successful general trading companies, or *sogo shosha*, of Japan, which have been an important factor in Japanese trade successes of recent years.<sup>7</sup> The Act falls short of permitting American companies to form the equivalent of the *sogo shosha*.<sup>8</sup> It has nonetheless substantially reduced the statutory prohibitions and regulatory burdens embodied in the banking<sup>9</sup> and antitrust<sup>10</sup> laws which have

6. ETCs are defined by the Act in two distinct sections, although the definitions are essentially the same. The Act defines an ETC as:

[A] person, partnership, association, or similar organization, whether operated for profit or as a nonprofit organization, which does business under the laws of the United States or any State and which is organized and operated principally for purposes of—

(A) exporting goods or services produced in the United States; or

(B) facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services; . . . .

Act, § 103(a)(4), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1234 (to be codified at 15 U.S.C. § 4002). See also Act, § 203(3), *id.* at 1238 (to be codified at 12 U.S.C. § 1843(c)(14)(F)(i)).

7. The Japanese *sogo shosha* have developed over the past 300 years as the result of the particular historical and business circumstances of Japanese industry. They operate as giant trade intermediaries and combine activities as diverse as trade financing, foreign exchange, transportation, packing and shipping, insurance, customs documentation, wholesaling and distribution, licensing and joint ventures and manufacturing. In addition, they have become a major factor in Japanese domestic industry. Although these companies, and similar companies in other foreign countries, are regulated by banking and antitrust laws, such regulation is perceived to be far less important than the encouragement that the companies obtain from their governments to increase exports. See *Hearings on S. 2379 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 2d Sess. 145 (1980) (statement of James Sommers, President of the Bankers Association for Foreign Trade); Holland, *Making Use of Export Trading Companies*, 1 BANKING EXPANSION REP. (HBJ) No. 21, at 1, 9-10 (1982).

8. It is only fair to note that the Act is not intended to create the equivalent of *sogo shosha*, but to permit United States industry to emulate some of the methods of the *sogo shosha*. Furthermore, historical concerns with the role of banks in the United States have caused Congress to limit the role of bank-affiliated ETCs. See *infra* notes 14-27 and accompanying text. Moreover, it would be unrealistic to expect Congress, by a single act, to create in the United States what has taken centuries to develop in Japan.

9. See *infra* notes 31-116 and accompanying text.

10. This Article does not discuss the antitrust aspects of the Act. Briefly, title III of the Act creates a procedure by which companies wishing to join other companies in an ETC venture may apply to the Department of Commerce for a certificate of antitrust immunity with regard to their activities covered by the Act. Act, §§ 301-312, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1240-45 (to be codified at 15 U.S.C. §§ 4011-4021). Title IV of the Act limits the jurisdiction of the Sherman Act, 15 U.S.C. §§ 1-7 (1976), and the Federal Trade Commission Act, 15 U.S.C. §§ 41-51 (1976), to activities of United States corporations other than those which have an impact solely on foreign countries or, in certain circum-

prevented American banks from investing in ETCs and have discouraged American exporters from joining to form them.

The changes in United States antitrust laws effected by the Act have received the greatest public attention,<sup>11</sup> probably because of the highly unusual procedure for antitrust immunity certification<sup>12</sup> and the changes in United States antitrust jurisdiction.<sup>13</sup> Given the history of banking law in the United States, however, the bank investment provisions<sup>14</sup> may prove to be revolutionary. This Article will address exclusively the changes in United States banking laws under the Act and the relevance these changes have to the banking business.

### I. BANKING AND COMMERCE

The principal goals of the Act are to increase the flow of United States exports and to create export-related jobs.<sup>15</sup> Underlying the Act is a congressional belief that existing American trading companies are hampered in their efforts to market United States products abroad by a lack of operating capital and ready financing for export sales, and that these resources are readily available in existing United States banks.<sup>16</sup> The preamble to the Act states:

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stances, involve exports from the United States. Act, §§ 401-403, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1246 (to be codified at 15 U.S.C. §§ 6a, 45(a)). For a discussion of the antitrust aspects of the Act, see Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 *FORDHAM L. REV.* 201 (1982).

11. See, e.g., *Late Addition May Prove to be Key to Export Act*, *Legal Times*, Oct. 11, 1982, at 1, col. 3.

12. See *supra* note 10.

13. *Id.*

14. All of the banking provisions of the Act are contained in title II.

15. Act, § 102(b), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1234 (to be codified at 15 U.S.C. § 4001).

16. The House Report accompanying the Act states:

Lack of operating capital and financing is the major obstacle to expanded sales faced by American trading companies. Few U.S.-based trading companies are publicly traded corporations. Most are privately held, inhibiting their ability to raise capital through issuance of stock or other debentures. Few have significant assets except for accounts receivable, against which most U.S. banks have traditionally been reluctant to grant loans. Not only are trading companies generally among the most asset-poor firms competing for bank loans, their business success depends upon their ability to penetrate often poorly understood foreign markets and to take other risks, such as operating on the basis of oral rather than written contracts and sales agreements. The successful trading company turns such risks into profits by experience and intimate knowledge of its markets and customers. Such intangibles,

[I]f the United States trading companies are to be successful in promoting United States exports and in competing with foreign trading companies, they should be able to draw on the resources, expertise, and knowledge of the United States banking system, both in the United States and abroad.<sup>17</sup>

This view represents a radical departure from the principles embodied in the Glass-Steagall Act,<sup>18</sup> which was designed to remedy some banking practices believed to have contributed to the Great Depression. The Glass-Steagall Act created a complete separation between banking and commerce. Congress decided that this separation was necessary to ensure that the institutions which hold the financial deposits of United States industry and commerce were operated in a responsible manner and that concentrations of power resulting from combinations of banking and commercial firms were minimized.<sup>19</sup> The Glass-Steagall Act allows banks to engage only in traditional banking activities, unless the specific nonbanking activity in question is permitted by the Act.<sup>20</sup> Expansion of banking activity has taken place predominantly under section 24, paragraph 7,<sup>21</sup> which provides that a national bank may perform "all such incidental powers as shall be necessary to carry on the business of banking."<sup>22</sup>

however, rarely meet the requirements of bank lending officers who must justify their loans to cautious superiors and regulatory agencies. Trading companies, therefore, typically command the lowest loan ratings of any of the categories of businesses seeking bank loans. Most trading company officials who testified before or otherwise consulted with the committee indicated that they are able to borrow only on their personal lines of credit, or against company reserves pledged as collateral. They were unanimous in citing this as the major constraint on thier [sic] business, particularly when their foreign competitors have much greater access to short- and long-term financing.

H.R. REP. No. 637, 97th Cong. 2d Sess. (pt. I) 11 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2431, 2433.

17. Act, § 102(a)(10), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1234 (to be codified at 15 U.S.C. § 4001(a)(10)).

18. Banking (Glass-Steagall) Act of 1933, ch. 89, 48 Stat. 162 (1933) (codified as amended at scattered sections of 12 U.S.C.).

19. For a more complete account of the development of the Glass-Steagall separation, see Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 *BANKING L.J.* 483 (1971).

20. 12 U.S.C. § 24 (1976 & Supp. V 1981).

21. 12 U.S.C. § 24, para. 7 (Supp. V 1981).

22. *Id.* For an interesting analysis of this language, see Huck, *What is the Banking Business?*, 21 *BUS. LAW.* 537 (1966).

The concept of separating banking and commercial activities was strengthened in the Bank Holding Company Act of 1956<sup>23</sup> (BHCA), which was intended to bring under federal control state regulated and unregulated nonbanking companies which control banks.<sup>24</sup> The BHCA is similar to the Glass-Steagall Act in that it prohibits bank holding companies from investing in the shares of a company engaged in nonbanking activities unless such investment is specifically exempted.<sup>25</sup> Most exemptions from the BHCA have been granted under section 1843(c)(8),<sup>26</sup> which provides that a bank holding company may invest in a company engaging in nonbanking activities if the Board of Governors of the Federal Reserve System (the Board) determines such activities "to be so closely related to banking or managing or controlling banks as to be a proper incident thereto."<sup>27</sup>

In recent years, banks and bank holding companies have had moderate success in expanding the scope of activities permitted under the "incidental to" and "closely related" tests.<sup>28</sup> However, the extent to which the Board can extend its interpretation of these statutory tests to allow bank participation in new ventures such as ETCs is limited, even if one assumes that the Board wishes to do so.<sup>29</sup> Congress deemed it necessary to create an express statutory exemption to the traditional separation between banking and commercial activities to permit banks to participate in ETCs, which are entirely commercial enterprises. There was, however, great reluctance to breach this tradition.<sup>30</sup>

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23. 12 U.S.C. §§ 1841-1850 (1976).

24. See S. REP. No. 1095, 84th Cong., 1st Sess. 2 (1955).

25. 12 U.S.C. § 1843(a) (1976).

26. 12 U.S.C. § 1843(c)(8) (1976).

27. *Id.*

28. See Note, *Bank Holding Companies and Nonbank Activities*, 1978 ANN. SURV. AM. L. 209, 222 n.108.

29. There is no reason to believe that the Board wishes to do so. As explained below, the Board strongly opposed permitting banks to make investments in ETCs. See *infra* note 33 and accompanying text.

30. The House Report accompanying passage of the Act is instructive on this point: "It should be noted at the outset that both the previous Administration and the current Administration continue to adhere to the principle of the separation of banking and commerce while supporting increased bank participation in ETC operations, including equity ownership." H.R. REP. No. 629, 97th Cong., 2d Sess. 5 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2467, 2468.

## II. BANK INVESTMENTS IN ETCs

### A. *The Act*

The congressional solution to this dilemma was to allow banks and Edge Act<sup>31</sup> or agreement<sup>32</sup> corporations to invest in ETCs, but only indirectly, through their parent bank holding companies, and only within prescribed limits providing at least a marginal barrier between banks and ETCs.<sup>33</sup> Bankers' banks<sup>34</sup> are also permitted to make these investments<sup>35</sup> and are treated as bank holding companies for the purposes of the Act.<sup>36</sup> The Act amends the BHCA to permit a bank holding company to invest in any company which is an export trading company, without reference to whether the activities of the ETC are "closely related to banking."<sup>37</sup> The Act does place certain specific restrictions on these investments, however, in

31. Edge Act corporations are used to engage in international or foreign banking operations and are generally subsidiaries of bank holding companies. See 12 U.S.C. §§ 611-631 (Supp. V 1981).

32. Agreement corporations are organized primarily to do foreign banking. See 12 U.S.C. §§ 601-604 (1976).

33. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1236 (to be codified at 12 U.S.C. § 1843(c)(14)). This position was not universally accepted by the parties interested in the Act. Two bills, representing two distinctly different positions, were initially advanced to deal with bank investments in ETCs. The Senate bill, S. 734, 128 CONG. REC. H4649-54 (daily ed. July 7, 1982), would have permitted ETCs to be joined with banking institutions in any number of ways, including as a subsidiary of a bank, a bank holding company, an Edge Act or agreement corporation, a banker's bank or a federal savings bank. The House bill, H.R. 6016, *id.* at 4640-41, would have permitted ETCs to be joined to banks only through bank holding companies. The Senate and House Conference Committee agreed to utilize the House approach but amended it to permit Edge Act and agreement corporations, which are themselves subsidiaries of bank holding companies, to own shares in an ETC. See H.R. REP. NO. 686, 97th Cong., 2d Sess. 17-25 (1982) (Conference Rep. No. 924), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2487, 2503-09. In fact, this final position was strongly opposed by both the Board and the Federal Deposit Insurance Corporation. These agencies believed that permitting banks to engage in nonbanking activities in any manner would lead to a serious danger in the banking industry. See H.R. REP. NO. 629, 97th Cong., 2d Sess. 9 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2467, 2472; Letter from Paul A. Volker to the Hon. William Proxmire (Aug. 20, 1980).

34. Bankers' banks are banks organized solely to do business with other banks and their officers, directors or employees, and are owned primarily by the banks with which they do business.

35. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1238 (to be codified at 12 U.S.C. § 1843(c)(14)(F)(iii)).

36. See H.R. REP. NO. 686, 97th Cong., 2d Sess. 20 (1982) (Conference Rep. No. 924), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2487, 2504.

37. See *supra* notes 26-27 and accompanying text.

order to ensure that the reduced separation between banking and commerce does not result in danger to the soundness or safety of banking institutions. No bank holding company may:

- (1) invest greater than five percent of its consolidated capital and surplus in export trading companies;<sup>38</sup>
- (2) extend credit to ETCs in an amount totalling greater than ten percent of its consolidated capital and surplus;<sup>39</sup>
- (3) extend credit to an ETC in which it has invested, or a customer of such ETC, on terms more favorable than those afforded similar borrowers in similar circumstances, and such extension of credit may not involve more than the normal risk of repayment or present other unfavorable features;<sup>40</sup> or
- (4) engage in agricultural production activities or in manufacturing, except for such incidental product modification . . . as is necessary to make United States goods or services to conform to requirements of a foreign country and to facilitate their sale in a foreign country.<sup>41</sup>

These restrictions, while seemingly minor, may substantially deter bank investment in ETCs. The limitations on the size of investment in and credit to ETCs by a bank holding company or its subsidiaries<sup>42</sup> are not particularly restrictive. Only very small banks are likely to be constrained by these limitations, which reflect wise investment policy for banks or, for that matter, any enterprise.<sup>43</sup> The restrictions on credit terms and manufacturing activities,<sup>44</sup> however, may prove to be substantial limitations on the activities of bank-affiliated ETCs.

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38. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1236 (to be codified at 12 U.S.C. § 1843(c)(14)).

39. *Id.* (to be codified at 12 U.S.C. § 1843(c)(14)(B)(i)).

40. *Id.* (to be codified at 12 U.S.C. § 1843(c)(14)(B)(iii)). "Extensions of credit" are not further defined in the Act, although the Board defines the concept in Federal Reserve Board Regulation O, 12 C.F.R. § 215.3 (1982). The more important question is what constitutes more favorable terms under similar circumstances.

41. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1237 (to be codified at 12 U.S.C. § 1843(c)(14)(C)(ii)). The Conference Report indicates that the types of activities contemplated by this section are repackaging, reassembling and extracting by-products as necessary to enable American goods to conform with foreign requirements. H.R. REP. NO. 686, 97th Cong., 2d Sess. 22 (1982) (Conference Rep. No. 924), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2487, 2506.

42. *See supra* notes 38-39 and accompanying text.

43. A key to prudent banking is distributing risks over many investments. Such distribution prevents one bad investment from threatening the entire enterprise.

44. *See supra* notes 40-41 and accompanying text.

The restriction on favorable credit terms for extensions of credit by banks to affiliated ETCs<sup>45</sup> is an effort to prevent banks from favoring affiliated ETCs and their customers over other potential borrowers. Strict enforcement of this provision, however, may reduce the benefit of bank affiliation with an ETC. One of the logical results of bank affiliation with ETCs is the acquisition by the banks of considerable information about and control over the activities of the affiliated ETCs. Such information and control necessarily reduce the risks of international trade lending and should be expected to result in reduced rates for loans to affiliated ETCs, whose competitive position would thereby be enhanced. By prohibiting banks from extending credit to affiliated ETCs on more favorable terms than those afforded similar borrowers in similar circumstances, Congress may have undermined its expressed intent to increase trading companies' access to financing.<sup>46</sup> The resolution of this issue will primarily depend on how the term "similar circumstances"<sup>47</sup> is interpreted by the Board. If, in determining credit terms, banks are permitted to consider the increased control and information gained through affiliation with an ETC as one of the circumstances, then banks and their affiliated ETCs will be able to exercise greater flexibility in pricing and financing goods. Such flexibility has been seen as a key factor in the success of an ETC.<sup>48</sup> A stricter interpretation of "similar circumstances" may substantially reduce the incentive for bank affiliation with ETCs by limiting their flexibility.

The restriction on bank-affiliated ETC engagement in agricultural or manufacturing activities<sup>49</sup> is a limitation not shared by ETCs unaffiliated with banks.<sup>50</sup> This limitation may put bank-affiliated ETCs at a competitive disadvantage relative to ETCs unaffiliated with banks. Any limitation on the activities of bank-affiliated ETCs that is not shared by their competitors potentially deters banks from investing in ETCs.

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45. See *supra* note 40 and accompanying text.

46. See *supra* note 17 and accompanying text. Clearly, if a bank may not give special consideration to an affiliated ETC, as opposed to unaffiliated ETCs, there can be little benefit from affiliation.

47. See *supra* note 40 and accompanying text.

48. See *infra* note 102 and accompanying text.

49. See *supra* note 41 and accompanying text.

50. The provisions of title II of the Act apply only to bank-affiliated ETCs.

It should be noted that two additional restrictions on bank-affiliated ETCs are not shared by ETCs unaffiliated with banks. These restrictions are derived from the definition of ETCs in the banking provisions of the Act.<sup>51</sup> This definition provides that, for the purposes of the banking provisions of the Act, an ETC must be “exclusively engaged in activities related to international trade, and . . . organized and operated principally for purposes of exporting goods or services produced in the United States by unaffiliated persons by providing one or more export trade services.”<sup>52</sup>

The legislative history of the Act reflects the issue at stake in this definition. First, Congress recognized that the Act radically departed from previous law by permitting banks to engage in international commercial activities.<sup>53</sup> Congress wished to provide that this departure could not be used by banks as a vehicle for entry into other nonbanking activities.<sup>54</sup> Thus Congress limited bank-affiliated ETCs to activities in international trade.<sup>55</sup> Second, permitting bank-affiliated ETCs to engage in nonexporting activities, particularly importing, tends to counter the Act’s goals of increasing exports and creating export-related jobs.<sup>56</sup> Congress recognized, however, that to be effective ETCs must engage in countertrade, importing, barter, third party trade and various other activities that are not strictly exporting.<sup>57</sup> Thus, Congress used the term

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51. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1238 (to be codified at 12 U.S.C § 1843(c)(14)(F)(i)).

52. *Id.*

53. The House conference noted:

ETC affiliation with banks represents a breach of the traditional separation of banking and commerce and has necessitated provision for a minimal but adequate regulatory presence. It is the intent of the managers that the regulatory authority, in addition to facilitating bank-related investments in ETCs, examine, supervise, and regulate ETCs in such a way as to assure that bank-affiliated ETCs operate in a manner consistent with the Congressional intent: that ETCs promote, increase, and maximize U.S. exports.

H.R. REP. NO. 686, 97th Cong., 2d Sess. 22 (1982) (Conference Rep. No. 924), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2487, 2506.

54. *Id.*

55. *See supra* note 51 and accompanying text.

56. *See supra* note 15 and accompanying text.

57. The House conferees noted this fact:

The House, however, receded to the Senate by adopting the Senate’s use of the term “principally” in defining the purposes of a bank-affiliated export trading company. This is [sic] no way implies a reduced commitment to the bill’s purpose: U.S. export promotion. On the contrary, while it is understood that ETCs will

“principally” to indicate that bank-affiliated ETCs may engage in nonexporting activities, but only insofar as these activities advance the primary purposes of the Act by being principally for export.<sup>58</sup> These limitations are necessary in order to retain the traditional separation between banking and commercial activities other than international trade and to further the purposes of the Act. Nevertheless, they have a negative impact on banks’ incentives to affiliate with ETCs. Such affiliation necessarily imposes on ETCs limitations that are not shared by competitors.

Congress specifically recognized that the essence of an effective ETC is the ability to operate quickly, imaginatively and freely, without the limitations that might be imposed on otherwise legal activities.<sup>59</sup> To the extent that bank-affiliated ETCs are restricted in their activities, banks will be deterred from investing in them. This was the concern that Congress addressed in the provisions regarding regulation by the Board<sup>60</sup> of bank holding company investments in ETCs.

### B. *The Role of the Federal Reserve Board*

The Board is given authority to regulate bank holding company investments in ETCs.<sup>61</sup> The Act requires that a bank holding company notify the Board at least sixty days before making an investment in an ETC. The Board may extend this period for thirty days if the necessary information is not filed.<sup>62</sup> The bank holding company may make the proposed investment unless it is expressly disapproved by the Board within this time period.<sup>63</sup>

periodically have to engage in importing, barter, third party trade, and related activities, the managers intend that such activity be conducted only to further the purposes of the Act. The managers do not expect the preponderance of ETC activity to involve importing.

H.R. REP. NO. 686, 97th Cong., 2d Sess. 22 (1982) (Conference Rep. No. 924), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2487, 2506.

58. *Id.* See also *infra* notes 79-81 and accompanying text (discussing the Board’s interpretation of this definition).

59. See *infra* note 102 and accompanying text.

60. The Board has general power to regulate bank holding companies under the BHCA. 12 U.S.C. § 1844(b) (1976). See also H.R. REP. NO. 686, 97th Cong., 2d Sess. 20 (1982) (Conference Rep. No. 924), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2487, 2504.

61. Act, §§ 202, 203, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1235-36 (to be codified at 12 U.S.C. § 1843).

62. Act, § 203(3), *id.* at 1236 (to be codified at 12 U.S.C. § 1843(c)(14)(A)(i), (ii)).

63. *Id.*

The Board may disapprove the proposed investment only if:

(1) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;<sup>64</sup>

(2) the Board 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<sup>65</sup>

(3) the bank holding company fails to furnish the necessary information.<sup>66</sup>

Furthermore, the Board may require a bank holding company either to terminate its investment in an ETC or subject the investment to limitations or conditions if the Board determines that the ETC has taken positions in commodities or commodities contracts, in securities, or in foreign exchange, other than those necessary in the course of the ETC's business operations.<sup>67</sup>

Neither the Act nor the Board's proposed rules implementing the Act specifies procedures for protests or public hearings on a bank holding company's application to invest in an ETC. This fact makes ETCs more attractive investments for banks. Such procedures under the BHCA have substantially delayed and increased the cost of proposed bank holding company investments in other ventures.<sup>68</sup> Perhaps even more important from a procedural point of view, the Act places the burden on the Board to demonstrate that

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64. *Id.* (to be codified at 12 U.S.C. § 1843(c)(14)(A)(iv) (III)). These are the same criteria on which the Board is required to base its decision to permit bank holding companies to invest in other nontraditional banking activities under the BHCA. See 12 U.S.C. § 1843(c)(8) (1976).

65. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1236 (to be codified at 12 U.S.C. § 1843(c)(14)(A)(iv) (II)). Note that the effect on subsidiary banks and not on the bank holding company or other affiliates is the important factor. Congress intended that the Board prohibit investments only if they threaten the soundness of a bank. See H.R. REP. NO. 686, 97th Cong., 2d Sess. 21 (1982) (Conference Rep. No. 924), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2487, 2505.

66. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1236 (to be codified at 12 U.S.C. § 1843(c)(14)(A)(iv) (III)).

67. *Id.* (to be codified at 12 U.S.C. § 1843(c)(14)(D)). Congress is thus ensuring that the Act will not be used as an instrument to circumvent the Glass-Steagall separation between commercial and investment banking. See *supra* notes 58, 76 and accompanying text.

68. See, e.g., *American Bancorporation v. Board of Governors of the Fed. Reserve Sys.*, 509 F.2d 29 (8th Cir. 1974).

an applicant's proposed investment would violate the Act.<sup>69</sup> This approach is directly opposite from the traditional procedure, which required the applicant to demonstrate that the proposed investment was authorized. The Act provides no additional authority for appeal of decisions of the Board, although the BHCA provides for the appeal of any of the Board's orders to a United States court of appeals.<sup>70</sup>

The regulatory authority given to the Board by the Act may appear to be self-defeating, since the Board has strongly opposed these investments.<sup>71</sup> Congress, however, included in the preamble to title II of the Act a strong directive to the Board that the purpose of the Act was to encourage formation of ETCs by bank holding companies, bankers' banks and Edge Act corporations or as joint ventures between banking and nonbanking firms.<sup>72</sup> Congress stated that the Board is not to follow a policy designed to prevent these investments.<sup>73</sup>

The Board did not ignore this directive. In issuing its proposed regulations, the Board reassured the public that it would fulfill its

69. See Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1236 (to be codified at 12 U.S.C. § 1843(c)(14)(A)(iv)).

70. 12 U.S.C. § 1848 (1976).

71. See *supra* note 33 and accompanying text.

72. This congressional directive was included in the Act:

The Congress hereby declares that it is the purpose of this title 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. In furtherance of such purpose, the Congress intends that, in implementing its authority under section 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 nonbank 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.

Act, § 202, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1235-36 (1982) (to be codified at 12 U.S.C. § 1843).

73. *Id.*

responsibilities under the Act “in accordance with the spirit motivating and underlying the legislation,”<sup>74</sup> while firmly stating that “the Board is cognizant of its responsibilities for the supervision of bank holding companies.”<sup>75</sup>

### C. Proposed Regulations of the Federal Reserve Board

The Board’s proposed regulations deserve close scrutiny. Several points in the Act are unclear and the proposed rules attempt to resolve some of the ambiguity. As discussed above,<sup>76</sup> the Act defines an ETC, for the purposes of the banking provisions,<sup>77</sup> as a United States company “exclusively engaged in activities related to international trade . . . operated principally for purposes of exporting goods or services produced in the United States.”<sup>78</sup> The proposed regulations would refine this definition to “a company that is exclusively engaged in activities related to international trade and [which] derives more than one-half its annual revenues from the export of, or from facilitating the export of, goods and services produced in the United States.”<sup>79</sup> This proposed definition is very liberal because it permits bank-affiliated ETCs to engage extensively in nonexporting activities. However, it also ensures that, on balance, bank-affiliated ETCs will increase exports more than they

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74. 48 Fed. Reg. 3376 (1983). This position could be considered generous given the Board’s staunch opposition not only to commercial investments by bank holding companies, but also to joint ventures between multiple bank holding companies and between bank holding companies and nonbanking companies. See *supra* note 33. Assuming that the Board does an effective job of implementing both parts of its responsibility, encouraging ETCs and supervising bank holding companies, the goals intended by Congress will be achieved. The legislators were confident of the Board’s cooperation.

The risks of operating an ETC within a bank itself would, [by permitting direct investments by bank holding companies only] be precluded by the Act, and the existing ample bank holding company and bankers’ bank supervisory and regulatory resources of the Federal Reserve System would be available to prevent undue risk taking.

H.R. REP. No. 629, 97th Cong., 2d Sess. 9 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2467, 2472.

75. 48 Fed. Reg. 3376 (1983).

76. See *supra* note 51 and accompanying text.

77. *Id.*

78. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS 1233, 1238 (to be codified at 12 U.S.C. § 1843(c)(14)(F)(i)).

79. 48 Fed. Reg. 3376 (1983) (to be codified at 12 C.F.R. § 211.32(a)) (proposed Jan. 19, 1983).

increase imports.<sup>80</sup> Such a construction is reasonable given the increasing importance of countertrade and bartering in international trading.<sup>81</sup>

As noted above,<sup>82</sup> the Board is authorized to terminate a bank holding company's investment in an ETC if the Board finds that the ETC has taken positions in commodities, securities or foreign exchange other than those necessary in the course of the ETC's export trading operations.<sup>83</sup> This provision is intended to prevent banks from venturing into various aspects of investment banking through their investments in ETCs. The Board has recognized that, under this provision, bona fide hedging<sup>84</sup> should be permitted in the ordinary course of trade, but the Board intends to prohibit speculation.<sup>85</sup> For guidance as to the thin line between hedging and speculation, the Board looks to its previous definitions of hedging, as opposed to speculation, in connection with forward and financial futures contracts and to the rules of the Commodities Futures Trading Commission in connection with commodity contracts.<sup>86</sup>

80. See *supra* notes 51-58 and accompanying text.

81. Countertrade is an arrangement in which traders agree that in return for the buyer's purchase of goods from the seller, the seller will purchase a certain amount of goods from the buyer in a related transaction. Bartering is similar, except that instead of two transactions involving sales for money, one transaction takes place with only an exchange of goods. Both transactions can take place among more than two parties. These kinds of trade arrangements tend to make it difficult for a trader to be sure whether it is a net importer or exporter on a given transaction. Bartering and counter-trade transactions have gained increasing importance in recent years. See *New Restrictions on World Trade*, *Bus. Wk.*, July 19, 1982, at 118-22.

82. See *supra* note 67 and accompanying text.

83. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS 1233, 1237 (to be codified at 12 U.S.C. § 1843(c)(14)(D)).

84. Hedging is generally used to refer to activities with a legitimate economic purpose in reducing risks involved in a particular transaction by affecting a current transaction in place of a future transaction. See also *infra* note 86.

85. See 48 Fed. Reg. 3377 (1983).

86. The Commodities Futures Trading Commission has defined hedging for purposes of such trading as follows:

(z) Bona fide hedging transactions and positions—(1) General definition. Bona fide hedging transactions and positions shall mean transactions or positions in a contract for future delivery on any contract market, where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel, and where they are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, and where they arise from:

(i) The potential change in the value of assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning,

Another ambiguous provision of the Act addressed by the Board is the elimination of credit collateral requirements other than those specifically mentioned in the Act. Section 203 of the Act states: "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."<sup>87</sup>

The legislative history reveals that this section was originally intended to eliminate the requirement of section 23A of the Federal Reserve Act<sup>88</sup> that extensions of credit between a bank holding company and its affiliates be secured by collateral in the amount of 120%<sup>89</sup> of the obligation.<sup>90</sup> At the time the Act was enacted, Congress was contemplating a major revision of section 23A.<sup>91</sup> The House and Senate conferees recognized that they might need to

producing, manufacturing, processing, or merchandising,

(ii) The potential change in the value of liabilities which a person owns or anticipates incurring, or

(iii) The potential change in the value of services which a person provides, purchases or anticipates providing or purchasing.

Notwithstanding the foregoing, no transactions or positions shall be classified as bona fide hedging for purposes of section 4a of the Act unless their purpose is to offset price risks incidental to commercial cash or spot operations and such positions are established and liquidated in an orderly manner in accordance with sound commercial practices and unless the provisions of paragraphs (z) (2) and (3) of this section and §§ 1.47 and 1.48 of the regulations have been satisfied.

17 C.F.R. § 1.3(z) (1982).

87. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1237 (to be codified at 12 U.S.C. § 1843(c)(14)(B)(ii)).

88. 12 U.S.C. § 371(c) (1976).

89. If the collateral is in the form of federal government securities, it need only be 100% of the obligation; if secured by the securities of a state or a subdivision thereof, then 110%.  
*Id.*

90. The House Report is clear on this point:

The bill also exempts lending by investors and their affiliates (including banks) to ETCs from the application of Federal laws specifically relating to collateral requirements. While this provision of the bill removes such lending from mechanistic coverage by the collateral restrictions in Section 23A [of the Federal Reserve Act], the bill also requires that lending to ETCs not involve more than the normal risk of repayment or other unfavorable features.

H.R. REP. NO. 629, 97th Cong., 2d Sess. 12 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2467, 2474.

91. *See* H.R. REP. NO. 686, 97th Cong., 2d Sess. 24-25 (1982) (Conference Rep. No. 924), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2487, 2508-09. This revision was a part of the Garn-Saint Germain Depository Institutions Act of 1982. Pub. L. No. 97-320, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1469.

review this provision when the revision of section 23A was made.<sup>92</sup> The drafters therefore limited this provision to laws in effect prior to October 1, 1982, the date the Act was passed by the Congress.<sup>93</sup>

It is unclear whether the conferees devoted further attention to this provision or section 23A, but section 23A was substantially revised and enacted on October 15, 1982.<sup>94</sup> The new section 23A retains the 120%<sup>95</sup> collateral requirement of the old version.<sup>96</sup> The Board has taken the position that, because they were reenacted after October 1, 1982, the reserve requirements of section 23A apply to bank holding company investments in ETCs despite the fact that the two versions are effectively the same.<sup>97</sup> If the Board maintains this position, bank holding company investment in ETCs will certainly be discouraged. The effect of applying section 23A to these investments is to increase substantially their cost. Although the language of the exemption seems clear on its face, the legislative history,<sup>98</sup> in conjunction with the Congress' stated intent that bank holding company investments in ETCs be encouraged,<sup>99</sup> indicates that the Board may be incorrect in its interpretation. At the very least, if the Board is successful in establishing its interpretation of the exemption, Congress should act swiftly to remedy this oversight.

92. This possibility was noted in the Conference Report:

The Senate receded to the House on the exemption of bank-affiliated export trading companies from the provisions of Section 23A of the Federal Reserve Act. During the start-up phase in an effort to encourage maximum bank participation in export trading company activities, the conferees believe that the overall limitation of ten percent of the consolidated capital and surplus of the bank holding company, on extensions of credit to an affiliated export trading company, would adequately protect affiliated banks from excessive risk, and that the exemption from the collateral requirement of existing law is necessary in view of the type of assets most ETCs would have. The conferees, however, intend to review the decision in connection with an imminent major revision of 23A either as part of a possible conference on legislation separately passed by the Senate or at such time as revisions to 23A receive final consideration by the Congress.

H.R. REP. No. 686, 97th Cong., 2d Sess. 24-25 (1982) (Conference Rep. No. 924), *reprinted* in 1982 U.S. CODE CONG. & AD. NEWS 2487, 2508-09.

93. *See supra* note 87 and accompanying text.

94. *See supra* note 91 and accompanying text.

95. *See supra* notes 88-89 and accompanying text.

96. Garn-Saint Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 410(b), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1469, 1515.

97. *See* 48 Fed. Reg. 3377 (1983).

98. *See supra* note 90 and accompanying text.

99. *See supra* note 72 and accompanying text.

The crucial factor regarding the Board's proposed regulations is that they affect only the bank's initial application and subsequent compliance with the terms of the Board's order.<sup>100</sup> The Board does not concern itself with the operation of ETCs so long as they stay within the broad limits of the Act.<sup>101</sup> The legislative history demonstrates that Congress recognized the need for ETCs to be able to operate freely, stating: "To impose banking standards, or the judgments of bank regulatory agencies such as Federal Reserve Board, upon the operating methods and practices of trading companies can only result in greater risk to the investors by reducing the operating flexibility, and thus the profitability, of trading companies."<sup>102</sup>

### III. OTHER BANKING PROVISIONS

#### A. Bankers' Acceptances

The Act also contains two provisions regarding international trade financing. Section 207 of the Act amends section 13 of the Federal Reserve Act<sup>103</sup> to permit any member bank or United States agency or branch of a foreign bank to accept drafts or bills of exchange in an amount not exceeding 150% of its paid up and unimpaired capital stock and surplus or, with the consent of the Board, 200% of such capital and surplus.<sup>104</sup> Such drafts and bills of exchange must mature in less than six months, exclusive of days of grace, and grow out of import or export transactions, domestic shipment of goods, or be secured by readily marketable goods.<sup>105</sup> Domestic transactions may not account for more than 50% of this limit.<sup>106</sup> Section 13 had previously limited these bankers' accept-

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100. This was clearly the intention of the Congress. See H.R. REP. No. 629, 97th Cong., 2d Sess. 11 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2467, 2473-74; H.R. REP. No. 637, 97th Cong., 2d Sess. (pt. I) 14 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2431, 2436; see also 48 Fed. Reg. 3378 (1983).

101. See *supra* note 100.

102. H.R. REP. No. 637, 97th Cong., 2d Sess. (pt. I) 14 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2431, 2436.

103. 12 U.S.C. § 372 (1976).

104. Act, § 207, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1239 (to be codified at 12 U.S.C. § 372(7)(B)). United States agencies and branches of foreign banks determine their capital and surplus under special provisions of the Act. *Id.* (to be codified at 12 U.S.C. § 372(7)(H)).

105. *Id.* (to be codified at 12 U.S.C. § 372(7)(A)).

106. *Id.* (to be codified at 12 U.S.C. § 372(7)(D)).

ances to 50% or, with Board approval, 100% of capital and surplus.<sup>107</sup>

The previous limits on bankers' acceptances were imposed in 1913.<sup>108</sup> Since that time, both international trade and the demand for this method of trade financing have increased dramatically.<sup>109</sup> Congress, observing that bankers' acceptances are particularly safe and liquid investments, increased the limits in order to permit more banks to accept a larger volume.<sup>110</sup>

The Board is permitted to define the terms of this section,<sup>111</sup> and to issue regulations authorizing increased limits for acceptances under such conditions as it may prescribe.<sup>112</sup> The Board has not as yet exercised this authority. However, if practice under the prior limitations is an indication of future policy, requests to increase acceptances to the greater limits routinely will be approved.

The bankers' acceptances provisions of the Act are not limited to ETCs. Any bank may take advantage of them. Nevertheless, they will permit banks, particularly small banks which would more likely be constrained by the prior limits, to increase substantially their international trade activities.

### B. Eximbank Provisions

Section 206 of the Act authorizes the Export-Import Bank of the United States to guarantee loans of banks or other public and private creditors of ETCs secured by export accounts receivable or inventories if (1) the private credit market is not providing adequate support to creditworthy ETCs and (2) such guarantees are necessary to facilitate exports that would not otherwise occur.<sup>113</sup> The guarantee program established by this provision will certainly be welcomed by ETCs and domestic manufacturers, particularly small, minority and agricultural concerns.<sup>114</sup> The Eximbank is al-

107. 12 U.S.C. § 372(7) (1976).

108. Federal Reserve Act, ch. 6, § 13, 38 Stat. 251, 263-64 (1913).

109. See H.R. REP. No. 629, 97th Cong., 2d Sess. 14-15 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2467, 2477.

110. *Id.* See also H.R. REP. No. 686, 97th Cong., 2d Sess. 25 (1982) (Conference Rep. No. 924), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2487, 2509.

111. Act, § 207, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1240 (to be codified at 12 U.S.C. § 372(7)(G)).

112. *Id.*

113. Act, § 206, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1239 (to be codified at 12 U.S.C. § 635a-4).

114. The Eximbank is directed to ensure that a major share of the program is devoted to small, minority and agricultural concerns. *Id.*

ready stretched to its limits,<sup>115</sup> however, suggesting that the section's impact will be limited by Congress' failure to provide any additional funding for the guarantee program.<sup>116</sup>

#### IV. FORMATION AND OPERATION OF ETCs

Congress implicitly assumes that banks have the necessary experience, resources, and desire to operate an ETC.<sup>117</sup> This assumption may not be well-founded. Primarily because of the traditional separation between banking and commerce,<sup>118</sup> banks lack familiarity with the skills and techniques necessary to succeed in most commercial enterprises. The rarified atmosphere in which banks have operated for some fifty years has tended to make them rather conservative, risk-averse institutions. ETCs, on the other hand, are anything but conservative and risk-averse. The very nature of export trading requires an ability to adapt to rapidly changing international markets.<sup>119</sup>

Many bankers have noted the unfamiliar problems that will be faced by banks engaging in export trading. These include lack of expertise in the mechanics of shipping, insurance, and taking title to goods.<sup>120</sup> In addition, banks' capital is not unlimited. Most banks operate with a very low capital reserve<sup>121</sup> and there are many competing investments for the remaining capital. Because most ETCs operate on a very low profit margin,<sup>122</sup> only a very successful ETC could compete as an investment opportunity with the alternatives that banks already enjoy. This is particularly true in view of the banks' ability to perform most of the export financing services at which they are most expert without obtaining an equity interest in an ETC.<sup>123</sup> Another problem for many banks is the danger that their current customers already engaged in exporting will view a

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115. See *A Fresh Threat to U.S. Exports*, BUS. WK., May 26, 1980, at 50-51.

116. Act, § 206, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1239 (to be codified at 12 U.S.C. § 635a-4).

117. See *supra* notes 15-16 and accompanying text.

118. See *supra* notes 15-30 and accompanying text.

119. See H.R. REP. NO. 637, 97th Cong., 2d Sess. (pt. I) 13 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2431, 2435.

120. See *Banks Not Rushing to Use New Power to Own Export Trading Companies*, 40 WASH. FIN. REP. (BNA) 71 (Jan. 10, 1983) (Special Rep.); Holland, *supra* note 7, at 11-12.

121. See *supra* note 120.

122. *Id.*

123. Banks have never been precluded from offering export financing services to ETCs, only from owning an equity interest in them. The Act does not change this.

bank's investment in an ETC as direct competition and take their business elsewhere.<sup>124</sup>

Despite these business considerations, many banks will undoubtedly decide to enter the export trading business. When they make that decision, banks will have to become familiar with some legal considerations they have never addressed before.

The banking provisions of the Act<sup>125</sup> are permissive only. They permit bank holding companies to invest in ETCs but do not state what form that investment should take. The key to a bank's formation, acquisition and subsequent operation of an ETC is that the Act does not affect the operation of other laws regulating the formation of companies or their operation in international trade.

ETCs may be created in a variety of forms, including sole proprietorships, partnerships, joint ventures, associations and corporations.<sup>126</sup> A bank, of course, may only indirectly invest in an ETC as a corporate subsidiary of the bank's holding company or through a bankers' bank.<sup>127</sup> Nevertheless, the flexible nature of the Act makes available a variety of forms of bank-affiliated ETCs. A bank holding company may choose to create or acquire a wholly owned ETC subsidiary, or may wish only to make a partial investment in an ETC joint venture along with other banking or non-banking investors.<sup>128</sup>

The Act permits bank ETCs to operate in a number of vastly different fields including, but not limited to, consulting, international market research, advertising, marketing, insurance, product research and design, legal assistance, transportation, trade documentation, freight forwarding, communications, warehousing, foreign exchange, financing and taking title to goods.<sup>129</sup> Among the few trade-related activities forbidden to bank-affiliated ETCs are manufacturing, agricultural production and trading in securities,<sup>130</sup> although the bank-affiliated ETC must take care to limit its activi-

124. *See Banks Not Rushing to Use New Power to Own Export Trading Companies*, 40 WASH. FIN. REP. (BNA) 71 (Jan. 10, 1983) (Special Rep.).

125. *See supra* note 5.

126. The Act does not restrict the formation of ETCs other than than by bank holding companies.

127. *See supra* notes 31-36 and accompanying text.

128. *See Holland, supra* note 7, at 11.

129. Act, § 203(3), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1233, 1238 (to be codified at 12 U.S.C. § 1843(c)(14)(F)(ii)).

130. *Id.* at 1237 (to be codified at 12 U.S.C. § 1843(c)(14)(C)(i), (ii)).

ties to international trade and to ensure that a majority of its revenues are derived from exporting.<sup>131</sup>

The choices of form and potential partners, as well as the choice of services to offer, are affected by important business and legal considerations. In choosing whether to create or acquire a wholly owned subsidiary or to enter into a joint venture with others, a bank holding company must consider not only whether it has adequate experience and personnel to enter into the new venture, but also whether its interests potentially conflict with those of any partners. For example, in a joint venture between a bank holding company and a manufacturer, the partners would have different interests with respect to the pricing of goods and the pricing of financing fees because their separate enterprises would share the costs and benefits of these decisions in different proportions. When creating a joint venture ETC, the partners would be well-advised to look ahead to potential conflicts and attempt to resolve them in their organizational documents, or to create a degree of independence from the partners in the management of the ETC in order to avoid conflicts over its business policy. These legal considerations are not a result of the Act, but merely the natural result of applying pre-existing business law to the various new forms of association that are permitted by the Act.<sup>132</sup>

Close attention should be directed to the nature of the activities in which the ETC is to engage. An ETC may wish to begin with one or more services and gradually expand the scope of its activities.<sup>133</sup> Each service, however, must be analyzed on its own terms and the legal implications of providing each service must be considered. For example, probably the most significant new service permitted to bank-affiliated ETCs is taking title to goods.<sup>134</sup> This activity substantially increases the role of an ETC in the trading system. Once title to and/or possession of goods has passed to the ETC, the risk of future destruction or loss of the goods and the risk of liability for defective design or manufacture of the goods may fall

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131. See *supra* notes 76-81 and accompanying text.

132. Since the Act does not affect the operation of ETCs other than in their relationship with affiliated banks, ETCs generally can operate in the same manner as any other company.

133. See Holland, *supra* note 7, at 11-12.

134. See *supra* note 129 and accompanying text.

on the ETC unless other contractual arrangements are made.<sup>135</sup> The ETC must consider whether it is willing to accept these risks, whether it wishes to insure its interest in the goods or whether it should take other measures to protect its investment. In operating an ETC, the business and legal implications of each activity must be fully explored. Finally, any ETC must be familiar with the various United States and foreign laws regulating international trade.<sup>136</sup> Although these legal considerations were present before the Act, they may require special attention from banking enterprises which have not had experience with them in the past.

### CONCLUSION

The Act is truly revolutionary insofar as it permits banking enterprises to invest in nonbanking enterprises. It is a major exception to the traditional separation between banking and commercial

135. See U.C.C. §§ 2-401, 2-509 (1977).

136. It is essential that any firm which participates in international trade be familiar with the basic document regulating the conduct of trade among most nations, The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. The GATT is applied through the Protocol of Provisional Application of The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (effective Jan. 1, 1948). GATT was originally negotiated in the 1940's and has been ratified by most of the major trading nations. GATT has undergone several revisions since that time, most recently during the Tokyo Round of Multilateral Trade Negotiations. This document serves as the foundation of most nations' laws with respect to international trade. See generally K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970).

Exports are controlled and administered in the United States primarily by the Commerce Department, under authority of the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (Supp. IV 1980). Commerce Department export regulations are found primarily in 15 C.F.R. pts. 368-99 (1982). Those engaged in international trade should also be familiar with the provisions of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78dd-2 (Supp. V 1981), prohibiting participation in certain boycotts and unfair trade practices. See also Commerce Department Regulations on Restrictive Trade Practices or Boycotts, 15 C.F.R. § 369 (1982).

Those engaging in importing must also be familiar with laws regulating customs and importing, codified primarily in title 19 of the United States Code, and the regulations of the United States International Trade Commission. In addition, exports and imports of certain specific commodities are regulated by other agencies. Military arms, crude oil, certain agricultural commodities and nuclear materials are several examples.

Of course, each foreign nation with which an ETC does business will also have its own laws and regulations regarding these matters. An ETC should not attempt to engage in commerce with any foreign country until it is fully informed of the foreign legal implications of the transaction.

enterprises. However, the Act does not affect any laws other than the banking and the antitrust laws. The creation and operation of ETCs still will be subject to the myriad laws regulating and directing business activity in the United States and foreign countries. The success of the Act in advancing Congress' goal of increasing exports and export-related jobs through the creation of ETCs will depend upon whether Congress is correct in assuming that the major obstacle to effective export promotion by ETCs is the lack of capital and ready financing and that these resources are readily available in existing American banks.<sup>137</sup> Certainly this shortage of capital and financing is not the only obstacle to increasing American exports. The relatively high cost of labor in the United States,<sup>138</sup> exacerbated by a strong dollar value relative to other currencies,<sup>139</sup> a general decrease in worldwide demand due to the current recession<sup>140</sup> and protectionist policies of foreign governments<sup>141</sup> suggest that increasing the level of American exports may require more than strong ETCs. Nonetheless, as a result of the Act, ETCs will have greater potential access to the resources of American banks and will be in a better position to take advantage of possible changes in the overall competitive position of American exports. More importantly from the point of view of American banks, the Act will provide them with one of their first opportunities to engage in nonbanking activities and may provide a model for future efforts to remove the barrier between banking and nonbanking activities.

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137. This assumption is already somewhat suspect. Many banks, including some that openly encouraged this legislation, now suggest that they are not particularly interested in investing in ETCs, at least partly because the export trading business is so dissimilar to banking that it makes a questionable match. See *supra* note 120 and accompanying text.

138. See *Factory Labor Costs Soar in U.S. but Hardly Budge in Japan*, Wall St. J., Oct. 15, 1980, at 52, col. 1.

139. See *U.S. Trade and the Recession*, MORGAN GUAR. SURV., July 1982, at 8-11.

140. *Id.*

141. See generally *Foreign Barriers to U.S. Trade: Hearings Before the Subcomm. on Int'l Finance and Monetary Policy of the Senate Banking, Housing and Urban Affairs Comm.*, 97th Cong., 1st Sess. (1981); Balassa, *The 'New Protectionism' and the International Economy*, 12 J. WORLD TRADE L. 409 (1978) (discussing factors motivating the growth of protectionist measures in recent years); Sauermilch, *Market Safeguards Against Import Competition: Article XIX of the General Agreement on Tariffs and Trade*, 14 CASE W. RES. J. INT'L L. 83, 100-17 (1982) (circumvention of article XIX of the GATT); Note, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement*, 12 N.Y.U. J. INT'L L. & POL. 315, 326 (1979) (discussion of purchasing practices and procedures which can lead to discrimination against foreign suppliers).