Calendar No. 38

97TH CONGRESS
1st Session

SENATE

REPORT
No. 97-27

# EXPORT TRADING COMPANIES, TRADE ASSOCIATIONS, AND TRADE SERVICES

REPORT

OF THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

UNITED STATES SENATE

TO ACCOMPANY

S. 734

together with

ADDITIONAL VIEWS

MARCH 18, 1981.—Ordered to be printed

Filed under authority of the order of the Senate of MARCH 17 (legislative day, FEBRUARY 16), 1981

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97TH CONGRESS 1st Session } SENATE { REPORT No. 97-27

# EXPORT TRADING COMPANIES, TRADE ASSOCIATIONS, AND TRADE SERVICES

MARCH 18, 1981.—Ordered to be printed
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Mr. HEINZ, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

## REPORT

together with

## ADDITIONAL VIEWS

[To accompany S. 734]

The Committee on Banking, Housing, and Urban Affairs, to which was referred the bill (S. 734) to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally, having considered the same, reports favorably thereon and recommends that the bill do pass.

### HISTORY OF THE LEGISLATION

The concept of legislation to encourage the formation of U.S. trading companies was first discussed at hearings on U.S. export policy held in early 1978 by the Subcommittee on International Finance (see, in particular, parts 3, 6, 7, and 8 of those hearings). The Subcommittee's report on the need for a U.S. export policy, issued in March 1979, included a recommendation that U.S. export trading companies be established to expand exports of the products of smaller U.S. producers and that the Webb-Pomerene Act be revised to clarify antitrust treatment of export activity.

S. 1663, the Export Trading Company Act of 1979, was introduced by Senator Stevenson on August 2, 1979, and referred jointly to the Committees on Banking, Housing, and Urban Affairs and Finance. Hearings were held on the bill before the Subcommittee on International Finance on September 17 and 18, 1979. Also considered during the hearings were three bills to amend the Webb-Pomerene Export Trade Act of 1918 concerning export trade associations: S. 864, the Export Trade Association Act of 1979, introduced by Senators Danforth, Bentsen, Chafee, Javits and Mathias on April 4, 1979; S. 1499, the Export Trade Activities Act, introduced by Senator Roth on July 12, 1979; and S. 1744, introduced on September 13, 1979, by Senator Stevenson for Senator Inouye.

The Subcommittee received testimony from Lurther H. Hodges, Jr., Under Secretary of Commerce: C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs; Ky P. Ewing, Deputy Assistant Attorney General in the Antitrust Division of the Justice Department: Daniel Schwartz, Deputy Director of the Bureau of Competition of the Federal Trade Commission; Senators Danforth, Bentsen, Chafee, Mathias and Javits: and a number of other witnesses. The testimony ranged across all the issues raised in the bills: antitrust treatment of trade associations and trading companies, tax treatment of export trading companies, Federal assistance for start-up costs and financial leverage of export trading companies, and bank ownership of export trading companies.

A new bill, S. 2379, the Export Trading Company Act of 1980, was introduced on March 4, 1980, by Senators Stevenson, Heinz, Javits, Bentsen and Glenn. The bill contained revised versions of each of the basic provisions of S. 1663. On February 26, 1980, Senators Danforth, Bentsen, Chafee, Mathias and Javits introduced a revised version of their legislation to reform the Webb-Pomerene Act: Amendment 1674 to S. 864.

Hearings were held on the revised legislative proposals on March 17 and 18, and April 3, 1980. Testimony was received from Secretary of Commerce Philip Klutznick, speaking on behalf of the Administration and accompanied by Assistant Secretary of the Treasury C. Fred Bergsten, Deputy U.S. Trade Representative Robert Hormats, and Assistant Secretary of State for Economic Affairs Deane Hinton; Deputy Assistant Secretary of State Erland Heginbotham (who appeared in his individual capacity as an expert on Asian trade): Governor Henry Wallich of the Board of Governors of the Federal Reserve System, (who was unable to appear in person due to foreign travel commitments): W. Paul Cooper, President of Acme-Cleveland Corporation and representing the National Machine Tool Builders Association: J. D. Minutilli, President of Commercial Credit Company; Ted D. Taubeneck, President of Rockwell International Trading Company and representing the Chamber of Commerce of the United States: E. Anthony Newton, Senior Vice President of Philadelphia National Bank; James B. Sommers, President, the Bankers Association for Foreign Trade and Executive Vice President of North Carolina National Bank: Lawrence A. Fox, Vice President of the National Association of Manufacturers: Jerry L. Hester, President of International Trade Operations, Inc.: Robert L. McNeill, Executive Vice Chairman of the Emergency Committee for American Trade: John R. Liebman, General Counsel of the Export Managers Association of California, Inc.: Ruth Schueler, President of Schueler and Company, Inc., representing the Subcommittee on Export Promotion of the President's Export Council: and Thomas M. Rees, representing the Task Force on International Trade of the White House Conference on Small Business.

The full Committee marked up a Committee print on May 12, 1980, which contained revised versions of S. 2379 and Amendment 1674 to S. 864, and agreed to report favorably an original Committee bill.

That bill, S. 2718, was considered by the Senate on August 26 and September 3, 1980, passing by a vote of 77 to 0 on September 3.

Although the House Foreign Affairs Committee reported a similar version of the bill, the legislation in the House was also referred to several other committees, and there was not sufficient time for all committees and the full House to act.

On January 19, 1981, Senators Heinz, Danforth, Bentsen, Tsongas, and others introduced S. 144, the Export Trading Company Act of 1981, which is virtually the same as S. 2718 in the 96th Congress without several amendments added at that time on the floor.

The Subcommittee on International Finance and Monetary Policy held three days of hearings on S. 144, on February 17, 18, and March 5, 1981, receiving testimony from the following witnesses:

Honorable Adlai Stevenson, Former Senator from Illinois; Honorable John C. Danforth, Senator from Missouri; Honorable Malcolm Baldridge, Secretary of Commerce; Honorable Henry Wallich, Member, Board of Governors Federal Reserve System; Honorable John G. Heimann, Comptroller of the Currency; Honorable Irvine Sprague, Chairman, Federal Deposit Insurance Corporation (written statement submitted); Mr. J. Hallam Dawson, President, Bankers' Association for Foreign Trade, President, Crocker National Bank, San Francisco, Calif.; Douglas R. Stucky, representing the American Bankers Association First Vice President, First Wisconsin National Bank, Milwaukee, Wisconsin; President, Boles & Company, Inc., Menlo Park, Calif.; John M. Boles, H. Peter Guttman, President, HPG Associates, Washington, D.C.; W. Paul Cooper, Chairman, Acme-Cleveland Corporation, Cleveland, Ohio, Chairman, Government Relations Committee, National Machine Tool Builders Association; Dr. Lonnie Haefner, Professor of Civil Engineering, Washington University, St. Louis, Missouri; Robert L. Waggoner, President, International Customs Service, Inc.; William R. Casey, President, National Customs Brokers and Forwarders Association of America, Inc.; Milton Schulman, President, Millen Industries, Inc., appearing on behalf of the U.S. Chamber of Commerce, accompanied by Douglas E. Rosenthal, Esquire, Sutherland, Asbill & Brennan and Howard Weisberg, Director, International Trade Policy, U.S. Chamber of Commerce; Howard Fogt, Partner, Foley, Lardner, Hollabaugh & Jacobs; Norman Seidler, Partner, Lord, Day & Lord; A. Paul Victor, Partner, Weil, Gotshal & Manges; Ky P. Ewing, Partner, Vinson & Elkins.

On March 12, 1981, the committee marked up S. 144 and agreed to report favorably an original bill incorporating the amendments to S. 144 agreed to in committee.

## Purpose of the Legislation

The purpose of the legislation is to improve U.S. export performance by facilitating the creation of U.S. export trading companies which could perform export services for tens of thousands of small and medium-sized American producers. Despite the success of trading companies as "export middlemen" for European, Japanese, and Korean producers, such companies have been slow to develop in the U.S. due to deterrents presented by banking regulations, antitrust uncertainties, and the traditional insularity of the U.S. market. This legislation modifies provisions of existing law which have acted to discourage the establishment or expansion of export trading companies, and offers modest incentives to the development of such companies.

The bill would provide for certification of antitrust exemption for specified export trade activities of such companies and of export trade associations; afford financing incentives to encourages formation and growth of export trading companies, including existing export management companies; direct the Export-Import Bank to develop an improved guarantee program to support commercial loans to U.S. exporters; require the Secretary of Commerce to provide information to U.S. producers regarding export trading companies and other firms offering export trade services; and permit banks and banking institutions to make limited investment in export trading companies. The legislation is intended to lay the basis for a significant expansion of export services and, thereby, U.S. exports.

## Need for the Legislation

This legislation is necessary to encourage the formation of export trading companies and export trade associations designed to link potential U.S. exporters with overseas markets.

The importance of trade to our national economy is often taken for granted. But it would be useful to review a few key facts.

Although the ratio of exports to GNP rose from 4.2 percent in 1972 to 7.5 percent in 1979, U.S. imports, led by massive increases in the cost of oil, grew equally as fast, increasing in importance relative to GNP from 5.1 percent to 8.7 percent in the same years. Because imports have expanded since 1972 from a higher base than exports, the trade deficit has expanded sharply, with an aggregate deficit over the past five years exceeding $140 billion.

Because of their superior international competitiveness in manufactured goods, our major trade competitors have been able to offset their imported energy bills much better than the United States. According to a study done by the National Association of Manufacturers last year, imports of manufactured goods increased nearly four times as fast as exports since 1970, with that margin growing in the last half of the decade. The study further concluded that our industrial competitiveness is declining measured both by increased import penetration here and loss of export markets elsewhere. The U.S. share of world markets declined from 21.3 percent to 17.4 percent over the past 10 years, the largest relative decline among major industrial exporters. We have lost market share in 8 of the 9 EC countries and 12 of the 13 OPEC countries. While our manufactured goods trade has stayed in rough balance, Japan and West Germany in 1979 had surpluses of $70 billion and $60 billion respectively. The study concludes:

> Because of worsening terms of trade, the U.S. has to run faster, in terms of export volume, to stay in the same place. . . . Improving the U.S. trade account by further depreciation of

the dollar (which increases inflation) and/or by restraining U.S. growth (which increases unemployment) are very unattractive long-term policy options.

Obviously, that trend is not going to be reversed overnight. But, every successful program of trade promotion is a step in the right direction. Small- and medium-sized businesses have too long been excluded from a significant role in our nation's export picture.

Only 10 percent of the 250,000 manufacturing firms in the United States export. Fewer than 1 percent of these firms account for 80 percent of our exports. The Department of Commerce and others have estimated up to 20,000 U.S. manufacturers and agricultural producers offer goods and services which could be highly competitive abroad. Yet the small size and inexperience of these firms leave them ill-equipped to absorb the front-end costs and risks involved in developing overseas markets.

Greater efforts to encourage and assist U.S. producers to export directly are desirable, but for most producers the marginal costs of developing fully their export opportunities abroad will prove prohibitive. Export expansion on the scale required to offset U.S. trade deficits will depend on the development of intermediaries, including export trading companies, which, by diversifying trade risk and developing economies of scale in marketing, financing, and other export trade service, can do the exporting for large numbers of U.S. producers.

Although a variety of existing enterprises do provide export services to U.S. producers—freight forwarders, brokers, shippers, insurance companies, commercial banks, export management companies, advertising firms, trade lawyers, foreign purchasing agents, and others—most fulfill only one or a few of the many functions required to engage in export trade. In contrast, most European countries, as well as Japan and Korea, possess sophisticated, large-scale general purpose trading companies which perform the full range of requisite functions for potential exporters; the success of such companies has contributed significantly to the export earnings of all of our major trade competitors.

Despite the similar success of foreign-owned export trading companies operating in the U.S. over the past few years, the growth of U.S.-owned export trading companies has been slow, except in a few sectors such as grain and raw material trade.

If U.S. export trading companies are a sound business proposition, why have not the working of the marketplace and American entrepreneurship produced such companies already? First, the U.S. domestic market has been much larger and more prosperous than foreign markets—until recently. Belatedly U.S. companies are beginning to see the greater growth possibilities in foreign markets, but foreign producers are already well organized for exporting and can offer quality products at competitive prices. Second, many foreign markets have been largely closed to U.S. exporters. China is an extreme example, but Japan and other countries have maintained high tariff walls and nontariff barriers to imports almost as effective as the isolation of China. Due to the recently concluded Multilateral Trade Agreements in GATT and persistent U.S. bilateral efforts, trade barriers are being reduced. Foreign competitors, however, with a longer history of

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aggressive exporting, are better poised to seize these new market opportunities; U.S. negotiating successes may only be opening markets for our competitors. Finally, U.S. laws and regulations, as well as traditional business and banking practices, have discouraged cooperative export trading companies, export trade associations, or bank participation in export trade activity.

Legislation is needed to remove these deterrents and to encourage the formation and growth of general purpose export trading companies by means of financing incentives. Rapid formation of export trading companies on a scale sufficient to affect overall U.S. export levels will require the involvement of banks and major corporations, whose financial resources, international marketing networks and trade financing experience position them well to play a major role in the establishment of export trading companies. This legislation is needed to enable banks and banking institutions to make limited investments in export trading companies, subject to prior approval and conditions imposed by Federal bank regulatory agencies for all controlling investments.

One of the major benefits of this bill is that it facilitates closer affiliation between financing institutions and trading companies. It allows banks to have a substantial equity interest in the trading companies. The absence of close ties with financial institutions has been recognized as the major weakness of entities such as export management companies, which are the closest organizations the U.S. has to the trading companies of other nations. As a consequence, these organizations tend to be small, thinly capitalized firms, with few contacts overseas.

U.S. trading companies have been mainly basic commodity traders, single manufacturer marketing arms, or small, independent firms with very limited assets to support them.

Banks are already providing extensive services to trading operations, but the Committee believes that the opportunity to fully participate in trading company profits will encourage the banks to be active rather than reactive in export activities. Today, they use their skills at the request of the exporter. As a part of a trading company, they will find it to their advantage to seek out the opportunity to use their skills. They will have a strong incentive to encourage potential exporters to export by providing marketing opportunities to the supplier that are as understandable as the domestic market.

Banking organizations have two resources which are essential to establishing a viable export trading company. First, through their retail banking operations, banking organizations are able to reach out to large numbers of small- and medium-sized companies who may manufacture exportable products. Second, through their international branches and foreign correspondent banking relationships, banking organizations are in an excellent position to identify potential foreign markets and customers. In other words, banks appear to be the best intermediary between the potential U.S. exporter and the foreign buyer because they already have offices (branches) at both ends of the chain and are already communicating with business people on both ends. For example, the Philadelphia National Bank, which is the 30th largest bank in the country but considers itself to be a typical medium-sized regional bank holding company, has either branches, representative offices or affiliates in some 26 countries. Within the

United States, on a retail basis, they have 71 branches in seven counties in the Philadelphia area. On a commercial basis, they have correspondent relationships with 500 banks and thus have business relationships in every State.

Banks already possess the kinds of skills and contacts that are needed to form successful trading companies. In addition to providing a full range of financial services, they also have foreign exchange facilities and can provide information on foreign markets and economies, which they already must have in some form in order to evaluate the risk of loans to foreign borrows. They already have business contacts to facilitate introductions and the provision of business references and to arrange shipping.

The bill also provides for revision of the Webb-Pomerene Act of 1918 to clarify the antitrust provisions applicable to export trade associations and to provide a certification procedure enabling export trading companies and other such associations to receive antitrust clearance for specified export trade activities. The lack of clear cut antitrust immunity provided exporters by the 1918 legislation and the exclusion of services from its coverage has severely limited the statute's effect on exports. Under the review procedures established by the present legislation any U.S. company may determine in advance exactly which export trade activities would be immune from antitrust suit and organize its operations accordingly.

In order to encourage the direct involvement of smaller exporters in the formation of export trading companies, the legislation urges the Economic Development Administration and the Small Business Administration to give special attention to the financing needs of small- and medium-sized concerns interested in exploring export opportunities in this manner. It authorizes an additional $10 million per year in fiscal years 1982 through 1986 to EDA and SBA to support loans or guarantees for these purposes.

This legislation would also improve the financial leverage of export trading companies. It directs the Eximbank to establish an expanded guarantee program for commercial credits secured by export accounts receivable or inventory held for exportation, if the Board of Directors of the Bank determines the private credit market is inadequate and Exim guarantees would facilitate exports which would not otherwise occur.

The bill would direct the Secretary of Commerce to promote actively the formation of export trading companies and the dissemination of information about related export opportunities.

These provisions would remove the most serious deterrents to the emergence of significant U.S. export trading companies. The legislation would foster competition by decreasing government regulation, and would offer the potential for greatly increased U.S. export competitiveness with minimal direct Federal government participation.

## Explanation of the Bill

### TITLE I—EXPORT TRADING COMPANIES

*1. Definitions*

The bill defines an export trading company as a U.S. company "organized and operated principally for the purposes of: (A) exporting goods and services produced in the United States; and (B) facilitating the exportation of goods and services produced in the United States by unaffiliated persons by providing one or more export trade services." The definition is intended to encompass most existing firms which offer export trade services to U.S. producers to whom they are not affiliated, while doing some exporting at their own risk. Many of these American firms, called export management companies or trading companies, are very small and have difficulty obtaining adequate financing to expand their operations. Encouragement and assistance to such firms are major objectives of the legislation.

The definition of an export trading company is meant to exclude firms by any name which export solely the goods or services of the company itself, its parent company or its subsidiaries, or other members of the corporate family. Many major American corporations have subsidiaries which may be called trading companies, but which in fact export only the products of the corporate group. If such companies wish to qualify as export trading companies as defined in the bill, they will need to do some exporting for, or provide trade services to, unaffiliated persons (generally, small and medium size U.S. firms). The bill does not establish minimum percentages for the proportion of export activity an export trading company must perform on behalf of unaffiliated persons; instead, the Federal agencies with administrative responsibilities related to the provisions of the bill are given flexibility to interpret and apply the definitions as seems most appropriate to further the purpose of the Act.

Because another principal objective of the Act is to induce major corporations with extensive export trade experience to offer exporting services to less experienced U.S. producers, it would be consistent with the Act to expect export trading companies to develop a significant portion of their total business in the export of goods or services produced by unaffiliated persons, or in the provision of export trade services to such persons. For example, a company claiming to be organized and operated principally as an export trading company within the definition in section 103(a)(5) of the Act, but which over a reasonable period of years received on the average less than 10 percent of its gross sales or income through exporting goods for, or providing export services to, unaffiliated U.S. persons might be disqualified.

The bill also defines U.S. exports and establishes a presumption that the principal business of a U.S. export trading company should be U.S. exports. Export trade is defined to mean exports of goods produced in the United States or services provided by U.S. citizens or otherwise attributable to the United States. The bill requires that at least 50 percent of the sales price of such goods or services must be of U.S. origin in order for the goods and services to be considered U.S. exports for purposes of the Act. Fifty percent was chosen because it is the existing standard in the Internal Revenue Code for eligible "export receipts" of Domestic International Sales Corporations (DISCs). Setting a higher minimum threshold for U.S. content would not only create the legal anomaly that a sale could be an "export" for DISC purposes but not for meeting the definition of an export trading company, but could also unreasonably restrict the trade possibilities for companies seeking to qualify as export trading companies.

Section 103(a)(5) defines an export trading company as one engaged "principally" in export trade, both on its own behalf and on behalf of unaffiliated persons. Thus, the presumption is established that on the average at least one-half the company's total business—which may include some domestic trade, some import trade and some "third-party" international trade wholly outside U.S. commerce—will be directly related to U.S. exports which must contain at least 50 percent value attributable to the U.S. If the company exports a product with 49 percent of the value added in the U.S., for example, the export sale counts as part of the "other" business of the company, not as part of its export business. Furthermore, successful trading companies must develop two- and three-way trade in order to reduce foreign exchange risk and maintain good relations with foreign customers. The presumption established in the Act will not be an easy one for trading companies to meet, but it does insure that "export trading companies" as defined in the Act will be principally engaged in exports of goods and services produced primarily by Americans.

The term "export trade services" is defined in section 103(a)(4) of the Act to include a broad range of services provided in order to facilitate the export of goods or services produced in the United States. While the Act's purpose is to enable the performance by export trading companies of a wide range of services to expand U.S. exports, including transportation and forwarding, the bill is not intended to repeal or amend the provisions of the Shipping Act of 1916 (46 U.S.C. 800 et seq.), which govern the licensing of independent ocean freight forwarders. Export trading companies wishing to render forwarding services may do so upon qualifying for, and receiving, a license under that Act.

*2. Promotion by Secretary of Commerce*

The bill directs the Secretary of Commerce to promote and encourage the formation and operation of export trading companies by providing information and advice to interested persons and by facilitating contact between producers of exportable goods and services and firms offering export trade services. The provision is intended to lead to a better two-way referral system by the Department of Commerce. The Department has an established role in assisting companies interested in learning how to export and in acquiring foreign market information, but in many cases a more effective approach may be to put companies in contact with export trading companies or other private enterprises which can either provide export assistance or do the actual exporting. Conversely, as part of the Department's responsibility to promote export trading companies, it should help such companies and others providing export trade services to locate and contact U.S. producers of exportable goods and services. It is the Committee's view that the Commerce Department should be more responsive than it has been in the past to the needs of export management companies and international trade consultants to make contact with potential clients.

*3. Ownership by Banks*

This legislation seeks to stimulate a form of business activity in the United States which has been neglected by major corporations and investors and has consequently been deprived of significant financial resources, as the history of U.S. export management companies clearly demonstrates. In an economy which has been primarily oriented to the domestic market, it is not obvious where the investment and entrepreneurship can be found to establish export trading companies on an economical scale, and one which can also make a difference in the U.S. trade accounts. This legislation attempts to stimulate initiative from at least three possible sources: (1) accelerated internal growth by existing U.S. export management or export trading companies; (2) formation of independent export trading companies fostered by major corporations with international trade experience; and (3) investments by U.S. banking institutions in new or existing export trading companies.

Banks with international offices, experience in trade financing, business contacts abroad, international marketing knowledge, and familiarity with domestic U.S. producers are the most likely source of leadership in forming export trading companies. Their skills are important to the organization and management of trading companies. A number of large non-Japanese trading companies are owned by banks in other countries. For example, Hongkong and Shanghai Banking Corp. owns a 33 percent controlling interest in Hutchinson Whampoa Limited; Midland Bank Limited owns controlling interests in at least three trading companies; Barclay's Bank International owns 24.5 percent of Tozer, Kernsley and Millbourn; Credit Lyonnais owns 80 percent of Essor PME; and Banco de Brazil owns 100 percent of Beke Company.

The potential contribution of U.S. banks was explained in the prepared statement of J. Hallam Dawson, President of the Crocker National Bank testifying on behalf of the Bankers' Association for Foreign Trade before the Subcommittee on International Finance and Monetary Policy on February 18, 1981:

> In support of our endorsement of section 105, I would like to take this opportunity to highlight a few of the important contributions which banking organizations can make to the success of U.S. export trading companies, and thus to the improvement of U.S. export performance.
>
> First, the United States banking system reaches virtually every U.S. business, including especially small and medium-sized U.S. businesses. United States banking organizations can thus provide an important introductory link between trading companies and U.S. businesses seeking to export their goods or services. In this regard, U.S. banks already plan an important role in introducing Eximbank, FCIA and other programs to businessmen throughout the country. There is no better way to reach U.S. business than through the banking system.
>
> Second, in today's world, the finance component of an export transaction is sometimes its most crucial element. A trading company must therefore be able either to provide or arrange for appropriate trade financing. Bank participation in a trading company will expand its capabilities to put forward realistic financing options.
>
> Third, bank participants can help trading companies penetrate markets abroad and can provide U.S. export trading

companies with the knowledge and experience crucial to meeting foreign competition. Many U.S. banks have substantial international networks that reach into every major export market and which form a tremendous reservoir of talent and experience for a trading company. For example, foreign branches and affiliates of U.S. banks have a detailed knowledge of local economic conditions, government policies, and business practices which would take a *de novo* trading company years to develop on its own, and which knowledge is crucial for competing abroad.

Fourth, larger U.S. banking organizations often have highly developed and technologically sophisticated operations and communications possibilities for processing trade transactions. Smaller banking organizations can also avail themselves of these capabilities through their correspondent banks.

Lastly, bankers have risk assessment and control procedures and general management processes that can contribute to the development of financially-sound, well-managed, and reputable U.S. export trading companies.

Section 105 of the bill would permit U.S. banks to make limited investments in export trading companies. Except for noncontrolling investments of less than $10 million, banking organization investments would be subject to the prior approval of Federal bank regulatory agencies, and be subject to conditions and safeguards designed to ensure the safety and soundness of the banks and prevent favoritism in bank lending to a trading company or its customers.

U.S. banks have been excluded from most commercial activities, including direct participation in export trade for more than a century. Among the reasons given for maintaining the traditional distinctions are: (1) that banks should focus on loans and deposits and can better exercise independent judgment on whether or not to make a loan if they are prohibited from holding a stake in the management of actual or potential borrowers; (2) that banks could be exposed to unfamiliar and excessive risks in commercial trading and the holding of inventories; (3) that the bank regulatory agencies lack the capacity to evaluate the commercial risks banks would encounter in owning export trading companies; (4) that bank capital is low and should be reserved for support of bank loans; and (5) that bank-owned export trading companies or companies dealing with them may have preferential access to bank credit.

The Committee, while supporting the general principle of separation of banking and commerce, believes there is good and sufficient reason to make an exception on a controlled basis for limited and conditional bank ownership of export trading companies in order to strengthen the Nation's capacity to meet non-traditional international trade competition. The Committee further believes that the bill as ordered reported contains prohibitions, restrictions, limitations, conditions and requirements more than ample to meet each of the concerns raised with respect to bank ownership of export trading companies:

(1) The bill prohibits banking organizations from making loans to any export trading company in which the banking organization holds any interest whatsoever, and to any customers of such company, "on terms more favorable than those afforded similar borrowers in

similar circumstances" or involving "more than the normal risk of repayment" or presenting "other unfavorable features." Thus, banking organizations would be barred from making preferential or unusually risky loans to export trading companies or their customers.

(2) The appropriate Federal banking agency may require divestiture or impose conditions on a banking organization's investment in an export trading company if the export trading company "takes positions in commodities or commodities contracts, in securities, or in foreign exchange, other than as may be necessary in the course of its business operations." That is, purely speculative activities are forbidden for any trading company controlled by a banking organization.

(3) The bill prohibits a trading company with a banking organization investor from engaging in "manufacturing or agricultural production activities" and permits it to engage in underwriting, selling, or distributing securities only to the extent its bank investor may do so under applicable Federal and State laws and regulations.

(4) The bill empowers the Federal banking agencies (the Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board for Federal savings banks) when acting on a banking organization's application to take a controlling interest in an export trading company, to impose any conditions they deem necessary

> (A) to limit a banking organization's financial exposure to an export trading company, or (B) to prevent possible conflicts of interest or unsafe or unsound banking practices.

(5) The bill authorizes the Federal financial institutions regulatory agencies to establish standards with respect to the taking of title to goods by any export trading company subsidiary of a banking organization, standards "designed to ensure against any unsafe or unsound practices that could adversely affect a controlling banking organization investor. Such standards may specifically include inventory-to-capital ratios.

(6) The bill would bar any banking organization from taking a controlling interest or making any investment over $10 million in any export trading company without receiving the prior approval of the appropriate Federal banking agency. The Federal agency would be required to disapprove any application for which it finds

> That the export benefits of such proposal are outweighed in the public interest by any adverse financial, managerial, competitive, or other banking factors associated with the particular investment.

(7) The bill would prohibit aggregate investments by any banking organization of more than 5 percent of its consolidated capital and surplus in one or more export trading companies.

(8) The bill would prohibit the total historical cost of a banking organization's direct and indirect investments in a trading company combined with extensions of credit by such organization and its subsidiaries from exceeding 10 percent of the banking organization's consolidated capital and surplus.

(9) The bill would allow the appropriate Federal banking agency

> Whenever it has reasonable cause to believe that the ownership or control of any investment in an export trading company constitutes a serious risk to the financial safety, soundness, or stability of the banking organization and is inconsistent with sound banking principles or with the purposes of this Act or with the Financial Institutions Supervisory Act of 1966, order the banking organization . . . to terminate . . . its investment in the export trading company.

(10) The bill requires that any banking organization investment, even if it is less than $10 million, be reported to the appropriate Federal banking agency. After receiving such notification, the agency could disapprove the investment or impose conditions on it if the agency determined that the trading company was a subsidiary of the banking organization investor.

(11) A banking organization also must report each additional investment in a trading company subsidiary or the engagement by a trading company subsidiary in any new line of activity, such as taking title to goods, which was not included in any prior application for approval of banking organization control of the trading company. The Federal banking agency could disapprove the proposed investment or new activity under the same standards applicable to controlling investments.

(12) The bill probibits a trading company from having a name similar to that of its bank organization investor unless the bank organization owns a majority equity interest in the trading company.

The Committee is supported in its view that the bill contains appropriate Federal regulatory authority over bank investments in export trading companies by the Administration, by the Comptroller of the Currency, and (with one exception) by the Federal Reserve Board. The sole exception is the Board's view that Federal bank regulatory agencies should not be authorized to approve any controlling investments by banks in export trading companies with the possible exception of certain "ingle-purpose" trading companies. Specifically, the Board would prohibit any one banking organization from acquiring 20 percent or more of any export trading company and any group of banking organizations from acquiring more than 50 percent of a trading company. The Board would accept non-controlling investments, subject to the provisions contained in the bill. The Board appears to question the ability, as well as the propriety, of permitting banks, either singly or as a group to manage export trading companies.

The Banker's Association for Foreign Trade, in testimony before the Subcommittee on International Finance and Monetary Policy on February 18, 1981, stressed the importance of flexibility with respect to the types of permissible bank investments in export trading companies:

> From our discussions in the banking community, we see a number of possibilities for bank participation which can be as varied as our banking system and economy.
>
> —Some banking organizations may join together to form an ETC. For example, S. 144 permits bankers' banks—banks

owned by a number of small banks—to form an ETC. An ETC owned by a number of banks from the same region could provide a significant export stimulus to the area.

—An ETC owned by a number of banks from different regions could stimulate the export of goods and services from throughout the country. For example, a banking organization with strong Far East relationships could join with another banking organization with strong South American relationships, thus expanding the worldwide export capabilities of a jointly-owned ETC.

—Some banking organizations will prefer to organize and form their own trading companies. The regional bank may form such an ETC to give its smaller customers the one-step service they need to enter the export market. A money-center bank may form such an ETC to assist in facilitating trade with China, Eastern Europe or other areas where barter or so-called counter-trade elements may be required due to the lack of U.S. dollar exchange.

—Some banking organizations may join with nonbank firms to establish an ETC, either on a permanent or one-shot basis. For example, a banking organization, an architectural firm, a construction company and a steel fabricator could form a "one-project" ETC to bid on a foreign tender. Or a bank might join with an export management company or freight-forwarder to organize an ETC that would provide an opportunity for the more efficient combination of their essentially complementary services.

—Some banking organizations may use the opportunity to integrate and expand the types of trade services they already provide their customers. For example, an export finance subsidiary of a banking organization could better meet foreign competition on behalf of U.S. exporters if it could take title to goods in the course of a transaction instead of having to proceed through other intermediaries, an activity denied U.S. export finance subsidiaries in the past.

I would note that this list is intended as suggestive only. Nevertheless, I think it is useful because it indicates the wisdom of S. 144, which would permit banking organizations to make controlling investments with prior agency approval.

Similar testimony was received from the business community regarding bank involvement in export trading companies and the need to permit banks to control such companies. W. Paul Cooper, Chairman of the Board of Acme-Cleveland Corporation, testifying on behalf of the National Machine Tool Builders Association before the Subcommittee on February 18, 1981, stated:

> We believe that banks can bring not only financial resources, but almost all of the supporting facilities and services which U.S. exporters now most lack by contrast with their foreign competitors. They will make it possible for American companies to combine their resources in a variety of ways and configurations in the interest of more competitive

overseas marketing of American products and services. More importantly, banks can encourage and help exporters develop a long term view of, and presence in, export markets. Moreover, bank affiliated trading companies would have special effect on encouraging more medium and small exporters who are now discouraged by the remoteness and strangeness of foreign markets and buyers, exchange risks, and by the complexity and expense of documentation.

Although NMTBA supports the general principal of separation of banking and commerce, we believe there is good, sufficient, and, indeed, compelling reason to make an exception on a controlled basis for limited and conditional bank ownership of export trading companies in order to strengthen U.S. capacity to meet non-traditional international trade competition. Moreover, we further believe that as drafted, S. 144 contains prohibitions, restrictions, limitations, conditions and requirements more than ample to meet each of the objections raised concerning bank ownership of export trading companies.

In our view, any legislation purporting to encourage U.S. exports through the facility of export trading companies, which does *not* permit bank participation and (in some cases) the right of bank control is only a *half* step. Adequate financing is one of the most critical elements of export promotion. To continue to prohibit bank participation in export trading companies is to continue a halfway policy of half steps leading to halfway results.

Permitting banking organizations to take controlling interests in trading companies promotes the safety and soundness of the investing banking organization, since it gives them greater ability to protect their investment through control of the business operations of an export trading company. A banking organization is more likely to become involved in an export trading company if it has a substantial or controlling voice in management. Arbitrary statutory limits on controlling investments serve only to lock banking organizations out of a management role: increase the risks of their investment; and deny to trading companies their substantial international expertise. The regulatory controls included in the bill insure that the greater degree of bank control, the greater degree of Federal banking agency control. The Committee believes this flexible approach adopted in the bill is necessary to encourage effective bank participation. Without initiatives by U.S. banks, the effort to stimulate U.S. export trading companies would be seriously weakened.

The amounts of bank capital potentially involved and the risks to the banks must also be put into perspective based on the restrictions in the bill. Total capital of all the banks in the United States is about $105 billion. Because the bill limits aggregate investments to 5 percent of capital, if every bank in the country from the smallest to the largest were allowed by the Federal regulators to invest the maximum amount under the Act, the total investment allowed would be $5.25 billion. Because the bill limits the total of investments and loans in export trading companies to 10 percent of capital, if every bank in the country both invested and lent the maximum under the Act, the total of all investments and loans would be $10.5 billion. Realistically, only a small fraction of the nation's 14,000-plus banks, large and small, will invest in, or lend to, an export trading company.

Both the banks and the Federal banking agencies can be expected to proceed cautiously. At most, $1 billion in total bank investments and loans to export trading companies might be anticipated within 5 years after enactment. In an economy which has long passed the $1 trillion mark, such amounts seem unlikely to dry up credit or significantly affect bank capital. Investments in export trading companies should strengthen bank capital by earning profits and diversifying risks. The 10 percent limit on combined investments and loans is quite conservative, considering that state banks in several states, including New York, may lend up to 25 percent of capital to a single borrower, and that some banks have more than half of their capital exposed in loans to borrowers in a single developing country.

In considering individual applications or notifications, the appropriate Federal banking agency may determine that safeguards are needed to protect against certain activities or practices which could reflect adversely on the banking organization investor. This bill gives the agencies the authority necessary to set conditions designed to insure that a bank-owned ETC is run in a financially-sound manner in order to safeguard the reputation and integrity of the banking organization investor.

Conditions appropriate to an ETC wholly-owned or controlled by a banking organization may be wholly inappropriate where a banking organization is to be a non-controlling investor. The size of the banking organization and ETC, the degree of banking organization involvement, and the size and financial strength of other participants are all factors that need to be weighed. Conditions imposed by the Federal banking agencies should not unnecessarily disadvantage, restrict or limit bank-owned ETCs in competing in world markets or achieving the purposes of section 102 of the Act. Conditions thus should be carefully drawn to meet legitimate concerns, without unduly handicapping bank-owned ETCs in meeting foreign competition. The Committee strongly believes that such conditions should not serve to discourage involvement of banking organizations, but rather should encourage their participation in the most prudent manner.

*4. Initial Investments and Operating Expenses*

The bill provides in section 106 for greater support by the Economic Development Administration (EDA) and the Small Business Administration (SBA) for the formation and expansion of export trading companies. Both agencies have given some support to export-related activities in the recent past, but only in minimal amounts; and SBA has been widely charged with lack of interest and expertise in export development.

It is the Committee's view that a modest level of federal assistance, in the form of loans or loan guarantees, for a limited period of time, is necessary to encourage the formation of export trading companies. In view of the current difficult budgetary situation, however, the Committee decided to cut in half the amount proposed to be annually authorized, from $20 million to $10 million per year for five years.

Section 106(a) would direct EDA and SBA, when considering loan or guarantee applications from export trading companies, to give "special weight to export-related benefits, including opening new markets for United States goods and services abroad and encouraging the involvement of small or medium-size businesses or agricultural concerns in the export market." The purpose of the amendment is to encourage EDA and SBA to consider favorably those applications with export benefits which also meet other criteria which EDA and SBA are required to consider. The provision is not intended to override or dilute other considerations the agencies are required to take into account.

Section 106(b) would authorize appropriation of an additional $10 million per year in fiscal years 1982 through 1986 to either EDA or SBA to support loans (or guarantees, if necessary) provided to meet the purposes of section 106(a). If existing authorizations and appropriations thereunder are deemed adequate by the Appropriations Committees of the Congress to meet the purposes of section 106(a), the authority of section 106(b) would not be used.

*5. Guarantees by Export-Import Bank*

Section 107 authorizes and directs Eximbank to establish a guarantee program for commercial loans to U.S. exporters secured by export accounts receivable or inventories of exportable goods, when in the judgment of the Board of Directors:

1. Private credit is inadequate to enable otherwise credit-worthy exporters to complete export transactions, and
2. Such guarantees would facilitate exports which would not otherwise occur.

This section permits the guarantee program to operate only to the extent that the Board of Directors determine the private credit market is not providing adequate financing. It is the intent of the Committee that the guarantees be directed primarily toward securing credit for small exporters. The amounts of guarantees would be limited by limits set in annual appropriations Acts. This section does not authorize additional funds for the bank.

*6. Small Business Export Managers*

During its consideration of the bill, the Committee voted to add a new section 108 which would establish in the Department of Commerce a pilot program of grants to small business manufacturing firms to help them absorb the first year costs of hiring a full time export manager. To qualify for the grant the business would have to not previously have been substantially engaged in exporting.

The size of each grant is limited to the lesser of one-half the manager's salary or $40,000. Total authorization for this section is $2 million per year for three years.

The intent of this section, which is modeled on a program in the Netherlands, is to provide another means of helping small businesses overcome the barriers they face to exporting. Most significant among those barriers are lack of "know-how" and experience in the complex business of identifying and successfully selling in foreign markets. Export managers could provide that expertise, and it was the view of a majority of the Committee members that the potential gain for the economy through additional exports produced by this program was worth its small cost.

### TITLE II—EXPORT TRADE ASSOCIATIONS

Under the Export Trade Act of 1918, commonly known as the Webb-Pomerene Act (15 U.S.C. 61–65), the joint exporting activities of export trade associations (associations engaged solely in export trade) receive a limited exemption from the Sherman and Clayton Antitrust Acts.

The Webb-Pomerene Act was an outgrowth of a report on foreign trade activities affecting U.S. companies prepared by the Federal Trade Commission in 1916. The Commission's report found that American manufacturers and producers were disadvantaged in attempting to enter foreign markets individually because of strong combinations of foreign competitors and organized buyers. The report concluded that in order for small American producers and manufacturers to enter world markets on a profitable basis and on more equal terms with these foreign combinations, they should be permitted to cooperate in their exporting efforts without fear of prosecution under the antitrust laws.

Section 2 of the Webb Act exempts from the Sherman Act (which prohibits contracts, combinations, or conspiracies in restraint of trade occurring either in interstate commerce or in commerce with foreign nations) an association entered into for the sole purpose of engaging in export trade as long as the association, its acts, or any agreements into which the association enters do not: (1) restrain trade within the United States; (2) restrain the export trade of any domestic competitor of the association; or (3) artificially influence prices within the United States of commodities of the class exported by the association. The Act also provides for oversight of Webb-Pomerene associations by the Federal Trade Commission.

Between 1930 and 1935 Webb-Pomerene associations numbered 57 and accounted for approximately 19 percent of total U.S. exports. By 1979 the number of associations had dwindled to 33 and their share of total U.S. exports had dipped to less than 2 percent.

The reasons for this poor showing are many. First, the vast majority of the 250 or so Webb-Pomerene associations formed over the last 60 years lacked sufficient product-market domination to exert foreign market price control and membership discipline. Second, the business community traditionally has placed top priority on tapping the vast domestic market and has been much slower to focus on the prospects overseas. Third, the ever expanding U.S. service industries have been excluded from qualifying for the Act's antitrust exemption, while cooperative and joint ventures have become increasingly important in the exportation of services. Fourth, and perhaps most important, the Department of Justice, and to a lesser extent the Federal Trade Commission, have been perceived by the business community as exhibiting a thinly veiled hostility toward Webb-Pomerene associations. The vagueness of the Webb-Pomerene Act leaves uncertain what activities will constitute a substantial restraint of domestic trade. As a result, the threat of antitrust litigation has served as a deterrent to broader utilization of the Webb-Pomerene Act.

This theme arose frequently in the 1981 hearings, as several business witnesses and attorneys commented on the difficulty of obtaining definitive antitrust guidance from the Justice Department and on the uncertainty Justice's ambiguity created for businessmen, small businessmen, particularly who cannot afford the time and cost of defending themselves in a suit, even if they might ultimately prove successful. Typical of the small business attitude is the comment of Milton Schulman, Chief Executive Officer of Millen Industries, Inc., who testified before the Subcommittee on behalf of the Chamber of Commerce of the United States on March 5, 1981, on problems he has encountered trying to market his products abroad:

> When I returned to the United States, I was advised that we could not look to other firms in our industry for a partnership in providing such a full range of boxes in these possible transactions, because joint discussions or a joint venture setting mutually agreed prices between us and our U.S. competitors as to foreign customers was thought to risk a violation of U.S. antitrust law.
>
> More recently I have talked to antitrust lawyers who are experienced in international trade. They tell me there is very little risk of antitrust prosecution for a small firm in my industry, which is very competitive and nonconcentrated, in forming a joint venture for exports. This may be true. But you must understand the extent to which a small businessman, who cannot afford to retain and seek constant high-priced antitrust counsel, fears the antitrust laws and is inclined to stay as far away from possible exposure as he can, even if it means giving up business opportunities . . . but if certification were granted quickly without a big expense, and with what expense there was shared among several exporters using a single trading company. I would find that very reassuring and a real encouragement to go out and see what I could do by way of joint venturing. We might be able to fulfill some of these selling opportunities by putting together a full line of products among two or three firms.

Title II of the bill deals directly with this problem by permitting an antitrust immunity, limited in scope to what is specified in the certificate, but more complete in its immunity than present law, thereby providing business with a greater degree of certainty.

With the increasing emphasis on the need to improve the competitiveness of U.S. companies in the world marketplace has come an awareness of the need to reduce the domestic barriers to exports. The provisions of this bill are intended as a step toward that goal. At the same time, however, the bill contains numerous procedural and substantive safeguards to ensure that this goal is not achieved at the cost of violating traditional principles of U.S. antitrust law.

*7. Antitrust Exemption for Certified Export Trade Activities*

Title II does the following: First: It makes the provisions of the Webb-Pomerene Act explicitly applicable to the exportation of services (the National Commission for the Review of Antitrust Laws and Procedures made this same recommendation in its report to the President in January 1979);

Second. It expands and clarifies the Act's antitrust exemption for export trade associations and export trading companies;

Third. It requires that the antitrust immunity be made contingent upon a certification procedure and in conformance with existing standards of antitrust law;

Fourth. It transfers the administration of the Act from the Federal Trade Commission to the Department of Commerce;

Fifth. It provides for procedures whereby the Justice Department and the Federal Trade Commission can provide their advice to the Department of Commerce during the certification process, and can seek invalidation of any certification which fails to conform to the substantive standards of the Act;

Sixth. It creates within the Department of Commerce an office to promote the formation of export trade associations and export trading companies, and to report to the appropriate Congressional committees on East-West trade transactions; and

Seventh. It provides for the establishment of a task force whose purpose will be to evaluate the effectiveness of the Webb-Pomerene Act in increasing U.S. exports and to make recommendations regarding its future to the President.

Title II reflects a recognition of the significant contribution to the promotion of U.S. export trade which can be made by export trade associations and export trading companies if they are allowed to engage in specific joint activities without fear of prosecution under the antitrust laws. Title II provides immunity from the application of U.S. antitrust laws for specified export trade, export trade activities and methods of operation of export trade associations and export trading companies only when: 1) the proposed export activities are determined not to be in violation of specified antitrust standards; 2) there is an established need for the immunity; and 3) the association or company successfully completes the certification process required in the bill.

*8. Certification procedures*

The certification process mandates that the Department of Commerce, after consulting with the Justice Department and the Federal Trade Commission, determine that the export trade activities of the association or company violate none of the substantive standards of antitrust law set forth in Section 204(a) of the bill. That section, which amends the second and fourth sections of the Webb-Pomerene Act (15 U.S.C. 62 and 64), sets out eligibility criteria for the antitrust exemption afforded under the act for export trade associations and trading companies.

With the exception of the requirements in paragraphs (1) and (6) of Section 204—provisions that impose further criteria for eligibility in addition to those found in the standards of the current Webb-Pomerene Act—the substantive law of antitrust as modified by the Webb-Pomerene Act has not been altered. As the court stated in *United States* v. *Minnesota Mining and Manufacturing Company*, 92 F. Supp. 947 at 965 (D. Mass. 1950):

> Now it may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely

the members' competition in domestic commerce. Thus every export company may be a restraint. But if there are only these inevitably consequences an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted.

The amendment of the Webb-Pomerene Act by Section 204(a) of Title II, with the exceptions as noted above, is a codification of court interpretations of the Webb-Pomerene exemption to domestic antitrust law. Further, the amendment is consistent with the enforcement policy of the Department of Justice. As stated by Ky Ewing, Deputy Assistant Attorney General, Antitrust Division, Justice Department, during hearings on S. 864 (now Title II) before the International Finance Subcommittee:

> We note (that S. 864) would require that a restraint of U.S. domestic trade be substantial before the exemption would disappear. The purpose of this proposal . . . is to bring the act into what we conceive to be the current state of antitrust law interpreted by the court. (September 17 and 1, 1979 hearing record on Export Trading and Trade Associations, p. 138)

Similarly, Daniel Schwartz, Deputy Director, Bureau of Competition, Federal Trade Commission, testified that the antitrust standards specified in S. 864 "are essentially equivalent to the standards of the Webb-Pomerene Act." (Id. at p. 194).

At the Subcommittee's hearing on March 5, 1981, A. Paul Victor, a partner in the firm Weil, Gotshal & Manges, and formerly an attorney in the Antitrust Division of the Justice Department, concurred in the above interpretation, as did the other three attorneys testifying at that time:

> In the first place, let me say that I do not discern any major substantive changes to existing antitrust law that would be wought if the proposed legislation is enacted. In other words, my reading of the bill does not reveal any fundamental changes to antitrust thinking that is not already contemplated by the existing Webb-Pomerene legislation. The changes proposed seem to be more procedural in nature in that their purpose is to expand the antitrust exemption to an additional category of U.S. exports—that involving services—as well as to provide a mechanism for ostensibly ensuring greater certainty to organizations seeking to take advantage of the exemption.

The bill also adds two new substantive standards, requested by the Department of Justice, to the Webb-Pomerene Act—a requirement that the export trade must not constitute trade or commerce in the licensing of patents, technology, trademarks or know-how, and that the export activities must serve to preserve or promote export trade.

Before an association or export trading company can obtain certification, the Secretary of Commerce also must find that the export activities to be certified will serve a specified need. Only those export trade, export trade activities and methods of operation specified in the certification issued by the Secretary of Commerce are immunized.

The certification must include any terms or conditions deemed necessary by the Secretary, in consultation with the Department of Justice and the Federal Trade Commission, in order to bring the company or its export activities into compliance with any of the substantive standards. Any material change in the membership, export trade activities or methods of operation must be reported to the Secretary and any modification to the certification must be approved by the Secretary. The guidelines to be used in making these determinations are to be issued by the Secretary of Commerce, after consultation with the Attorney General and the Federal Trade Commission.

It was also the Committee's view that the decision to issue a certificate, based on a conclusion that the proposed export activities will serve a need, belongs in the hands of the Commerce Department, the agency charged with overseeing export trade. Commerce Secretary Baldridge, in his March 4, 1981, letter to Senator Heinz, chairman of the Subcommittee on International Finance and Monetary Policy,[1] summarized the reasons for that decision in language which was also approved by the Justice Department:

> We are aware of business concern that U.S. antitrust enforcement puts U.S. companies at a competitive disadvantage vis-a-vis foreign competitors and that uncertainty about antitrust enforcement inhibits legitimate joint export activity. We believe that the certification procedure of Title II will give U.S. businessmen the additional confidence they need to export through an export trading company or a Webb-Pomerene Association while protecting competitive principles.
>
> In our view, the antitrust certification by the Department of Commerce, in effect a kind of antitrust preclearance, is an acceptable compromise of competing interests—the one, to encourage U.S. companies to form ETCs and increase exports; and the other, to insure that antitrust enforcement can protect the domestic economy from potential anticompetitive spillover. The guiding purpose of S. 144 is export promotion. The proposed certification procedure is limited to that goal, since no certificate can issue unless a proposed ETC would serve to preserve or promote U.S. export trade.
>
> With regard to the procedure for issuing certificates to export trading companies and Webb-Pomerene Associations, the bill recognizes that basic responsibility for antitrust enforcement and expertise in antitrust law both lie in the antitrust enforcement agencies. Consequently, it gives the Justice Department and the Federal Trade Commission an essential advisory role in the certification procedure. We believe it is important that the fundamental authority to enforce the antitrust laws remain as it is today.
>
> We believe Title II meets substantially all these requirements. It generally maintains separation of enforcement and certification functions, and antitrust enforcement authority would remain in the Department of Justice and the FTC. Since we expect to consult fully with the enforcement agencies and the development of guidelines, I can assure you that the

[1] The complete letter appears at the conclusion of this report.

Commerce Department will administer the certification procedure of Title II in accordance with competitive principles.

*9. Amendment, Revocation or Invalidation*

Even after the exports activities of an association or export trading company have been certified, they remain subject to the continuing scrutiny of the Department of Commerce and Justice and the Federal Trade Commission. The certification of any association or export trading company whose activities fail to comply with any of the substantive standards is subject to modification or revocation by the Department of Commerce. Additionally, either the Department of Justice or the Federal Trade Commission at any time may initiate an action to invalidate all or any part of the certification of an association or trading company. Once the certification has been revoked, civil or criminal actions and enforcement proceedings may be brought on a prospective basis.

*10. Treatment of Existing Webb-Pomerene Associations*

There are today 33 Webb-Pomerene Associations operating under current law. Because this bill could have an impact on their current business activities, the Subcommittee received testimony from representatives of some existing associations and had discussions with representatives of others. Some associations expressed interest in the new opportunities the bill might provide them. Others expressed satisfaction with existing law and their current course of business and did not wish to be forced into a new procedure.

Accordingly, the Committee determined to deal with existing associations in two ways. Section 206(b)(3) of the bill provides for an expedited certification process for existing Webb-Pomerene Associations who wish to obtain the immunity offered by Title II within 180 days of the bill's enactment.

In addition, section 207 of the bill permits existing associations to continue functioning under current law without change if they so choose, although they could apply for a certification under this bill at any time under normal procedures.

The Committee believes that these alternate procedures provide fair and equitable treatment for existing Webb-Pomerene Associations without disruption of their present export activities.

[Letter referred to earlier follows:]

THE SECRETARY OF COMMERCE,
*Washington, D.C., March 4, 1981.*

Hon. JOHN HEINZ,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR HEINZ: Thank you for your letter of February 25th requesting that I, as Administration spokesman on export trading companies, designate a representative of the Justice Department to testify at March 5th hearings on S. 144.

I was pleased to testify, February 17, on behalf of the Administration in support of S. 144. The bill is the result of extensive hearings held over the past two years, including intensive review within the Executive Branch by banking and antitrust authorities. As spokesman for the Administration, I indicated that the Attorney General, Secretary of the Treasury, and U.S. Trade Representative were in accordance with this position. The Reagan Administration has spoken with one voice on this matter and I do not believe that a separate Justice Department appearance is necessary.

My testimony specifically dealt with the questions raised in your letter of bank participation in trading companies, bank control of an ETC, and the financial provisions of S. 144. With respect to the antitrust immunity, you asked whether such an immunity is necessary to encourage the formation of export trading companies. We are aware of business concern that U.S. antitrust enforcement puts U.S. companies at a competitive disadvantage vis-a-vis foreign competitors and that uncertainty about antitrust enforcement inhibits legitimate joint export activity. We believe that the certification procedure of Title II will give U.S. businessmen the additional confidence they need to export through an export trading company or a Webb-Pomerene Association while protecting competitive principles.

In our view, the antitrust certification by the Department of Commerce, in effect a kind of antitrust preclearance, is an acceptable compromise of competing interests—the one, to encourage U.S. companies to form ETCs and increase exports; and the other, to insure that antitrust enforcement can protect the domestic economy from potential anticompetitive spillover. The guiding purpose of S. 144 is export promotion. The proposed certification procedure is limited to that goal, since no certificate can issue unless a proposed ETC would serve to preserve or promote U.S. export trade.

With regard to the procedure for issuing certificates to export trading companies and Webb-Pomerene Associations, the bill recognizes that basic responsibility for antitrust enforcement and expertise in antitrust law both lie in the antitrust enforcement agencies. Consequently, it gives the Justice Department and the Federal Trade Commission an essential advisory role in the certification procedure. We believe it is important that the fundamental authority to enforce the antitrust laws remain as it is today.

We believe Title II meets substantially all these requirements. It generally maintains separation of enforcement and certification functions, and antitrust enforcement authority would remain in the Department of Justice and the FTC. Since we expect to consult fully with the enforcement agencies on the antitrust aspects of proposed joint export activities and the development of guidelines, I can assure you that the Commerce Department will administer the certification procedure of Title II in accordance with competitive principles.

Finally, we are convinced that the substantive antitrust standards covered by the antitrust exemption (Section 2 of the amended Webb-Pomerene Act) are limited to codification of existing law. By clarifying what kind of joint export activity is permitted under U.S. antitrust law, we will be reducing the regulatory burden which U.S. firms face in competing abroad.

Enactment of this legislation is an important element in developing a coherent and comprehensive U.S. export policy to meet our international competition. I appreciate the efforts you have made to secure early Senate action on it.

Sincerely,

MALCOLM BALDRIGE,
*Secretary of Commerce.*

# SECTION-BY-SECTION ANALYSIS OF THE BILL

## TITLE I—EXPORT TRADING COMPANIES

*Short Title*

Section 101 provides that Title I may be cited as the "Export Trading Company Act of 1981."

*Findings*

Section 102 includes eight findings by Congress concerning exports and export trading companies, and states that the purpose of the Act is to increase U.S. exports by encouraging more efficient provision of export trade services to U.S. producers.

*Definitions*

Section 103 defines the following terms used in the title: "export trade," "goods produced in the United States," "services produced in the United States," "export trade services," "export trading company," "United States," "Secretary," and "company." An export trading company is defined as a U.S. company "organized and operated principally for the purposes of (A) exporting goods and services produced in the United States; and (B) facilitating the exportation of goods and services produced in the United States by unaffiliated persons by providing one or more export trade services."

*Promotion of Export Trading Companies by Secretary of Commerce*

Section 104 requires the Secretary to promote and encourage formation and operation of export trading companies by providing information and advice to interested persons and by facilitating contact between producers and firms offering export trade services.

*Definitions in Section on Bank Ownership*

Section 105(a) defines "banking organization," "State bank," "State member bank," "State nonmember insured bank," "bankers' bank," "bank holding company," "Edge Act Corporation," "Agreement Corporation," "appropriate Federal banking agency," "capital and surplus," "affiliate," "control," "subsidiary," and "export trading company." The terms "control" and "subsidiary" are defined as in the Bank Holding Company Act. The term "export trading company" means a company which is exclusively engaged in activities related to international trade and which meets the definition of export trading company in section 103(a)(5) or a company organized and operated principally for the purpose of providing export trade services. Such company, however, may not engage in manufacturing or agricultural production activities, or may engage in underwriting, selling, or distributing securities only to the extent its banking organization investor may do so under applicable Federal and State law and regulations.

*Authority to Own Export Trading Companies*

Section 105(b)(1) would authorize banking organizations, subject to the procedures and limitations of section 105(b), (c), and (d) to invest in the aggregate not more than 5 percent of the banking organizations consolidated capital and surplus in export trading companies.

Section 105(b)(1)(A) would authorize investments of up to $10 million in total by a banking organization without prior approval by the appropriate Federal banking agency if such investment did not make the export trading company a subsidiary of the banking organization (Pursuant to the Bank Holding Company Act, ownership of 25 percent of the stock is presumed to constitute control and therefore make the company a subsidiary, and ownership of less than 25 percent may be found by the Federal banking agency to constitute control and make the company a subsidiary. If the agency made such finding it could require divestiture or place conditions on the investment.). Section 15(b)(1)(B) would permit investments of more than $10 million, or controlling investments, or investments which give a group of banking organizations more than 50 percent of the stock of an export trading company, only with prior approval of the appropriate Federal banking agency.

Section 105(b)(2) would require banking organizations to notify the appropriate Federal banking agency 90 days before making any additional investment in an export trading company subsidiary or engaging in any line of activity, including specifically the taking of title to goods, which was not previously disclosed. The Federal banking agency could disapprove or place conditions on such investment or activity.

Section 105(b)(3) would provide that if the appropriate Federal banking agency failed to act upon an application or notification within the specified time period, approval would be assumed.

*Additional Limitations on Bank Investments in Export Trading Companies and on Such Companies*

Section 105(c) would place the following limitations on export trading companies and investments in them by banking organizations: (1) the export trading company could not use a name similar to that of any banking organization owning any of its stock unless the banking organization investor owned a majority of its stock; (2) the total historical cost of a banking organization's direct and indirect investments in an export trading company, plus any credit extended by the organization and its subsidiaries to the company, could not exceed 10 percent of the banking organization's capital and surplus; (3) banking organizations could not hold stock in export trading companies which take speculative positions in commodities securities or foreign exchanges, other than as may be necessary in the course of its business operations; and (4) banking organizations could not extend credit to any export trading company in which it holds stock, or to the company's customers, on terms "more favorable than those afforded similar borrowers in similar circumstances, and such extension of credit shall not involve more than the normal risk of repayment or present other unfavorable features."

*Factors to be considered by Federal Banking Agencies in Disapproving or Placing Conditions on Investments*

Section 105(d) would require the appropriate Federal banking agency to consider the resources, competitive situation, and future prospects of the banking organization and export trading company concerned in any application, and the benefits of the proposal to U.S. business, industrial, and agricultural concerns (with special emphasis on small, medium-size, and minority concerns), and the effect on United States competitiveness in world markets, and authorize the agency to disapprove the investment if it finds the export benefits are "outweighed in the public interest by adverse financial, managerial, competitive, or other banking factors." The agency would be authorized to impose such conditions on approved investments or activities as it deemed necessary" (A) to limit a banking organization's financial exposure to an export trading company, or (b) to prevent possible conflicts of interest or unsafe or unsound banking practices." The agency would be required to set standards for the taking of title to goods and holding of inventory to prevent unsafe or unsound practices. In imposing conditions, the Federal banking agency would be required to consider the size of the banking organization and export trading company involved, the degree of investment or other support to be provided by the banking organization, and identity and financial strength of other investors. The agency could not impose conditions on the taking of title which unnecessarily disadvantage, restrict or limit trading companies in competing in world markets. Notwithstanding any other provision, the appropriate Federal banking agency could after due notice and opportunity for hearing, order an investment in an export trading company terminated if the agency had reasonable cause to believe the investment constituted a serious risk to the banking organization or was inconsistent with sound banking principles or the Financial Institutions Supervisory Act of 1966. Within two years after enactment a report to Congress by the Federal banking agencies would be required. Federal banking agencies may exempt an extension of credit from a bank to its trading company affiliate from the collateral requirements of section 23A of the Federal Reserve Act. if the agency determines the exemption is necessary to finance the trading company's operating expenses, and that it does not expose the bank to undue risk.

*Court Appeals*

Section 105(e) would provide an opportunity to appeal orders of Federal banking agencies to the Federal Court of Appeals and require cases of procedural error to be remanded to the agency and permit cases of substantive error to be remanded to the agency as well.

*Rulemaking and Enforcement*

Section 105(f) would provide general rulemaking authority to Federal banking agencies for purposes of administering this section.

*State Preemption*

Section 105(g) makes clear that nothing in this section prevents any state from enacting laws either prohibiting banks chartered under that state's law from investing in export trading companies or imposing additional conditions or restrictions on such investment.

*Initial Investments and Operating Expenses*

Section 106 would direct EDA and SBA to give special weight to export benefits, including opening new export markets and encouraging exporting by small and medium-sized businesses or agricultural concerns, when considering applications by export trading companies for loans and guarantees. $10 million would be authorized to be appropriated for each of the next 5 fiscal years for the purposes of this section.

*Guarantees for Export Accounts Receivable and Inventory*

Section 107 would direct the Export-Import Bank to establish a guarantee program for commercial loans secured by export accounts receivable or inventories of exportable goods when the Bank's Board judged the private credit market was not providing adequate export financing to otherwise creditworthy exporters and such guarantees would facilitate exports which would not otherwise occur. The guarantees would be subject to limits in annual appropriation Acts.

*Export Managers*

Section 108 provides for a pilot program of Commerce Department grants to small businesses not previously significantly involved in exporting to pay up to one-half (or $40,000, whichever is less) the salary of an export manager for one year to assist the company in entering export markets. After the initial year, the company would have to assume the total cost of the salary if it wanted to continue the position. The section authorizes $2 million for each of the next three fiscal years.

## TITLE II—EXPORT TRADE ASSOCIATIONS

Section 201. Short Title: Export Trade Association Act of 1981

*Finding and Declaration of Purposes*

Section 202 sets forth findings by the Congress regarding exports and joint exporting activities and the purposes of the Act.

*Definitions*

Section 203 defines the pertinent terms. Among others. The definition of "export trade" is expanded from the definition contained in the Webb-Pomerene Act (15 U.S.C. 61–66) to include services. The term "service" means intangible economic output, including, but not limited to business, repair, and amusement services; management, legal, engineering, architectural, and other professional services; and financial, insurance, transportation, informational and any other data-based service, and communication services. The term "export trade activities" includes any activities or agreements in the course of export trade. The term "methods of operation: means the methods by which as association or trading company conducts or proposes to conduct export trade. The term "association" refers to any combination of persons, partnerships, or corporations, all of which must be citizens of the United States or created under the laws of any State of the United States. The term "antitrust laws" means the antitrust laws defined in the first Section of the Clayton Act and Section 5 and 6 of the Federal Trade Commission Act and State antitrust laws.

*Exemption from Antitrust Law*

Section 204 strikes Sections 2 and 4 of the Webb-Pomerene Act and inserts in lieu thereof a new Section 2. Section 2 provides that an export trade association or export trading company and their members, certified according to the procedures set forth in this Act is exempt from the application of the antitrust laws during the period of the certification provided that the association or export trading company and its export trade activities (1) serve to preserve or promote export trade; (2) neither result in a substantial lessening of competition or substantial restrain of trade within the United States nor constitute a substantial restraint of the export trade of any competitor of the association; (3) do not unreasonably enhance, stabilize, or depress prices within the United States; (4) do not constitute unfair methods of competition against competitors engaged in export trade; (5) are not reasonably expected to result in the consumption or resale in the United States of goods or services exported by the association or export trading company; and (6) do not constitute trade or commerce in the licensing of patents, technology, trademarks, or know-how, except as incidental to the sale of goods or services exported by the association or export trading company or its members.

Section 2 also provides for a 30 day suspension of the effective date of the exemption if the Attorney General or the Federal Trade Commission formally advises the Secretary of Commerce that it disagrees with the Secretary's determination to issue a certification.

*Conforming Changes in Style*

Section 205 amends Section 3 of the Webb-Pomerence Act to provide for conforming change in style.

*Administration; Enforcement; Reports*

Section 206 strikes Section 5 from the Webb-Pomerene Act and inserts in lieu thereof a new Section 4 and eight additional new sections.

A new Section 4(a) establishes the procedure for applying for certification as an export trade association or export trading company. It requires associations or export trading companies seeking certification to file applications describing in detail their proposed export activities including the goods or services to be exported, the methods of export trade, including, but not limited to, any agreements to sell exclusively to or through the association or trading company, any agreements with foreign persons who may act as joint selling agents, any agreements to acquire a foreign selling agent, any agreements for pooling tangible or intangible property or resources, or any territorial price-maintenance, membership, or other restrictions to be imposed upon members of the association or export trading company, and any other information, including the countries where export trade is proposed to be conducted, the Secretary may request on the association or company, its relations with other associations or companies, and effects on competition or potential competition.

A new Section 4(b) requires the Secretary to certify an association or export trading company within 90 days after receiving the application if the Secretary determines, after consultation with the Attorney General and Federal Trade Commission, that the proposed trade activities and methods of operation meet the standards set forth in amended Section 2 of the Act and will serve a specified need in promoting export trade. The certificate must specify permissible activities and any terms and conditions deemed necessary to ensure that the standards of the Act are met. Expedited certification and appeals procedures are specified.

This Section also requires the Secretary to provide the Attorney General and the Federal Trade Commission with a copy of the proposed certificate and sets forth procedures to be followed by the Attorney General and the Commission in rendering advice on a certification. Certifications may be issued by the Secretary prior to the expiration of forty-five days after the proposed certification has been delivered to the Attorney General or the Commission only if no formal notice of disagreement has been made by the Attorney General or Commission under the procedures specified in the Act.

Section 4(b) also provides for expedited certification procedures in cases where the temporary nature of the export trade activities or other circumstances such as bidding deadline necessitate a prompt decision on the application. Similarly, simplified procedures are provided for existing Webb-Pomerene Associations seeking certification under Title II within 180 days of its enactment. A procedure is also provided for appealing the Secretary's decision not to issue a certificate.

A new Section 4(c) of the Webb-Pomerene Act requires certified export trade associations and export trading companies to report any material changes in membership, export trade activities and methods of operations and allows them to apply for an amended certificate. The Committee expects the Commerce Department, in its regulations for this procedure, to make clear that a material change in export trade activities would include, among other things, a material change in the type of goods or services the company exports, but that an export trade association or trading company shall not be expected to report overall changes in the export environment outside its control, such as, for example, changes in market conditions.

Additionally, the Committee expects the Department to include in its certificates a specification that the certificate applies only to the trading company or association's membership as identified in the certificate, and that the certificate lapses if new members are added, unless notification of change in membership is reported to the Secretary within 30 days.

A new Section 4(d) of the Act permits the Secretary to require certified export trade associations or export trading companies to modify their organization or operation to correspond with their certification, or to revoke or amend the certification.

A new Section 4(e) to the Webb-Pomerene Act authorizes the Attorney General or Federal Trade Commission to bring an action to invalidate, in whole or in part, a certification on the grounds that the export trade, export trade activities or methods of operation of an export trade association or export trading company fail to meet the standards of Section 2 of the Act. This Section also permits the Attorney General or Commission to seek preliminary relief pending the disposition of an action if the Attorney General or Commission brings an action for invalidation the 30 day period provided in Section 2(b)(2). No person other than the Attorney General or the Commission would have standing to bring an action against an association or company for failure to meet the standards of Section 2 of the Act.

A new section 4(f) of the Act requires each association and trading company and their subsidiaries to comply with U.S. export control laws pertaining to the export or transshipment of goods on the Commodity Control List to controlled countries.

A new section 4(g) provides that final orders of the Secretary of Commerce under this section shall be subject to judicial review under chapter 7 of title 5 of the U.S. Code.

A new Section 5 to the Webb-Pomerene Act requires that the Secretary, the Attorney General, and the Chairman establish guidelines for purposes of determining whether an association, its members and its export trade activities meet the requirements of the new Section 3.

A new Section 6 to the Webb-Pomerene Act stipulates that every certified association or export trading company shall submit to the Secretary an annual report setting forth the information required in the application for certification.

A new Section 7 to the Webb-Pomerene Act establishes within the Department of Commerce an office to promote and encourage to the greatest extent feasible for formation of export trade associations through the use of provisions of this Act, and to report annually to the appropriate Congressional committees all East-West trade transactions requiring validated licenses and any other relevant information on the role of trading companies in East-West trade.

A new Section 8 to the Webb-Pomerene Act provides for the confidentiality of the information contained in an association's application for certification, application for amendment of certification, and annual report.

Section 8 also requires the Secretary to make available to the Attorney General and the Commission for their official use all materials filed by an association or export trading company which has been certified or, which has applied for certification if the Secretary believes the applicant is eligible for certification.

A new Section 9 to the Webb-Pomerene Act authorizes the Secretary of the Treasury to require an association or export trading company to modify its operations so as to be consistent with future international obligations of the United States set by treaty or statute.

A new Section 10 to the Webb-Pomerene Act authorizes the Secretary, in consultation with the Attorney General and the Chairman, to promulgate such rules and regulations as are necessary to carry out the purposes of this Act.

A new Section 11 to the Webb-Pomerene Act requires the President seven years after the date of enactment of this Act to appoint a task force to examine the effect of the operation of this Act on domestic competition and on the United States' international trade deficit and to recommend either continuation, revision, or termination of the Webb-Pomerene Act.

Section 6 of the Webb-Pomerene Act is redesignated as "Section 13, Short Title".

*Treatment of Existing Associations*

Section 207 sets out procedures whereby Webb-Pomerene Associations in existence as of January 1, 1981, may continue to operate under the standards presently in effect in that Act, unless they choose to seek certifications under this new law.

If an existing association elects to seek new certification (after the 180 day period specified in section 4(b)(3) of the Webb-Pomerene Act as amended by this bill, during which special procedures are in effect), the Secretary shall consider such application under the normal procedures set forth in section 206 of this bill. The association's exemption under current law will remain effective until the Secretary issues a new certificate and the association decides to accept it. The association has 30 days from the date of the Secretary's determination to decide whether or not to accept the certificate. If the Secretary decides not to issue a certificate, the association's exemption under existing law shall also continue in effect, under the procedures of current law.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, D.C., March 18, 1981.*

Hon. JAKE GARN,
*Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for a bill to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally, as ordered reported on March 12, 1981 by the Senate Committee on Banking, Housing, and Urban Affairs.

Should the Committee so desire, we would be pleased to provide further detail on the attached cost estimate.

Sincerely,

RAYMOND C. SCHEPPACH
(For Alice M. Rivlin, Director).

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: To be assigned.
2. Bill title: A bill to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services, generally.
3. Bill status: As ordered reported by the Senate Committee on Banking, Housing, and Urban Affairs on March 12, 1981.
4. Bill purpose: The purpose of Title I is to increase U.S. exports by encouraging more efficient provision of export trade services to American producers and suppliers.

Section 104 directs the Secretary of Commerce to promote the formation of export trading companies by providing information and advice to interested persons.

Section 105 delineates provisions for ownership of export trading companies.

Section 106 directs the Economic Development Administration and the Small Business Administration to give special weight to export-related benefits in consideration of loans and guarantee for export trading companies and in consideration of operating grants to non-profit organizations. This section further authorizes the annual appropriation of $10 million for fiscal years 1982 through 1986 for this purpose.

Section 107 authorizes and directs Export-Import Bank to establish a program to provide loan guarantees to export trading companies. The loan guarantees would be subject to the annual limitation on program activity provided in appropriation acts.

Section 108 authorizes the Secretary of Commerce to make grants to subsidize the employment of export managers by some small business manufacturing firms. The section further authorizes the annual appropriation of $2 million for fiscal years 1982 through 1984 for this purpose.

The purpose of Title II is to encourage U.S. exports by establishing an office in the Department of Commerce to promote the formation of export trade associations through the Webb-Pomerene Act.

5. Cost estimate:

| | Millions |
|---|---|
| Authorization amount: | |
| Fiscal year: | |
| 1982 | $12 |
| 1983 | 12 |
| 1984 | 12 |
| 1985 | 10 |
| 1986 | 10 |
| Estimated outlays: | |
| Fiscal year: | |
| 1982 | 10 |
| 1983 | 12 |
| 1984 | 12 |
| 1985 | 10 |
| 1986 | 10 |

6. Basis of estimate: This estimate assumes enactment of this legislation before October 1, 1981. The estimate also assumes that the annual authorization amounts will be appropriated in full in the year authorized.

The only direct budget costs estimated for the bill occur in Section 106 and Section 108 of Title I. Section 106 authorizes the annual appropriation of $10 million from 1982 to 1986. Section 108 authorizes the annual appropriation of $2 million from 1982 to 1984. Outlays were derived by applying a composite outlay rate.

The guarantee program authorized for the Export-Import Bank in Section 107 is assumed to take place within the annual program limitations. This section is assumed to have no direct budget impact.

While Title II creates an office within the Department of Commerce to promote the formation of export trade associations, the bill does not authorize any appropriation for this purpose. It is assumed, therefore, that funds for the office will be transferred or reprogrammed to fulfill this section.

7. Estimate comparison: None.

8. Previous CBO estimate: CBO provided an estimate for an earlier versions of this bill, S. 2718, on May 15, 1980. This bill differs from the earlier bill in three major respects. First, the bill annually authorizes $10 million rather than the $20 million authorized in S. 2718 for the Economic Development Administration and Small Business Administration. Second, this bill contains a new provision authorizing the annual appropriation of $2 million for the employment of export

managers. And third, this bill eliminates Title III of the earlier bill which allowed certain trading companies to be treated as DISCs.

9. Estimate prepared by: Rita J. Seymour.

10. Estimate approved by:

JAMES L. BLUM,
*Assistant Director for Budget Analysis.*

## REGULATORY IMPACT

In compliance with paragraph 5 of rule XXIX of the Standing Rules of the Senate, the committee reports that no increase in regulatory activity is expected to result from this bill.

## CHANGES IN EXISTING LAW

In the opinion of the Committee, it is necessary to dispense with the requirements of section 4 of Rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate.

## ADDITIONAL VIEWS OF SENATOR PROXMIRE

There are two serious defects in this legislation.

One serious defect is that the significant and historical precedent setting power for banking organizations to control up to 100 percent of export trading companies engaged in business and commerce will be administered by three separate bank regulatory agencies. In the past when Congress enacted bank legislation authorizing major non-bank activities by banking organizations the authority to regulate the activities has been given to the Federal Reserve.

Another serious defect is that the Justice Department and the Federal Trade Commission have been shunted aside as primary anti-trust enforcers of the antitrust laws governing foreign commerce from the United States in favor of the Commerce Department whose primary mission is to promote and trumpet trade.

Thus this legislation, whose goal is meritorious, will undoubtedly result in inconsistent, wasteful and overlapping bank regulation instead of a consistent and coherent bank regulatory policy; and will result in competition taking a back seat to trade promotion while price-fixing in domestic and international markets gets a wink from the Commerce Department.

First of all we should recognize that this is major legislation: major bank legislation and major anti-trust legislation. Banking organizations—banks, bank holding companies and Edge Act International Corporations are given the power to control export trading companies which are permitted to engage in a wide range of export and import activities not only as financiers but as equity participants. An export trading company is permitted to purchase for its own account goods and commodities, warehouse them, and market them overseas through its own retail network. The separation between banking and commerce which has served this nation well for over 100 years has prohibited such activities by banks.

The Federal Reserve and the Federal Deposit Insurance Corporation, the two regulatory agencies which are responsible for the safety and soundness of our banking system testified that bank control of export trading companies posed unacceptable risks to our banking system. Their recommendation was that exports could best be served by banks continuing their role as financiers, holding a minority position perhaps in export trading companies, but not a position which would jeopardize bank capital in the highly-leveraged risk operations of an export trading company.

Our export posture is not one that requires that we put our financial system at risk. We already have enough risk in our financial system. One need only to read the public pronouncements of the highest officials in the Reagan Administration concerning the condition of our financial system to learn the seriousness of the problem. Yet the same

Reagan Administration comes forth with this legislation as the "centerpiece" of its trade policy in flagrant disregard of the warnings of the regulatory agencies charged with the safety and soundness of our financial system.

I offered an amendment which would contain the risk yet let the legislation move forward. This amendment would have allowed control of an export trading company by only a bank holding company or an Edge Act International Company. The benefit of my amendment is that it would continue to require separation between banking and non-banking activities and would lodge authority in the Federal Reserve to administer the provisions. This is consistent with our existing banking structure where non-bank activities are carried out through the holding company and through Edge Act Corporations. Both the bank holding company laws and the Edge Act are administered by the Federal Reserve.

The Senate on occasion gets stampeded to the point where it closes its ears to meritorious responses to questions raised by legislation. This is one of those occasions. The sponsors of the bill will not countenance any deviation from their current wisdom. Thus the Senate will send to the House a bill that mixes banking and commerce unnecessarily. We will have to rely on the House Banking Committee to show greater wisdom than we have shown.

By recommending that the Commerce Department play the key role in administering the Sherman Antitrust Act in place of the Justice Department and the Federal Trade Commission, the Reagan Administration continues its assault on the antitrust laws.

The legislation rewrites the Webb-Pomerence Act. Currently, adherence to the provisions of the Webb-Pomerence Act provides a defense against suit under the Sherman Act for export associations. This legislation goes further. An export association upon making an application to the Commerce Department may obtain certification by the Commerce Department that its activities meet the standards of the legislation.

Such a certification carries with it immunity from not only the Federal antitrust laws but also from State antitrust laws and private party suits, except for *ultra vires* acts.

This intrusion into the realm of State's rights and private rights might be plausible if a Federal agency with antitrust experience were charged with the responsibility of administering the statute. That is not the case here. The Commerce Department will issue the certificates upon consultation with the Justice Department and with the Federal Trade Commission. The legislation leaves it up to the Commerce Department to determing the degree to which it considers the views of the Justice Department and the Federal Trade Commission.

While the Justice Department and the Federal Trade Commission may file suit within 30 days after the issuance of a certificate by the Commerce Department on the grounds that the export association's behavior violates the standards set forth in the Webb-Pomerence Act, it is clear that the real action in administering the law will be in the granting of certificates by the Commerce Department.

The Commerce Department is in a massive conflict of interest situation under the legislation, having responsibilities to promote trade and enforce the antitrust laws. It is clear that the antitrust laws are going to take a back seat. Any why? The antitrust laws have served this nation well giving us a marvelous free and open competitive society. They are now to be placed on the scrap heap because the Justice Department and the Federal Trade Commission have done their job in enforcing the law.

The true test of competition is whether there is a market restraint on prices. The authors of this legislation told us that this legislation did not change the substantive standards under the antitrust laws. Yet when the antitrust experts came before the Committee we were told that the legislation is "an attempt to codify what many people who participated in this process consider to be the best thinking on what the law should be interpreted to be by the courts." That statement makes it obvious that a good deal of judgment went into the alleged codification.

It is clear from the testimony of Secretary Baldrige where U.S. firms fix prices overseas or allocate markets overseas, he intends to certify the behavior even though such behavior is actionable at the present time under the antitrust laws. It was precisely this kind of behavior in overseas markets that caused the Wall Street Journal to say in an editorial:

> By endorsing and expanding the principle of export cartels, the legislation undermines U.S. commitment to an open international trading system. How can we complain about OPEC or Third World cartels if we encourage our producers to form their own export cartels?

It is clear that the Commerce Department will not have the stomach to stand against price-fixing overseas. How will they administer the act when the effect is on domestic prices? I do not know, but I have my doubts. Commerce will find itself in a basic conflict position of trying to balance effects on domestic prices and overseas trade.

The Commerce Department has no expertise in administering antitrust statutes, according to Secretary Baldrige's own testimony. Yet they are entrusted with administering a complex statute. For example, under the legislation one of the changes made is to prohibit affects on domestic prices that are "unreasonable". Under the standard currently in effect "artificial or intentional" effects on domestic prices are prohibited. This is potentially an explosive change. The words "reasonable" or "unreasonable" are terms of art under the Sherman Antitrust Act. But with respect to price-fixing under the Sherman Act no inquiry is permissable as to "reasonableness" or "unreasonableness."

Price fixing is one of those categories of antitrust behavior that is *per se* unlawful. Where price-fixing is found it is always held to be "unreasonable" under current law.

Now comes this legislation, providing that only behavior that does not "unreasonably enhance, stabilize or depress prices within the U.S." is permitted. Is price-fixing to be allowed? How much price-fixing is reasonable or unreasonable? And the Commerce Department, which does not know a thing about antitrust is to administer the law while the experts at the Justice Department and the Federal Trade Commission sit on the sidelines. I hope the House Judiciary Committee does a better job on the antitrust sections of this bill than we did.

WILLIAM PROXMIRE.

## ADDITIONAL VIEWS OF SENATORS ARMSTRONG, PROXMIRE, D'AMATO, LUGAR, GARN, SCHMITT AND TOWER

During the markup of this legislation, the committee adopted by a 7–6 rollcall vote an amendment offered by Senator Riegle establishing a grant program for businesses which hire export managers.

The amendment allows the Secretary of Commerce to give up to $40,000 each to small business manufacturing firms to help them defray the cost of employing an export manager on their own. We oppose this amendment.

We believe that this is exactly the wrong signal to send to the American public in these times of economic crisis. In one breadth we are being accused of taking food from children's mouths, yet seven members of the committee said in another that we want to continue to subsidize American business when it is politically advantageous.

The amount of money authorized by this amendment is a relatively small $2 million. It is so small, on one hand, that at $40,000 each, only 200 U.S. companies could be helped, yet there are so many more which might qualify for the aid.

But $2 million is also a very large amount. Since the average cost to the government to provide one child one subsidized school lunch is 65 cents per day, a school system of 4,200 students could be fed for the next four years on $2 million.

We do not feel this program deserves a chance to become another one of many federal giants that began with good intentions and a few million dollars. If there really are substantial benefits in hiring export managers, the private sector will find ways to finance their employment.

We support this bill, but wish to see this give-away program removed from it.

JAKE GARN.
JACK SCHMITT.
RICHARD G. LUGAR.
JOHN TOWER.
W. L. ARMSTRONG.
WILLIAM PROXMIRE.
ALFONSE D'AMATO.



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