

EXPORT TRADING COMPANY ACT OF 1981

HEARINGS
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL FINANCE
AND MONETARY POLICY
OF THE
COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 144

TO ENCOURAGE EXPORTS BY FACILITATING THE FORMATION
AND OPERATION OF EXPORT TRADING COMPANIES, EXPORT
TRADE ASSOCIATIONS, AND THE EXPANSION OF EXPORT
TRADE SERVICES GENERALLY

FEBRUARY 17 AND 18, AND MARCH 5, 1981

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EXPORT TRADING COMPANY ACT OF 1981

TUESDAY, FEBRUARY 17, 1981

U.S. SENATE,
COMMITTEE ON BANKING,
HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON INTERNATIONAL
FINANCE AND MONETARY POLICY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 5302 of the Dirksen Senate Office Building, Senator John Heinz, chairman of the subcommittee, presiding.

Present: Senators Heinz, Chafee, Proxmire, and Dixon. Also present: Senator John C. Danforth.

OPENING STATEMENT OF SENATOR HEINZ

Senator HEINZ. This hearing of the Subcommittee on International Finance and Monetary Policy will be on the export trading company legislation.

I might add, I am pleased to participate in hearings on the subject once again. As the members of this committee know, this is not a new subject for us. This subcommittee and the full committee have previously held hearings specifically on export trading company legislation, on September 17 and 18, 1979, on March 17, 18, and April 3 and July 25, 1980. Prior to that, in 1978 and 1979, the subcommittee also had extensive hearings on export policy and promotion generally.

Subsequently, this committee reported legislation which was passed by the Senate on September 3, 1980, by a vote of 77 to 0. Every current member of this committee who was in the Senate at that time voted for the bill. This year's bill, S. 144, has 58 cosponsors.

Unfortunately, there was not adequate time last year for the House to examine the bill as closely as it needed to, particularly since it was referred to three different committees. As a result, the bill was not enacted.

In view of this extensive history, it is my judgment that the Senate's position on the merits of this legislation is clear and that our objective should be to approve the bill without undue delay in order to give the House ample time to work its will. Accordingly, we have scheduled hearings today and tomorrow and plan, after an additional day of hearings in early March, to mark up the bill next month.

This schedule, in my view, allows full and efficient consideration of the bill in a way that will build on the work that was done last year. I would note that many of the witnesses here this week have

not previously testified on the bill, as we are trying to increase the breadth of comment on the legislation, as well as the depth.

In the past discussion of this bill, there appear to have been two main issues raised: the need for a bill at all and the need for bank control of trading companies. It is not my intention in an opening statement to go into detail on these points, as I am sure they will be fully discussed in the hearings. Let me simply make the following brief observations.

One, the case for increasing exports, which is the fundamental objective of this bill, is clear and compelling. 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 the 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 market 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 United States 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.

I don't think there is any question but that our export performance is lagging and that a broad range of additional steps is needed. S. 144 is one of those steps, and this committee will be taking up others as time goes on.

Second, an observation on bank control. This bill is designed to provide a number of different incentives to promote the formation or expansion of export trading companies. While some existing trading companies or potential exporters will be interested in the bill because of the noncontrolling bank investments it permits so they can expand their operations, there are also some banks that will be interested in the bill because of the opportunity it provides to set up their own trading company to more fully utilize their existing expertise in international marketing.

S. 144 permits this option under carefully contained conditions providing for prior approval by the appropriate bank regulatory agencies in the case of a controlling investment. Other restrictions, included last year at the suggestion of the Federal Reserve Board, prohibit lending on preferential terms, limit a bank's financial commitment to a trading company, and limit bank identification with a trading company. The Senate agreed last year that these provisions constituted more than adequate protection against any risks associated with control, and the control against any risks associated with control, and that control itself—carefully defined—was an appropriate alternative to include in this legislation.

I expect these and other issues to be thoroughly discussed again this year, and I look forward to the committee's consideration of the

bill. To begin that effort, we are particularly honored to have with us leading off the hearing the real father of this legislation, who has graduated to the role of godfather, the chairman emeritus of the committee, former Senator Adlai Stevenson. More than anyone else, he has brought the bill as far as it is today, and I hope with his support we will be able to finish the work he so ably began several years ago.

Before I yield to my colleagues for opening statements, if any, and then recognize the witnesses, I would like to add one other thought. It is my hope that with the press of budget and other matters that the Congress will be involved with very shortly, that we may move ahead promptly on this legislation. It is my hope that this bill will be the first major bill to move through the Senate this year, and I believe it is appropriate policy for us to act in this way.

I believe it is time to mobilize this Nation's resources to compete effectively in world markets. We can no longer afford to stand idly by while our trading competitors become our most successful exporters. It is with some irony that I note that the sixth most prolific and successful exporter is the Mitsui trading company, not an American-domiciled company as we know the term.

And so it is the view of the chairman that we could reverse a period of great decline in our ability to compete by moving this legislation, and I want to thank my colleagues for their interest and presence here this morning.

I would like to yield to my ranking member, Senator Proxmire.

OPENING STATEMENT OF SENATOR PROXMIRE

Senator PROXMIRE. Thank you, Chairman Heinz.

I certainly join in the tribute that you paid to Senator Stevenson. He did a marvelous job on this committee in many, many respects. Certainly, he is more responsible than anybody else for bringing this legislation along. What he did was extremely constructive.

I want to commend you, Mr. Chairman, for holding these early hearings and moving this along. S. 144, the Export Trading Company Act, is a major bill. It's major banking legislation, major anti-trust legislation.

The legislation would permit banks and bank holding companies to control export trading companies, subject to the jurisdiction of three separate bank regulatory agencies. Export trading companies would be permitted to engage in a wide variety of export-import transactions, not only as financiers but as equity holders of goods and commodities.

Both the Federal Reserve and FDIC have said S. 144 represents a historical breach of the separation of banking and commerce in this country with substantial risk, risks so great these agencies, which are responsible for the safety and soundness of our banking system, recommend our banks not be permitted to control export trading companies. I don't believe we should ignore the Federal Reserve and FDIC.

We are not facing an export crisis. The fact is that our balance and current account is favorable. We are almost alone in this favorable foreign trade position among non-OPEC countries.

What we do face is an eroding capital position. Alan Greenspan has said publicly that the cost of a large-scale financial system bailout will increase the inflation rate from 10 to 20 percent. The Federal Reserve, which could not, in my view, maintain any semblance of a rational monetary policy in such circumstances, tells us that bank control of export trading companies poses high risks, risks that, on the basis of the track record, pose a threat to the banking system as a whole.

Now, I think the chairman of this subcommittee has made it very clear that this legislation has had strong support and continues to have strong support. I have no illusions. I doubt that even my amendment which seeks only in a small way to minimize the risk will receive substantial support.

Given the nature of the legislation, pure bank expansion not invading the turf of any powerful lobby, there is no concerted opposition. Big banks want it; export lobbies want it; and the administration wants it.

In these circumstances, I can only point out to my colleagues the possible serious consequences of this legislation unless it is scaled to proportion, as suggested by the Federal Reserve and FDIC.

Also a big concern are the antitrust provisions of this legislation. Antitrust enforcement is basic. It provides the economy with a vital anti-inflation, procompetitive policy. Nothing destroys free markets faster than monopolies and cartels. We all pay for price fixing. Yet there is no lobbying constituency for antitrust enforcement.

This legislation will shift responsibility to the Commerce Department. The Justice Department will be able to go to court, but the real action will be in the day-to-day administration by Commerce in the issuance of certificates of compliance.

It is obvious why the legislation is drafted this way. Antitrust is going to take a back seat.

What kind of a message do we send to our European allies or Third World countries when our basic export laws encourage cartels? Is OPEC to be the star by which our foreign trade is conducted? Does the signal go off that the U.S. free-market world economy is only so much rhetoric, but deep down inside, we feel cartelization is the way to go?

The Wall Street Journal hit it on the head last year:

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?

That statement is not from some wild-eyed liberal. It's from the Wall Street Journal.

Mr. Chairman, there are substantial issues in this legislation. I hope the hearings and markup will result in a bill that I can give my unqualified support to.

I don't believe we have an export crisis, as I say. I want to do all I can to increase exports, which can best be increased by lowering prices, wages, labor costs. Maybe increased bank involvement would be helpful, but we need to take great care in fashioning appropriate legislation.

I look forward to the testimony of the distinguished witnesses today and look forward to the legislation that will be supported by all of us.

Senator HEINZ. Thank you, Senator Proxmire.
Senator Chafee.

OPENING STATEMENT OF SENATOR CHAFEE

Senator CHAFEE. Thank you, Mr. Chairman.

First of all, I would like to join in the tribute to Senator Stevenson for all the work he's done in the past, and also Senator Danforth, who has been active on this legislation right from the beginning.

I'm delighted, Mr. Chairman, that you have begun prompt consideration of this legislation, of which I am a cosponsor. With the growth of new export opportunities around the world as a result of the Multilateral Trade Agreement, competition for foreign markets has become more intense. I think we all recognize that.

Our trading competitors have accepted this challenge and have been aggressive in taking advantage of the reduced trade barriers. But the U.S. trade deficit has shown no improvement in recent years. In 1977 we ran a \$26.5 billion deficit. In 1978 we reported a \$28.5 billion deficit, and a \$25 billion deficit in 1979. In 1980, no improvement was shown as we ran yet another deficit just under \$30 billion. Our exports, in my judgment, are not growing fast enough, and the reasons are many.

We have a host of self-imposed export disincentives. There is also a reluctance on the part of business to bear the costs and risks of international trade. We all recognize that U.S. businesses may be reluctant to go abroad when the market in the United States is so large.

The Department of Commerce estimates that there are more than 20,000 U.S. companies which could export profitably but don't. Most are smaller firms located outside the major metropolitan centers. The U.S. market has served these companies well. They have more to gain by expanding here, they believe, than going abroad. But actually, they can gain a great deal by going abroad.

American business needs to learn how to compete abroad. With the proper assistance, these firms will soon discover that the markets are there.

I have sponsored an export-opportunities conference for firms in my own State of Rhode Island, and I have learned that many companies do not export because they have neither the funds to invest in market development nor the time nor the personnel to master customs documents, shipping, packaging, regulations, and the many details involved. They need someone to market their products for them.

Trading companies, such as those proposed in this bill, can give U.S. manufacturers access to experienced traders who are equipped to handle all the intricacies of exporting and who have the expertise. I believe trading companies can pool talents and resources to do market analyses on behalf of thousands of American firms.

I don't see this legislation as the end-all solution. This is just one piece of legislation which I hope this Congress will pass. There are

other acts that are going to come for debate before Congress this year, one before this committee. I am referring to proposed changes in the Foreign Corrupt Practices Act. I hope we will begin work on this matter soon. Also, in the Finance Committee, we are going to consider the taxation of Americans abroad. Action on both of those measures, I think, are essential for us to reduce the disincentives that are affecting American exporters.

So, Mr. Chairman, I am glad we are getting on with this important export incentive legislation so quickly.

Thank you.

Senator HEINZ. Senator Chafee, thank you very much.

Senator Dixon.

Senator DIXON. No questions, Mr. Chairman, or statement. I'm just delighted to welcome to the committee he served with such distinction my good and warm friend Senator Stevenson from Illinois.

Senator HEINZ. Very well.

Senator PROXMIRE. Mr. Chairman, I am going to have to leave very briefly, I hope for 15 or 20 minutes, but I will be back.

Senator HEINZ. Senator Dixon, you are both the spiritual and in fact successor to Senator Stevenson. Let me take this opportunity to welcome you to the subcommittee. This is the first time we have met in subcommittee, and I think it is very appropriate that your predecessor is our lead-off witness.

I am, first, delighted that you are both here and, second of all, want to just reiterate all the kind things everybody said about Senator Stevenson.

We even said some of them before you decided to leave. You threatened to reconsider, but clearly, it was an idle threat. We are always delighted to have you here in any capacity.

Senator CHAFEE. I don't remember he ever even threatened.

Senator HEINZ. Well, he did it in private, but it was a jest.

Let me insert a statement of Senator Tsongas, who was unable to attend the hearing, in the record as though read, and then we will ask Senator Stevenson to please proceed.

[Statement follows:]

STATEMENT OF SENATOR TSONGAS

I am pleased to return to the Banking Committee's Subcommittee on International Finance and Monetary Policy to pledge my support for export trading companies. Let me emphasize at the outset that I believe export trading companies can play a vital role in American export capabilities. Thus, I am committed to enacting export trading companies as soon as is prudently possible.

Last year a number of hearings were held on export trading companies, a bill was reported out of committee, and the Senate passed export trading companies without amendment by a vote of 77 to 0. However, no bill was passed because the House failed to act.

This session, we begin anew. Senators Danforth, Heinz, and Bentsen are working diligently on export trading companies as am I. I would like to thank Senator Stevenson, who testified earlier on the legislation before this committee. Adlai's efforts catalyzed the export trading companies idea. I commend him for his work.

I am optimistic about our chances for securing an export trading company bill. Senator Heinz informs me there are now 58 cosponsors, not a poor show of support for mid-February. Additionally, initial contacts with colleagues in the House have been heartening. There appears to be a willingness to consider export companies on the merits. I am therefore hopeful that this session will see the fear about export trading companies allayed and that we will get on with the business of improving U.S. export potential.

Our import picture is alarming. This year well over \$90 billion will be paid to OPEC countries for oil. Oil price increases alone added over \$16 billion to the deficit in 1979—the seventh deficit year of that decade. Furthermore, with gasoline prices now beginning to reflect the world's limited supply of oil, U.S. car manufacturers are losing out dramatically to foreign producers of fuel efficient cars. The resulting dollar flows for oil and auto imports are at record levels.

The potential U.S. responses are increase exports or protectionism. We can begin imposing quotas, tariffs and the like, and prepare ourselves for retaliatory action, or we can attempt to improve our export capability and compete in the world market. The role of Government must be to insure that U.S. business does not compete abroad at a disadvantage.

Export trading companies can play an important role in improving our trade record. The design of the bill is simple. Trading internationally involves a variety of tasks, many of which can be performed jointly. Title I of the bill addresses this issue. Title I assures firms that cooperative export efforts will not be threatened by antitrust suits. Title II of the bill allows banks to participate in the formation of export trading companies.

Banks will supply the two critical resources that small- and medium-sized manufacturers lack: One, investment capital, and two, managerial and commercial expertise in international finance. But, in order to get banks to participate, there must be the potential for a controlling interest under appropriate circumstances. Banks simply will not be willing to play a leading role without the kinds of controls that will insure sound management, minimization of risks, and enhancement of profit. Thus, the legislation permits banks to acquire a controlling interest in export trading companies, subject to prior approval by bank supervisors.

By allowing firms to work together and banks to lend their expertise and assistance, there is a good chance that a great number of small- and medium-size businesses will be brought into the export market.

Therefore, I believe that export trading companies deserve a chance. I am confident that Senator Heinz and the other members of the Banking Committee will report out a good export trading company bill, and I am hopeful that export trading companies will become law early in this session.

STATEMENTS OF ADLAI STEVENSON, FORMER U.S. SENATOR FROM THE STATE OF ILLINOIS; AND JOHN C. DANFORTH, U.S. SENATOR FROM THE STATE OF MISSOURI

Senator STEVENSON. Thank you, Mr. Chairman.

I am grateful for the kind words of you and all my good friends and former colleagues on this body, and very much so for those of my successor on this committee, a good friend and a fine public servant, Senator Alan Dixon.

Mr. Chairman, let me offer a statement for your record. I will try to condense my remarks.

Senator HEINZ. Without objection, the entire statement will be included in the record.

[The complete statement follows:]

Adlai E. Stevenson
Testimony on Export Trading Companies
Subcommittee on International Finance
and Monetary Policy
February 17, 1981

Suite 400
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Washington, D.C.
785-4443

I thank you for the opportunity to appear before this distinguished Subcommittee and continue an effort we began together some years ago, to examine U. S. export performance and develop the elements of a national export strategy.

The nation's oil import bill will exceed \$85 billion this year and leave us with a merchandise trade deficit of almost \$20 billion. Last month, the Commerce Department recorded the nation's 57th consecutive monthly trade deficit. The deficits mount, with no end in sight, adding to inflation and unemployment, weakening the dollar and, ultimately, our influence in the world. The deficits persist, yet we leave the nation's vast export potential largely untapped.

U. S. exports have grown over the past decade from 4.3% of our national product to 8% today. But this expansion has not kept pace with the growth of overseas markets. Since 1970, the U. S. share of total world exports has declined from 15% to 12%, while our competitors have maintained or increased their shares. For exports of manufactures, the decline in U. S. share has been even more precipitous--from 21.3% in 1970 to 17.4% in 1979.

These figures are not abstractions; they represent billions of dollars of export business which have fallen to our trading partners in Europe and Japan. And with each billion

dollars of lost exports, we lose an estimated 40,000-50,000 domestic jobs. Other countries, such as West Germany, go all out to produce and sell in world markets, and export upwards of 22% of their GNP. This country, despite countless studies documenting untapped export potential, still lacks a coherent national export policy and the institutions and channels which could mobilize it.

Foreign trade remains the province of the largest U. S. corporations, with 1% of U. S. firms responsible for 80% of all exports. Export expansion on the scale required to offset U.S. trade deficits will depend on the development of new channels to link tens of thousands of small and medium sized American firms with global markets. Today, fewer than one in ten U.S. manufacturers sell any part of their production overseas (20,000 out of 250,000 U.S. firms). Yet studies by the Department of Commerce and testimony before this Subcommittee have indicated that more than 20,000 other U. S. producers offer goods and services which could be highly competitive abroad. The small size and inexperience of these firms, however, leave them unaware of overseas opportunities and ill-equipped to absorb the front end costs and risks involved in developing foreign markets.

Export trading companies could link these exporters with global markets. They could represent small as well as large U.S. companies world wide, spotting market opportunities, meeting price competition, absorbing exchange rate fluctua-

tions, handling the details of export transactions--and offering a full range of services and products to foreign purchasers and domestic producers.

Regional and international banks, with their financing capabilities, international correspondent networks, and expertise about foreign economic conditions, are especially well positioned to develop trading company subsidiaries handling export goods and services. Banks could buy into existing firms or form alliances with manufacturers or other banks to create new ones.

Large manufacturers and merchandisers already involved in sizeable export trade could, via export trading companies, handle the goods of myriad other firms. A corporation's international contacts and expertise offer economies of scale in the overseas marketing of products from small and medium sized firms which could not otherwise be exported profitably. Export trading companies would also give corporations the flexibility to deal with multi-country, multi-currency transactions, or massive "turnkey" projects involving multiple suppliers. Perhaps most importantly, it would enable firms to handle the complex trade deals increasingly being carried out on a barter basis with socialist and Third World countries. According to the Commerce Department, as much as 40% of East-West trade this year will involve some sort of barter arrangement. Companies such as GE, GM and Rockwell International already have established "counter-trade

subsidiaries." With passage of S.144, these could become full-line trading companies and in a better position to carry out counter-trade transactions.

Despite the success of trading companies as "export middlemen" in Europe, Japan, and other countries, such companies have been slow to develop in the United States, due to deterrents presented by banking regulations, antitrust uncertainties, and the traditional insularity of the U.S. market. Last year, legislation was developed by this Subcommittee to remove some of these deterrents. The Export Trading Company Act of 1980 modified provisions of existing law which discourage the establishment or expansion of export trading companies, and offered modest incentives to their development. It passed the Senate last session by a vote of 77-0. Unfortunately, the House was unable to act on the bill before the session ended. I am pleased the export trading company legislation has been reintroduced and I am hopeful that through your efforts, Mr. Chairman and those of other Senators concerned about U.S. export performance, the clock will not run out on this legislation again.

Although a variety of existing enterprises provide export services to U.S. producers, most are small, thinly-capitalized firms which fulfill only a few of the many functions required for export trade. Concern has been raised that these firms would be at a competitive disadvantage against the full-line export trading companies contemplated by this legislation. This concern is misplaced, for several reasons.

First, the whole premise of this legislation is that U.S. export potential has barely been tapped. The export business is not a static pie. Major opportunities exist for existing export management firms as well as new export trading companies, opportunities which will be enhanced by passage of this legislation and as more firms gain export experience.

This has been the case in Japan, where despite the existence of nine dominant export trading companies, over 6,000 smaller export trading companies continue to compete profitably for export business.

Second, nothing in this legislation precludes existing export management firms from seeking bank or corporate equity and expanding into full-line trading companies. Indeed, many firms have testified before this Subcommittee of their eagerness to do so. This legislation basically affords existing firms the flexibility to structure their operations as comprehensively as they find profitable.

Third, I agree that the formation of export trading companies will increase competition in the export trade business. But I find that outcome wholly desirable. Competitive export management firms will remain competitive, whether or not they remain specialized. If they choose to expand, they will be prime candidates for (bank or corporate) equity investors. Less competitive export firms will be forced to improve efficiency or go out of business. The result-- increased productivity in the export service sector and expanded U.S. exports.

The success of large-scale general purpose trading companies in Europe and Japan has contributed significantly to the export earnings of all our major trade competitors. Foreign-owned trading companies operating in the U.S., in a manner precluded to U.S. export trade associations, have been equally successful. Last year, a Japanese-owned trading company was responsible for 1% of total U.S. exports--serving 34 corporations in the Fortune 500. The sixth largest U.S. exporter is another Japanese trading company - Mitsui. While these companies successfully expand U.S. exports, the profits go to Japan. Why should U.S. firms be precluded from competing for this business, offering a full range of services and keeping the profits here?

The growth of U.S. export trading companies has been hindered by government regulation, the structure of American enterprise, and the traditional insularity of the U.S. market. U.S. banking laws exclude banks from offering export trading services or investing in export trading companies. Antitrust uncertainties deter U.S. companies from pooling resources with other producers in order to expand exports. American businessmen, especially small businessmen, are unfamiliar with foreign customs and languages, unaware of foreign market opportunities, and ill-equipped to deal with the bureaucratic requirements of licensing, insurance, financing and shipping arrangements. Large multinational companies have developed their own export markets, but do little to assist other potential exporters.

Without S. 144 to reduce impediments and encourage U.S. trading companies, small and inexperienced firms will continue to be locked out of foreign markets, except as suppliers to large firms which will themselves remain handicapped.

The Necessity for Bank Participation

If export trading companies are to develop on a scale sufficient to affect overall U.S. export levels, it is imperative that banks and major corporations be involved in their formation. Commercial banks especially, with their financial resources, international correspondent networks and trade financing experience are well positioned to assist in the establishment of trading companies. Even more importantly, commercial bank networks extend throughout the U.S., touching virtually all small and medium sized firms. U.S. banking organizations have the systems, skills and experience to develop trading companies offering one-stop export service to U.S. firms, but need broader authority to do so. S. 144, within carefully defined limits, would provide that authority, by enabling banks, banking holding companies and Edge corporations to make limited investments in export trading companies, subject to prior approval and conditions imposed by appropriate Federal bank regulatory agencies. These limitations include the specifications that no bank may invest more than 5% of its capital in an export trading company, and that all investments over \$10 million, as well as any controlling (25 percent or more) equity positions, be reviewed by the appropriate bank

regulatory agency and subject to conditions designed to ensure the safety of bank involvement and fair competition.

The legislation comprehends a number of safeguards to protect against breaches of the traditional wall separating domestic banking and commercial activities. The bill makes clear that trading companies must be engaged exclusively in international trade. It does not grant ETCS any authority to engage in, for example, manufacturing, farming or the securities industry.

The separation of banking and commerce is an American tradition with some justification. It is not true, however, that banks have been limited exclusively to credit and deposit related functions for 100 years. In 1919, for example, Congress recognized that banks must compete in the foreign market and authorized banks to form Edge Act corporations which may engage in activities abroad which are prohibited within the United States. Another instance of bank participation in commercial activity is bank ownership of Small Business Investment Corporations, which Congress deemed necessary to make capital available for small businesses.

Section 105(4) of S. 144 squarely prohibits preferential bank lending to any affiliated export trading company or its customers, a prohibition which exceeds anything now in the Bank Holding Company Act or International Banking Act. The legislation ensures that banking organizations would have to exercise the same credit judgments in lending to export trading

companies and their customers as they do in other banking activities. The limit on aggregate bank investments in export trading companies further protects against too great an incentive to lend to an affiliated trading company or its customers.

Above and beyond these statutory limitations, the bill vests bank regulatory agencies - the Federal Reserve, Comptroller, FDIC and FHLBB - with authority to establish standards, guidelines, regulations, inventory-to-capital ratios, or other requirements governing the activities of export-trading companies with commercial bank involvement. Any initial investment by a banking institution in an export trade subsidiary must be specifically approved by a federal banking agency. Thereafter, the agency has the right to disapprove additional investments in an ETC, or additional lines of activity the ETC may want to engage in. The agencies can set conditions limiting a particular bank's financial exposure to an ETC and prevent any operations or practices they deem unsound. They also have the authority to enforce any conditions or limitations imposed with cease-and-desist orders, and require such reports as necessary to monitor a banking organization's export trade involvement. All this is in addition to the stringent statutory limitations limiting total investments (equity and loans) in ETCs to 10% of a bank's capital and prohibiting preferential lending. These comprehensive controls, devised in cooperation with the Federal

Reserve, ensure against any conceivable threat to a bank's depositors, shareholders or competitors which could be posed by the equity involvement of banks in export trading companies.

The Necessity of Antitrust Immunity to Encourage Trading Companies

Title II of S. 144 would revise the Webb-Pomerene Act of 1918 to clarify the antitrust provisions applicable to export trade associations and export trading companies. It also extends the Act's coverage to the export of services and transfers administrative responsibility for Webb-Pomerene from the FTC to the Commerce Department. Most importantly, it provides a certification procedure which would enable Webb associations and export trading companies to obtain antitrust preclearance for specified export trade operations. The clearance procedure would facilitate exports by permitting firms to determine in advance exactly which export trade activities would be immune from antitrust suit and which ones would not.

It should be clearly understood that this title constitutes no substantive change in U.S. antitrust law. It merely codifies what ambiguities in the wording of Webb-Pomerene left unclear, in a manner consistent with court interpretations and Justice Department Enforcement practices. Legal uncertainties about what export activities constitute a "substantial restraint of domestic trade," and the threat of antitrust litigation have severely limited the statute's

utility. The 33 Webb-Pomerene associations in existence today account for less than 2% of U.S. exports.

The United States can ill-afford inconsistencies in antitrust policy which, in the name of competition, effectively prevent U.S. firms from competing in world markets. Title II of this legislation recognizes the significant export gains which could be made if export trading companies and Webb-Pomerene associations were allowed to engage in specific activities without fear of prosecution under the anti-trust laws. The certification process mandates the Department of Commerce to consult with the Justice Department and the Federal Trade Commission in determining that proposed export activities do not violate antitrust standards. The Secretary of Commerce must also find that the export operations to be certified will serve a specified need. Any change in the export trade or methods of operation must be reported to the Secretary of Commerce and the certification accordingly modified.

Even after the export activities of a trading company or association have been certified, they remain subject to the continuing scrutiny of the Departments of Commerce and Justice and the Federal Trade Commission. Either Justice or the FTC may at any time initiate an action to revoke a trading company's certification. Once the certification has been revoked, civil or criminal suits may be brought against an export trading company.

Mr. Chairman, it is extremely difficult to comprehend how the modest clarification of existing law and elaborate safeguards of Title II could be deemed in any sense a legislative endorsement of cartels or a violation of U.S. antitrust statutes. Careful reading of this Title and the legislative and case history of the Webb-Pomerene Act makes clear not only the established need for clarification of permissible export trade activities, but the fact that nothing in this legislation constitutes a substantive change in anti-trust law.

Provisions for Implementation of S. 144

In order to encourage the direct participation 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. S. 144 authorizes \$20 million per year in fiscal years 1981 through 1985 to EDA and SBA to support loans or guarantees for these purposes. The level of funding proposed is modest, both in relation to the need for export promotion activities directed towards small businesses and in comparison with the tremendous employment and balance of payments gains which accompany increased export activity. In 1978, in fact, the Carter administration's "export policy" proposed a \$100 million SBA program to assist small businesses interested in exporting. Unfortunately, nothing on this scale has been implemented.

The bill also directs the Secretary of Commerce to promote actively the formation of export trading companies and to disseminate information about related opportunities. Finally, S. 144 directs Eximbank to establish a guarantee program for commercial loans to U.S. exporters when potential export business is threatened by a small exporter's inability to secure adequate financing. The legislation leaves the size of this program unspecified, with amounts to be appropriated annually to the Export-Import bank. The section makes clear, however, that the program is designed to aid small and medium sized exporters.

In my judgment, all of these provisions are essential if this legislation is to reach its intended beneficiaries--the large pool of small and medium sized firms with export potential, but lacking the expertise and resources to bring their products to world markets.

Finally, Mr Chairman, I would like to comment on certain tax provisions which were contained in earlier versions of this legislation. The original bill's third title extended tax deferrals available under the DISC (Domestic International Sales Corporation) provisions of the tax code to export trading companies, including income from the export of services. It also allowed for limited use of subpart S of the tax code by export trading companies--permitting certain passthroughs to shareholders of closely held corporations. The title directed the Commerce Department, in consultation with the IRS, to

prepare a guide to help export trading companies form DISCs or elect subpart S tax treatment.

These provisions were intended to help small exporters benefit from favorable tax provisions in existing law. Since its inception in 1971, over 60% of total DISC benefits have gone to parent corporations with more than \$250 million in assets. A Treasury Department analysis of the program concluded the legal and accounting costs of complying with the complex DISC legislation inhibited small company participation in the tax benefits.

It is only fair to ensure that export trading companies, and especially smaller companies or Webb associations, are able to take advantage of legitimate tax benefits. Eligibility for favorable tax treatment could also present a significant incentive to formation of export trading companies. For these reasons, I hope the tax provisions will be reintroduced, and receive favorable consideration by the Senate Finance Committee as an integral element of export trading company legislation.

In conclusion, S. 144 is not a national export strategy; it will not overnight reverse a \$20 billion merchandise trade deficit. But this legislation will substantially improve the nation's ability to compete in a highly competitive, trade-dependent world. No other first step will do more to strengthen the marketing of American goods and services abroad. S. 144 proposes no costly or cumbersome new federal programs. It simply repeals disincentives and impediments in existing

law. It helps put American industry on an equal footing with its foreign competitors. It gives American business, especially small business, a chance to win new markets, create new employment, and foster the broad expansion of U.S. export potential required to reverse dangerous deficits and stabilize the dollar.

Senator STEVENSON. Mr. Chairman, you have put this bill's paternity at issue. If I have some responsibility for its paternity, you have some responsibility for its maternity. I think it would be more accurate to say that this bill's conception is a little messy and that it is owing to many members of this subcommittee and also, especially, to Senator Danforth who supplied the answer to one of the most difficult questions we faced in developing the legislation.

It goes back, as you also indicated, quite a few years—to a study which this subcommittee made of the export competitiveness of the United States.

DECLINING EXPORT COMPETITIVENESS

In the course of that study, it became obvious that one of the reasons for our declining competitiveness was the Trading Company, the trading company of most industrialized countries but which, for obscure reasons, was not available to the United States, at least not in any meaningful way.

We asked why, and over a period of time, I think we discovered the answers. The answers are incorporated in this legislation.

Since 1970, the U.S. share of world exports declined from 15 to 12 percent. Its share of exports of manufactures from 23.3 percent to 17.4 percent.

Last month, it recorded its 57th consecutive monthly trade deficit. Those figures reflect billions of dollars of business lost to competitors. With each billion dollars, some 40,000 to 50,000 jobs in the United States are lost.

They reflect a weak dollar supported primarily by high interest rates. They reflect more inflation and economic stagnation.

And, to, the concern that you have expressed and which I am trying to express, we frequently hear that the current account surplus is strong. I don't have the current figures, but I think there is an answer to that suggestion.

There is comfort in the current account figure. However, the current account figures when I last examined them reflected very strong returns of foreign investment.

For 1979, U.S. Overseas direct investment generated net income to the U.S. economy of \$31.7 billion. That income then, and I suspect also in 1980, offsets the deficit in the foreign trade account.

In other words, Mr. Chairman, we are living off the past. That income from foreign investments abroad declines as the level of economic activity declines abroad, and with foreign investment made attractive in the United States, partly through the weak dollar, it begins to reverse.

The return on investments made in the United States by foreign investors offsets the return to the United States from its foreign investments abroad.

Trading companies would link producers in the United States with world markets, especially in the lesser-developed countries where the potentials are the greatest and the representation for American industry is the weakest.

They would spot the market opportunities; they would meet the price competition, absorb the exchange rate fluctuations.

They would handle all the details of exporting. They would provide the full range of services and products for both purchasers and their producers.

They could represent the small- and intermediate-size firms now excluded, effectively, from global markets, except as suppliers of large firms.

There are, according to the Department of Commerce, some 20,000 such potential exporters. They would represent competing companies and product lines; they would be able to put together the large turnkey transactions involving multiple suppliers. They might be put together for ad hoc transactions, the single transaction, like the export of a large oil refinery.

Or more likely, they would operate on a continuing basis. They would give the United States an institutional means of putting together the barter and the third-country transactions which are becoming increasingly necessary, especially in the nonmarket and developing countries.

Most countries have trading companies. The United States has very few. And because, as I tried to indicate a moment ago, because of some quaint regulations in the banking and antitrust laws of the United States.

These are almost, if not, unique in the world. I think I will skip over the antitrust provisions since Senator Danforth is here.

I am sorry Senator Proxmire isn't, but will try to emphasize the importance of bank participation in the trading companies.

AMERICAN BANKS UNIQUELY SITUATED

The American banks are uniquely situated to organize and operate trading companies. They have networks and correspondents which reach all firms in the United States in all markets, in all regions of the United States, and into all markets of the world. With those correspondent relationships, their financial resources, branches, trade financing experience, banks are positioned as are no other institutions in the United States to get the trading companies off the ground and operating on a profitable basis.

So this legislation does permit limited participation by banks in trading companies. They can invest either through the bank or through a holding company up to 5 percent of capital and surplus, but with no controlling interest or investments of more than \$10 million without approval of the appropriate regulatory agency.

There are numerous safeguards. The regulatory agencies have broad authority to regulate the activities of bank-related trading companies and, as I indicated, they couldn't acquire control without the approval of the regulatory agency in the first instance.

I think on this issue, the Comptroller's statement last year was about the strongest, most persuasive, comprehensive statement of the problem that I have seen.

I suspect he will be testifying again. But, Mr. Chairman, let me offer his statement from last year on this whole subject for your record in case you don't get all of it this time.

~ Senator HEINZ. Without objection, it will be a part of the record. [The statement referred to is reprinted as follows:]

STATEMENT OF JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY

This is in response to the Committee's request for the views of the Office of the Comptroller of the Currency on the "Export Trading Company Act of 1980" (S. 2718). We welcome the opportunity to comment on this legislative proposal. Our comments are limited to those provisions which permit bank participation in new export trading ventures.

S. 2718 is designed to promote the expansion of U.S. exports through the formation and operation of export trading companies ("ETCs") to facilitate the export of goods and services on behalf of small- and medium-sized firms. The bill provides for a significant role for U.S. banking organizations as an important component of the promotion of exports by permitting their investment in and ownership of ETCs.

This Office supports the concept of export trading companies and urges the enactment of this legislation. Our national interests require the strengthening of U.S. competitiveness in world markets. The proposed ETCs appear to be a viable means to further that national objective. Various testimony on S. 2718 and similar bills has strongly advocated bank participation as an essential element to successful trading company operations. ETCs require the capital, financing, financially-related services, and marketing capacities which U.S. banking organizations can provide through their national and international networks to small- and medium-sized firms across the U.S. We believe that it is necessary for a significant role to be taken by banks to assure the success of ETC operations.

While the degree of future bank participation in ETCs, and the forms that such participation may take, remain unclear at this early conceptual stage of developing a U.S. model for trading companies, we do anticipate a wide range of bank lending to and investment in ETCs. This would reflect the diversity of probable bank participants as well as the diversity of the local and regional businesses which ETCs would serve. Permitting banks to have equity interests in ETCs would be a long-term incentive for them to establish the additional organizational framework necessary for them to provide a complete range of services to effectively promote exports of goods and services. A bank prudentially may require a controlling interest in an ETC in which it becomes an active participant. For these reasons we do not want to foreclose a bank's ability to acquire such an interest. Accordingly, we support ownership of ETCs by banking organizations if the reasonable supervisory safeguards in S. 2718 are enacted.

Equity participation by banks in ETCs would be a limited extent breach the traditional policy of separating banking and commerce. However, we believe that S. 2718 addresses the national interest of export promotion in a way which preserves the safety and soundness of the banking system. The Congress has previously permitted limited bank participation in commercial activities over the past 60 years to accommodate particular national needs—our current trade imbalances require similar legislative action.

A healthy and expanding export sector has become increasingly essential to a strong U.S. economy, the stability of our external accounts, and our critical fight against inflation. Exports contribute significantly to U.S. employment, production and growth; enable economies of scale which contribute to the efficient use of resources and reduced prices; and provide a constructive method for the payment for U.S. imports of essential and desired commodities. U.S. industries must be able to compete abroad if they are to maintain their ability to compete at home.

The Commerce Department reports that only 10 percent of the 250,000 U.S. manufacturing firms export their products and that total U.S. exports account for the lowest percentage of gross national product of any industrialized nation. Also, 95 percent of U.S. manufacturing firms are small- or medium-sized companies which employ less than a thousand persons. These companies represent a small share of exports, about 10 to 15 percent of total U.S. exports. Conversely, most U.S. exports are the sales of a small number of U.S. firms. Approximately 100 U.S. firms account for 50 percent of the total exports of U.S. manufacturers. The purpose of this bill is to strengthen the international competitiveness of the U.S. by providing small- and

medium-sized U.S. firms increased opportunities to export. At present, these firms face a number of structural obstacles and disincentives to exporting which are difficult for the independent firm to overcome.

FLEXIBLE ETC SERVICES

At the present time, small- and medium-sized U.S. firms have four primary methods available by which they may export goods and services. They may: sell directly to foreign end-users; sell through foreign agents or brokers; sell through U.S. export management companies; or, find a large U.S. multinational firm that needs certain products for specific overseas activities. These methods apparently have not provided U.S. firms with adequate opportunities to export their goods and services. These methods entail problems for small- or medium-sized firms which act as disincentives to exporting. Such practical barriers include:

Selling directly overseas ties up the current cash flow of U.S. firms because of slower payment time than in the domestic market.

Foreign export agents or brokers often demand total product control and extremely flexible pricing.

The majority of export management companies lack the expertise to handle more than one or two specialized product lines. Most of these companies lack the management and capital necessary to expand geographically and to establish overseas sales offices.

Generally, large U.S. multinational firms do not directly involve smaller firms in foreign trade.

Besides these difficulties, small- and medium-sized U.S. firms lack other necessary capabilities and expertise such as specialized knowledge of markets to match specific product demands, funds for the development of a foreign market for their particular products, adequate working capital, and adequate financing for foreign purchasers of goods or services. These problems have substantially contributed to the lack of participation of many small- and medium-sized U.S. firms in export trade.

The export trading companies would be an alternative to the existing cumbersome export mechanisms and would encourage the involvement of small- and medium-sized U.S. firms in export trade. As demonstrated by the successful operation of export trading companies in other countries, an export trading company can develop and provide an integrated package of managerial and financial services to facilitate exports. Export trading companies, through volume transactions, also permit economies of scale to reduce the costs of exporting goods or services by U.S. firms.

Export trading companies abroad have proved to be effective. They act as more than intermediaries handling a broad spectrum of products. Export trading companies not only function as a bridge between suppliers and users of products but also provide many other services essential to successful exporting. For example, an export trading company may offer expertise in financing, credit services, market analysis, distribution channels, documentation, leasing, communications, accounting, foreign exchange and advertising. Essentially, an export trading company reduces the requirements for special expertise and capital investment of firms interested in exporting. U.S. businesses should not be deprived of the same advantages as those enjoyed by foreign competitors through their access to such foreign ETC exporting assistance.

THE ROLE FOR BANKS

U.S. banking organizations should play a significant role in the development of export trading companies. They can contribute significantly to U.S. export capabilities in several ways. First, banks have extensive national and international networks comprised of branches, subsidiaries, affiliates, representative offices and correspondent relationships. These networks not only can provide essential marketing and other services abroad but, more importantly, these networks extend throughout the U.S. touching virtually all small- and medium-sized firms. Second, U.S. banks can provide through that network a wide range of export-related financing as well as ancillary services, such as assistance and guidance in the identification of foreign markets, foreign exchange, trade documentation, transportation and warehousing. Third, banks can provide export trading companies and exporters the financing necessary for export transactions.

Major foreign banks which are involved in export trading companies provide a convenient single-source service for exporters abroad. U.S. banks, however, are not authorized under existing laws to offer the complete range of services essential to attracting small- and medium-sized U.S. firms into exporting their goods and services. Traditionally, the export promotion efforts of U.S. banking organizations have

been adjunct to overall commercial lending because their operations have been legally confined to those activities which are considered to be closely related to the business of banking. U.S. banking organizations have the systems, skills, and experience necessary to provide one-stop export services to U.S. firms but need broader authority to do so: S. 2718 would provide that authority by permitting participation in ETCs by banking organizations.

U.S. bank investment in ETCs would facilitate achievement of the underlying purposes of the proposed legislation. With equity participations in ETCs, banks could readily package essential one-stop exporting services which would greatly reduce the expertise and overhead expenses required of individual firms seeking to sell abroad.

There are other reasons why S. 2718 properly permits U.S. banks to invest in ETCs. First, the investment authorities contained in S. 2178 would increase the number of possible investors and available capital to form ETCs. Second, banks with their international offices, experience in trade financing, and familiarity with domestic U.S. producers, are likely sources of leadership in forming ETCs. They possess many of the skills important to ETCs organization and management. Third, their investment in ETCs would provide banking organizations with an incentive to create the long-term organizational framework necessary to accommodate export promotion as a mainstream function. Finally, by permitting U.S. banking organizations to hold equity investments in ETCs, S. 2718 would rationalize the present system of authorities. U.S. banks are presently permitted to be involved in foreign ETCs which can buy and sell goods and services abroad. Foreign banks operating in the United States may also own a foreign ETCs which can export goods to the United States.

We do not know, however, the degree and forms of participation that U.S. banks may develop with ETCs. We also cannot forecast whether banks would immediately begin to organize ETCs should this bill be enacted. We are only working with a conceptual model for ETCs at this time. However, we anticipate that, should the legislation be passed, U.S. banks over time would develop ETCs relationships suited to the wide range of commercial transactions generated by their own local and regional economies. We are confident that U.S. multinational banks would seize any new opportunities in this area. Moreover, multinational and regional banks would also offer ETC facilities and participations to local banks and firms through joint ventures.

We support the provisions of S. 2718 which provide for U.S. banking organizations to own a controlling interest in ETCs. This Office generally prefers banks to have equity and management control over their affiliate relationships rather than have that capital exposed to decisions by majority non-bank partners. It also is reasonable to expect banks to be more inclined to form ETCs if the banks can control their investment and the ETC's activities. The unfavorable bank experiences during the early 1970's with less than controlling participations in REITs, foreign banks and finance companies have led U.S. banks to adopt investment strategies which generally avoid non-controlling positions in affiliates.

We recognize that equity participation by U.S. banking organizations in ETCs would represent an exception to traditional policy which separates banking and commerce. However, we believe that the proposed legislation is consistent with previous exceptions Congress has made in order to further necessary national policies. Congress has permitted banks to own equity participations in Edge Act Corporations, international financial or holding companies, commercial corporations oriented towards national or community purposes, and bank service and other banking related entities. Similarly, we believe this bill addresses the national interest (of export promotion) in a way which preserves the safety and soundness of U.S. banking system.

SUPERVISORY SAFEGUARDS

The proposed legislation contains several necessary supervisory safeguards regarding U.S. bank involvement in ETCs. First, S. 2718 addresses entry and aggregate investment limitations: U.S. banks could not invest more than \$10 million or acquire a controlling interest in an ETC without prior agency approval; a U.S. bank would not be permitted to invest more than 5 percent of its capital and surplus in the stock of one or more ETCs; the aggregate amount of loans and investments a U.S. bank could make in an ETC would be limited to 10 percent of the bank's capital funds; and, no group of banks could acquire more than 50 percent of an ETC without prior agency approval, even if no one bank were to acquire a controlling interest, and no bank were to invest \$10 million or more.

Second, the legislation would also establish several other restrictions on banking organization investors and ETCs. For example, the name of an ETC could not be

similar in any respect to that of an banking organization investor. If an ETC takes speculative positions in commodities, all banking organization investors would be required to terminate their ownership interests. A banking organization would be prohibited from making preferential loans to any ETC in which it has any interest, or to any customers of such an ETC. These limitations and restrictions have been structured to provide minimal financial exposure by banking organizations in ETCs and to prevent conflicts of interest.

Most importantly, S. 2718 provides substantial regulatory flexibility to the federal financial supervisory agencies to control investments by banking organizations in ETCs. If an agency determines that the anticipated export benefits of an investment are outweighed by adverse banking factors, the agency may disapprove an investment application submitted by a particular bank. Controlling investments in ETCs by banking organizations can otherwise be limited by (1) conditions imposed by the agencies to limit a banking organization's financial exposure or to prevent possible conflicts of interest or unsound banking practices; and (2) standards set by the agencies regarding the taking of title to goods and inventory by the ETC subsidiary, to ensure against unsafe or unsound practices that could adversely affect a controlling banking organization. The agencies may examine bank-controlled ETCs and may use their cease-and-desist authority to enforce any and all requirements of the law. The agencies may also require divestiture of any ETC investment that would constitute a serious risk to a banking organization investor.

These provisions adequately mitigate the supervisory concerns which we expressed regarding earlier proposals as to the safety and soundness of participating national banks. We do not feel, therefore, that additional statutory restrictions—such as a specific limit on the maximum interest a banking organization may have in an ETC, or a minimum capital ratio for bank-owned ETC—need be enacted. As you know, Edge Act Corporations (EACs) must now operate within a leveraging regulation which requires paid-in capital and surplus to equal at least seven percent of an EAC's consolidated risk assets. The administrative authority granted to the federal agencies by S. 2718, in our opinion, will allow similar requirements to be imposed upon bank-owned ETCs through implementing regulations, with appropriate variations to take account of different types of permissible ETC activities. We believe that such regulatory authority to fashion particular limitations is preferable to a specific statutory provision.

While we support this legislation, we recommend that certain amendments be adopted. First, the definition of "export trading company" should be clarified to limit non-exporting activities by ETCs to conduct which facilitates U.S. exports, such as activities necessarily involved in international barter arrangements. The bill, as presently drafted, defines an ETC as a company organized and operated "principally" to export U.S. goods and services, among other activities. This definition should be supplemented by a requirement that all activities of an ETC be "related to" international trade.

Second, the specific time limits for agency disposition of investment applications should be extended. S. 2718 requires agency action within 60 days of written notice from a banking organization of its intention to make additional investments or to have an ETC undertake certain activities. S. 2718 would require agency action within 90 days of notice from a banking organization of its intention to make an investment of \$10 million or more or to acquire a controlling investment in an ETC. We suggest that these time limits be extended to 90 days in the former case, 120 days in the latter. In either case, an agency's failure to disapprove or impose conditions on a proposed investment within the appropriate time limit would result in the investment being deemed approved. We believe that the additional 30 days will allow the appropriate agencies to give more extensive considerations to new investment or activity proposals. At a minimum, specific statutory authority should be provided for the agencies to extend the time period in appropriate cases.

We fully support the objectives of S. 2718—encouraging the efficient provision of export trade services to U.S. producers and suppliers. The restrictions on bank involvement should adequately protect depositors of banking organizations which choose to participate in the management of ETCs. The limited opening of this area of activity to banks will create a unique U.S. export trading company system to allow more U.S. producers to benefit from existing international marketing networks and trade financing expertise.

Senator STEVENSON. He makes the point that bank safety is not promoted by forcing them into noncontrolling positions.

That is the lesson from the experience of banks with the REITS. Ultimately, the position of the banks depends on the economy and condition of their borrowers and depositors.

By strengthening the economy, as this bill would, the Congress would ultimately be strengthening, not weakening, the position of the banks.

The risks are carefully hedged, safeguarded against. It is basically a deregulation bill.

It also, as you indicated, clarifies the antitrust laws. It doesn't make any substantive changes in the law. It doesn't create cartels to any greater extent than they are permitted right now under the antitrust laws.

It simply clarifies ambiguities in the antitrust laws in accordance with judicial precedent and the practices of the Justice Department.

It makes no substantive changes and would make it clear in advance what you can and cannot do.

It also establishes a procedure for clearance from the Commerce Department, but only after consultation with Justice and the FTC.

And they have the right and opportunity to sue to invalidate any clearances with which they disagree.

I hope the provisions, Mr. Chairman, for EDA and SBA support can remain in.

They may not be needed in time, but, as a means of helping to get these trading companies off the ground, I think the EDA and SBA, very limited financing authority, could be extremely helpful.

They could help to provide the seed money. That goes for the Eximbank, too. One of the lessons of this subcommittee is the importance of finance to trade.

U.S. WEAKNESSES

One of the weaknesses in the U.S. position is the, frequently, the unavailability of credit for the support of trade.

There is very little financing available, none from the Eximbank, and very little from the commercial banks for the financing of inventories for export and for financing of foreign accounts receivable.

This provision which directs the Eximbank to establish a guarantee program is largely for that often-unmentioned purpose, to try to get the banks and others involved, with some encouragement from the Eximbank and for the benefit of these trading companies, in the financing of the inventories that are necessary for exports and foreign accounts receivable.

Finally, Mr. Chairman, I hope we don't forget, you don't forget, I am sure you won't, but especially you, you are on the other committee, the tax provisions.

The extension of this to the export of services through the trading companies would be particularly beneficial to small companies. Those provisions would encourage formation of trading companies and are, I trust, not in this bill now for jurisdictional reasons.

I hope that in conjunction with any tax legislation considered by the Congress this session, that those provisions that are important will be taken up.

I congratulate you, Mr. Chairman, for taking this measure up with such alacrity in this session of the Congress.

I urge you to push ahead so that time does not run out, in another session of the Congress, and I thank you very much for giving me this chance to reappear in these very familiar surroundings for which I have some very warm feelings.

Thank you.

Senator HEINZ. Senator Stevenson, we are obviously more than delighted that you are here.

You will be pleased to know that the Comptroller of the Currency, John Heimann, will be testifying later today. I haven't had the chance to look over his statement. But I believe it is equal to, if not stronger than his statement last year.

As to the tax matters that you have raised, it is my intention, along with a number of other members of the Finance Committee, some of whom may be present, I am thinking of Senators Danforth and Chafee, to pursue the tax provisions of last year's bill in the context of the tax legislation that will be forthcoming this year from both Ways and Means, we hope, and Finance.

Finally, when you were mentioning the question of paternity, suggesting that there were more than one person who, shall we say, had his oar in the water, I was reminded of an old saying, which is that "success has many fathers, and failure has but one."

And I suppose that leaves the paternal benefits question squarely in somebody's lap, to the extent that they are benefits.

I have no questions for you on an absolutely superb opening statement.

Let me yield to Senator Dixon for any questions he has.

Senator DIXON. No questions.

Senator HEINZ. Senator Chafee.

Senator CHAFEE. Mr. Chairman, I will move into this area of mixed metaphores.

Senator HEINZ. With caution.

Senator CHAFEE. Senator, does this bill represent any compromises that you feel vitiate the full effect that might be obtained if compromises weren't included?

You have pointed out that the bill comprehends a number of safeguards to protect against breaches of the traditional wall separating domestic banking and commercial activities.

The bill makes clear that the trading companies must be engaged exclusively in international trade. Now, my view is if we are going for a bill, I would like to go all the way for the best possible bill.

I think the atmosphere is such that the best bill can be achieved, even though some might object to those efforts. Do you feel that there exists in this legislation, any major compromises that were included in order to garner greater support?

COMPROMISES

Senator STEVENSON. Senator Chafee, I think the bill in its present form is very sound. It does reflect many compromises. And in particular, to satisfy the bank regulatory agencies. Those compromises were worked out over a period of many, many months, with all of the regulatory agencies.

I would hate to see it get compromised any further. If it did, then I think you would be getting into hot water. But I think in its

present form, those compromises are sound, and that they would not effectively prevent banks from participating in or acquiring controlling interest in the trading companies.

If, on the other hand, you were to say, well, only banks through holding companies can participate, then I would be very concerned—if you limit it only to the largest banks, those with holding companies, and then you put the exclusive jurisdiction in the Federal Reserve Board which has been the most unfriendly agency to this whole idea, I think in its present form it is full of compromises, but it's a sound piece of legislation.

Senator CHAFEE. In other words, even though compromises were made in some areas, the bill will be able to achieve those goals for which we hoped, and is not inhibited.

Senator STEVENSON. With the tax provisions?

Senator CHAFEE. Will we be capable of creating our Mitsui out of this?

Senator STEVENSON. I don't think you are going to get Mitsui.

Senator CHAFEE. I am not sure that is bad.

Senator STEVENSON. I doubt it very much. There is a long culture and tradition that is just not going to get replicated in the United States, certainly not overnight.

What precise form they will take in the United States, I don't know. But I don't think you are going to get Mitsui. If you do, it will be a long time from now.

SMALL BUSINESS BREAKTHROUGH

Senator CHAFEE. But you think this legislation we are considering will be something that a small company with 100 employees in Illinois or Rhode Island or wherever it might be that has never had any export business, will be able to join a trading company, break through the barriers you mentioned and get into the export market?

Senator STEVENSON. He gets what he most needs. At the moment, he participates in the export markets only as a supplier of the large exporting industries. He gets one-stop service. Instead of having to market himself abroad, he goes to the trading company, or the trading company comes to him.

In addition to that—and he sells. This isn't an agency relationship. He sells to the trading company instead of attempting to sell abroad.

The trading company maintains the inventory, puts together the package. In addition, Senator Chafee, it is always suggested that this is just for large banks. I don't know why.

The principal benefit, among the principal beneficiaries, will be the small banks. They can provide, can establish their own combinations and jointly and cooperatively, establish regional trading companies. The small banks are also afforded an opportunity to take advantage of the trading companies and could be among the principal beneficiaries.

Senator CHAFEE. Fine. Thank you, Mr. Chairman.

Senator HEINZ. Thank you, Senator Chafee. I am particularly glad you asked that question. It can't be emphasized enough that the product that we have before us is the result of a number of carefully crafted compromises, not one, but many.

The bill as Senator Stevenson and I first took it up might have been in some respects, for some people, a preferable bill. It might, however, have resulted conceivably in less support than we have now.

I would hope that as our colleagues look at this legislation, they recognize that this bill, as so many pieces of legislation, is not introduced with a number of provisions in it that may be given away as bargaining chips. This is the carefully crafted and in my judgment, finished product of the legislative process that passed the Senate 77 to nothing. And so, I think your point is exceptionally well taken.

I thank you for raising it so that it is absolutely clear on the record.

Adlai, you may stay; you may be excused, as you wish. I would like Jack Danforth to come forward at this time and we would—personally, I wish you would stick around.

Senator STEVENSON. I have been enjoying the reunion this morning, Mr. Chairman. I think I will. Thank you, sir.

Senator HEINZ. Senator Danforth, before you start, may I say a word of introduction?

Senator DANFORTH. I thought I needed no introduction.

Senator HEINZ. Senator Stevenson indicated in his opening remarks that Senator Danforth had done a good deal of work on title II of the bill, the antitrust section of the bill.

Indeed, it is fair to say, as I say it in case Senator Danforth is too modest to say it for himself, he undertook a series of painstaking, very lengthy, extremely lengthy negotiations which were successfully concluded on at least two occasions with the Carter administration Justice Department, satisfying people at every level of the Justice Department.

He is, beyond a doubt, the most expert person in the Congress on title II. He comes well equipped as a former attorney general of the State of Missouri. And I think it's fair to say that without his outstanding work we would not have been in a position to have the bill pass virtually unchallenged on the Senate floor last year.

Jack, thank you for being here. We appreciate your willingness to testify. And after you complete your testimony and my colleagues have had a chance to ask you any questions, because you are an incumbent Member of the Senate, we would welcome you to join us and sit up here and participate in the discussions with any of the subsequent witnesses.

Please proceed.

STATEMENT OF SENATOR DANFORTH

Senator DANFORTH. Mr. Chairman, thank you very much for that offer. Of course, this is so important I will be prepared to stay with the committee as long as my testimony is needed.

However, Mr. Ed Harper, who is the new designated Deputy Director of OMB, is a Missourian and he is being presented to the Governmental Affairs Committee. I think that it is so important that more Missourians join the administration that I feel an obligation to be there if I can.

Therefore, I am not going to, if you will forgive me, sit here through the whole proceeding.

Senator HEINZ. Well, just put in a good word that he resided in Pennsylvania for a good number of his last practicing business years before he joined the Reagan administration while you're claiming him totally for Missouri.

Senator DANFORTH. No, that is absolutely correct. Fortunately for him and for us, he moved on.

Mr. Chairman, I think Senator Stevenson has pretty well covered the question of the present posture of the United States with respect to international trade. To sum up his comments, the United States, during the first 70 years of this century, always had a surplus in international trade. It was not until 1971 that we experienced our first deficit of this century. Now, during the last few years the deficit has been very, very large, over \$25 billion each of the last 3 or 4 years.

In November 1977, my staff began a survey of American law relating to international trade for the purpose of determining whether or not there were some things that Government could do to improve our position. Obviously, Government can't do everything, and one of the problems we got ourselves into as a country is because the business community was content for most of our history to look internally for a source of new markets. However, the last frontier internally has probably been reached, and increasingly it becomes necessary for us to look abroad. At a time when it's necessary for us to look abroad, we find ourselves with this very large deficit.

WEBB-POMERENE ACT

The American business community clearly can be more aggressive than it has been in trying to market American products in other countries. However, in that survey we did come up with several possibilities for changing American law, several possibilities for Government action. And one of them was to amend the Webb-Pomerene Act.

Now, the Webb-Pomerene Act is not a novelty. It is not a new idea. The Webb-Pomerene Act was first enacted by the Congress in 1918, and it was enacted after a study by the Federal Trade Commission which was published in 1916. The Webb-Pomerene Act in short is a very old piece of legislation. The purpose of the Webb-Pomerene Act was to encourage American exports by providing limited exemptions from the antitrust laws for consortiums of American businesses to doing business abroad. Thus, the design was to make American consortiums a business similar to combinations of businesses from other countries engaged in export business.

Unfortunately the history of the Webb-Pomerene Act has not matched the high hopes for it at the time that it was enacted. American businesses have been reluctant to form Webb-Pomerene associations for several reasons. The first was that while the Webb-Pomerene Act in its present form does cover the export of goods, it does not cover the export of services. We're becoming an increasingly service-oriented society. Much of the business done abroad today is done not in goods, but in services.

Second, the Webb-Pomerene Act was administered by the Federal Trade Commission, an antitrust enforcement agency. And many American businesses were wary of the FTC, believed that the FTC and Justice Department did not mean them well and were not encouraging Webb-Pomerene associations.

Third, while the Webb-Pomerene Act in theory offered protection from the antitrust laws, in fact, it offered very questionable protection. American business could never predict when its activities abroad could be challenged by the Justice Department or by the FTC. And therefore, they felt that they were always living in the shadow of possible legal actions by antitrust enforcement agencies.

So given those flaws in the Webb-Pomerene Act, its success was much less than was predicted for it back in 1918 when it was passed. Therefore, Mr. Chairman, title II of this bill is designed to correct the defects which exist in the Webb-Pomerene Act.

First of all, if this bill becomes law, the Webb-Pomerene Act would apply not only to the export of goods, but also to the export of services. The bill would specifically provide that services are covered under the Webb-Pomerene Act.

Second, the risk, the doubt felt by American business would be removed by a preclearance procedure which would certify consortiums of American businesses as meeting the terms of the Webb-Pomerene Act, providing them with absolute immunity until such time as the certification is withdrawn.

Finally, the administration of the act would be transferred from the Federal Trade Commission, which is an antitrust enforcement agency, to the Commerce Department, and the Commerce Department would be charged with an affirmative responsibility of promoting Webb-Pomerene groups.

Senator CHAFEE. Is there a time limit in which the Commerce Department must give the approval to proceed under that act?

Senator DANFORTH. I think it's 30 days. I'm a little bit reluctant to get into all of the details of how it works for two reasons. One, this has had such an elaborate history of negotiations as to the exact content, I'm concerned I'll misspeak.

Second, I'm concerned that I'll establish a questionable legislative history for it. But I believe that the deal that was worked out was that there was a 30-day period of time between the announced proposed certification and actual granting of the certificate during which time the Justice Department or FTC could move to enjoin the certification.

Senator HEINZ. On pages 32, 33, and 34 of the bill, Senator Chafee, that information is found. I won't take the time to read it into the record. It's somewhat complex, but it substantially is as Senator Danforth indicated.

Please proceed, Senator Danforth.

Senator DANFORTH. I just have one other comment, Mr. Chairman. I'm not sure what the parentage of this bill is, I think you played a part, Senator Stevenson played a part, I played a part and a lot of other people played a part in it.

Regardless of the parentage, this bill has had an unbelievably long period of gestation. We started working on it in our office, as I

said, in November 1977. As I recall, the initial form of the bill was introduced in 1978.

There have been exhaustive hearings on it, multiple hearings on it here in the Senate. In the House, as you pointed out, it was referred to not one or two, but three different committees. Some held hearings; some did not hold hearings. It has already gone through the Senate, and in fact passed in the Senate by, as you pointed out, a margin of 77 to 0, after considerable debate.

You asked Senator Stevenson whether or not there was compromise, there were many compromises on the antitrust side of the bill. The bill was fly-specked by the Justice Department, by the Commerce Department, and by Stuart Eizenstat, the Domestic Council of President Carter, who finally ended up resolving any differences within the Carter administration on the bill.

The Justice Department and the Carter administration was on again, off again. They kept raising points that they hadn't raised before. And finally, after this extensive period of negotiation, not only before committees, but in elaborate conversations that were held within the executive branch of the Government, between staff people in my office and staff people of this committee, and of your office, and various officials of the administration, finally the compromise was reached.

I'm sure that if we could go back, I might like a slightly different bill, you might like a slightly different bill. Maybe some people in the Justice Department would like a slightly different bill. But we have been at this now for more than 2 years. And even Gargantua didn't have that period of gestation. Eventually, as painful as it is, birth has to come. The baby has to be delivered.

And so, Mr. Chairman, I would hope that this committee, and I would hope that the administration, would not want to go through the process of conception all over again. I would hope that we could take the baby in its present form and deliver it. At long last. And that we could get on with it.

I complement you for the early hearings. I hope that this committee will have an early markup. I would hope that we could bring this to the floor with a time agreement and that we could dispose of it in the Senate and we could then direct our attention to the House of Representatives.

Senator HEINZ. You have issued, following in Senator Stevenson's footsteps, an invitation to rise to a metaphorical occasion that, in this instance, I am going to decline. I would like to ask you this. Did any officials of the Carter administration Justice Department sign off one or more times on title II?

Senator DANFORTH. Yes, they did.

Senator HEINZ. More than one official of the Justice Department?

Senator DANFORTH. Yes, sir, more than one official.

Senator HEINZ. On more than one occasion?

Senator DANFORTH. Many officials from the Justice Department. And there were differences within the Justice Department and they finally resolved those differences. The Justice Department and

the Commerce Department and, as I said, Mr. Eizenstat, finally got their acts together for the administration.

Senator HEINZ. I think the record is clear on that point. It needs to be stressed, that while I was not as deeply involved in those negotiations as you, I myself recollect that a number of officials from the Carter administration Justice Department indicated that they worked out their differences with you and that they approved of the final provisions of this bill.

Senator DANFORTH. I might say, Mr. Chairman, that the week before last I was at a dinner party, and a very high official from the Justice Department was present at that dinner party. He told me that he had just received an extensive briefing from his staff on this bill. And I just turned pale. I broke into a sweat. It would be my hope that we don't just go back and rehash the same ground.

UNANIMOUS SUPPORT

Anytime people compromise anything, it doesn't absolutely satisfy all of the concerns or all of the desires of anyone. But I think the fact that this bill, after some debate on the floor of the Senate, was finally passed by a margin of 77 to 0 last fall, and it has, as you pointed out, 58 cosponsors now?

Senator HEINZ. Yes.

Senator DANFORTH. Fifty-eight cosponsors right now. I think that that indicates that there is to say the least very strong, hopefully unanimous support for it in the Senate.

Senator HEINZ. If we get more cosponsors than we get votes, it will be tough to explain, but I'll take the risk.

Senator Dixon? Senator Chafee? Jack, even though you may have to go down to introduce Ed Harper, if you're finished up with that, my invitation still stands for you to come and participate in the hearing.

Thank you very much.

Senator DANFORTH. Thank you very much, Mr. Chairman.

Senator HEINZ. I would like now to call on the Honorable Malcolm Baldrige, Secretary of Commerce.

STATEMENT OF MALCOLM BALDRIGE, SECRETARY, DEPARTMENT OF COMMERCE

Senator HEINZ. Mr. Secretary, we welcome you here to the subcommittee. I know you have an opening statement, which I hope you will feel free to give in full or summarize. I know it is not a very lengthy statement, so please feel free to handle it as you see fit.

Secretary BALDRIGE. Thank you, Senator. I am pleased to appear today before the International Finance and Monetary Policy Subcommittee to present the administration's view on S. 144.

I am sorry that Bill Brock is unable to join me today in supporting this measure, because he is speaking at the AFL-CIO Executive Council, but he has submitted a written statement for the record. (See p. 99.)

This bill would increase U.S. exports by facilitating the formation of export trading companies and export trade associations. I am particularly pleased to have a chance to testify on a matter of considerable importance to our export expansion effort.

Mr. Chairman, my statement will be brief. The administration strongly supports S. 144. Bills similar to S. 144 were carefully considered in six separate hearings during the last session of Congress. The need to increase U.S. exports and the utility of export trading companies in meeting this need have been well demonstrated. I urge the Congress to pass this legislation quickly.

VITAL ROLE OF EXPORTS

As you know, Mr. Chairman, the President will be appearing before Congress tomorrow to announce his economic program. This action, coming as it does with the administration not yet a month old, reflects the urgency with which the President views the economic problems of the United States. Exports already play a vital role in the U.S. economy and will only become more so in the years to come. Thus, it is also with a sense of urgency that I testify this morning.

U.S. merchandise exports alone are now running at about 8.5 percent of our gross national product, twice the ratio of 10 years ago. Exports in general stand at \$221 billion, almost one-fifth of all the goods produced in this country—\$1,132.7 billion in 1980. The most rapidly expanding markets for many U.S. goods are export markets.

Most economists feel that the growth of the world economy will be less than it has been in the last decade. Thus, international competition for available world export markets will increase substantially. If we fall behind in this race, it will be U.S. jobs which suffer most.

Exports preserve and create jobs in the United States. Exports can lead to increased production and increased jobs for U.S. firms. In a real sense, U.S. exports pay for our imports of oil and other necessary or desirable commodities. Yet competition for our export markets is more severe each year.

Although the U.S. share of manufactured goods exported by the major industrial nations increased in the second quarter of 1980 to 18.4 percent, its highest level since 1976, it still remains considerably below our share in 1960, which stood at 25.3 percent.

We should acknowledge that successful exporting requires special effort and expertise. Our competitors abroad have had to learn how to export—small- and medium-sized firms as well as large firms—in order to survive. Too large a share of U.S. exports comes from large firms. We need a mechanism to stimulate and train these smaller firms in this skill such as their foreign competitors are doing.

This administration acknowledges the responsibility of the Government to create a legal and economic atmosphere conducive to exporting. Enactment of the bill before us, with changes I will describe later, would be a first step in creating such an environment and would be particularly helpful for our small- and medium-sized firms.

In considering our international competition, most of us think immediately of Japan. Significant, in my view, is the fact that two-thirds of Japan's exports are handled by trading companies. Moreover, Japan has learned how to export from America. As mentioned before today, the sixth largest U.S. exporter is none other

than Mitsui, one of the largest Japanese trading companies. I believe that Mitsui is merely doing that which an American trading company should.

Japan is not alone among our industrialized trading partners in making use of specialized export entities. West Germany, France, and Hong Kong do likewise.

With a few notable exceptions, the United States does not have large export trading entities. There are some 700-800 export management companies in the United States, many of them well-managed and successful businesses, and several thousand small export merchants. Not all of these export companies are adequately financed or managed, however, and many cannot provide a full range of export services, market intelligence, and knowledge of local business practices.

We need export trading companies that provide a full range of export services to firms of any size interested in exporting. These exporting companies must be sufficiently capitalized to allow operations on a scale that would achieve substantial economies in selling and distributing. These companies must be large and experienced enough to develop new markets for U.S. goods. Large manufacturers are already exporting extensively and typically have spent time and money building up overseas networks which our smaller U.S. companies have not been able to afford.

Similarly, many banks have national and foreign coverage through branches, agents, or correspondent banks and are already in the business of evaluating risks and researching foreign markets. Banks already involved in international transactions understand the subtleties of international financing and exchange. Banks with foreign affiliates are also in a better position than many U.S. companies to understand foreign regulations affecting our export trade. Therefore, they also are logical candidates to form and participate in effective export trading companies.

As an example of how a trading company could increase exports, the Commerce Department undertook a study to determine the usefulness of export trading companies for the textile and apparel industries. Preliminary findings indicate that a trading company would be very useful in promoting American textile and apparel exports. Many firms in this industry are small and now find it difficult or impossible to devote the financial and managerial resources needed to establish an effective companies arm.

We will provide the committee with the complete study shortly. Senator HEINZ. We would welcome that study. Thank you. (See p. 48 for executive summary.)

Secretary BALDRIGE. A key feature of this administration's program is to eliminate regulation that unnecessarily limits our economic growth. We apply the same principle to Government regulation that unnecessarily retards export growth.

BANK LIMITATIONS

With the exception of bank holding companies, which can purchase up to 5 percent of the share of any U.S. company, our banking laws and regulations do not allow bank investments in export trading companies. There is also considerable uncertainty

over application of the antitrust laws to export activities, and this uncertainty inhibits the development of joint export activities.

We need legislation that allows bank ownership participation in export trading companies. And we need legislation that provides a way for businessmen to insure that they will not run afoul of the antitrust laws in their export activities. S. 144 will achieve both these aims. Both the Attorney General and the Secretary of the Treasury, as well as the USTR, endorse the concept of export trading companies embodied in this bill.

We believe the need to increase U.S. exports is a compelling reason to make an exception from the general principle of separating banking and commerce. S. 144 provides such an exception and thereby creates opportunities for banks of all types and sizes. The limitations and protection in title I are adequate to safeguard the integrity of our financial system.

We expect that the bill's encouragement of cooperation among U.S. companies for exporting will extend to cooperation among banks for the same end. In particular, we hope that banks outside the major urban centers, whose clients often are the small and medium-sized firms, S. 144 targets, will be able to cooperate through bankers' banks or otherwise in working together to form and operate trading companies.

The business community must have assurance that specified cooperative export activity will not lead to antitrust liability. We believe the procedure in title II for obtaining a certification of antitrust immunity will enable most businessmen to obtain just this assurance, while at the same time providing safeguards to protect competitive principles.

I must note before closing that the administration opposes sections 106 and 107 of the bill, the two provisions on financing. As we all strive to reduce Government spending substantially, we cannot support new appropriations or authorizations for expenditure programs.

Furthermore, we believe we could administer title II of this bill within our International Trade Administration without major additional resources. Therefore, we feel it is unnecessary to require legislatively the establishment of a special office of export trade to carry out the certification and promotion functions.

To sum up, Mr. Chairman, the administration urges adoption of the banking and antitrust provisions of S. 144. I look forward to working with this subcommittee and the Congress to secure quick passage of export trading company legislation. Thank you very much.

Senator HEINZ. Mr. Secretary, thank you for not only an excellent but an unequivocal statement.

Correct me if I am wrong, but in addition to the Treasury Department and Justice Department, you are here representing the opinions of USTR, State, Labor, Agriculture, and OMB. You are speaking for the administration; is that correct?

Secretary BALDRIGE. Yes, I am speaking for the administration, Senator, specifically with regard to the USTR, the Commerce Department, Treasury, and the Attorney General. I can only assume that the other agencies you mentioned, Cabinet members, are for it.

Senator HEINZ. Now, I want to first of all commend you for the fact that, although it has been scarcely a month, less than a month, since our new administration took office, and you have had even less time on the job than the President, both you and President Reagan have made the decision on a major piece of legislation.

As my colleagues recollect, and my former colleague Senator Stevenson, it took us over 20 years to get any kind of a decision out of your predecessors on this subject. So I sincerely commend you and welcome you back before the subcommittee any time in the future, particularly since you so obviously have your act together.

Now, I do note that you have raised two concerns about the bill, one involving section 106, which provides for SBA and EDA loans or loan guarantees or, in the case of nonprofit organizations, grants. As you know, those are to encourage the involvement of small and medium-sized or minority businesses in exporting. The section authorizes \$20 million per year for the next 5 fiscal years.

On the one hand, I certainly recognize the administration's proper concern about reducing the growth of the Federal budget. And recognizing that concern, are there any alternative ways you might suggest to increase small and minority involvement besides through loans or loan guarantees?

Secretary BALDRIGE. Senator, I am sure you understand, we don't think those two provisions are necessarily that bad. It's this very difficult thing of budget cutting we have to do. Unless everyone's ox is gored, we would have a problem with the administration getting passage of the budget tax bill.

In answer to your question, sir, I would expect the Commerce Department to take a very active role, as we have tried to do in the past, in getting the message, the opportunities that are inherent in this bill, across to small businesses and minority businesses. I think that that is the most constructive thing the Commerce Department can do. And I can guarantee you, sir, that our efforts will lean very strongly in that direction.

EXIMBANK FINANCING

Senator HEINZ. Now, section 107 of the bill permits Eximbank guarantees to export trading companies and other exporters, guarantees to be secured by export accounts receivable or inventories of exportable goods, if the Eximbank board feels such action is necessary to expand exports and that the private market is not adequate for the purpose. The guarantees should be intended, of course, to promote small and minority involvement in exporting.

Now, that provision is one you have reservations about, as I understand it. It does, I would point out, contain no additional authorization of funds for the Export-Import Bank. It does not even engage in an earmarking of existing appropriations.

Do you have an objection in principle to the bank having that additional authority, which is obviously discretionary in nature? Could you be more specific? If indeed you do, what is wrong with giving the bank that authority, so long as the funding is within existing appropriation levels?

Secretary BALDRIGE. Well, Senator, I see nothing wrong with that. It's mostly the budget constrictions. The Eximbank right now

has a very, very limited pie. They have many constraints under which they operate.

My opinion is that more of an effort should be made to bring smaller companies in under Eximbank financing. But I would hate to see any restrictions on their ability, because I think they have to be able to make up their mind. But the new administration will obviously have new directors, a new chairman of the bank.

I know that the administration feels strongly about increasing chances for smaller manufacturers, minority business people to be able to grow and prosper.

Senator HEINZ. Mr. Secretary, on this section, section 107, the administration might want to keep an open mind on it, because not only after discussions with you, both public and private, and others in the administration, including Dave Stockman, the Director of OMB, I do sense, as you have stated, that there is a very sincere and far-reaching interest in bringing small and medium-size businesses into the exporting field.

And indeed, one of the criticisms that Mr. Stockman has leveled at the Eximbank is that it spends too much of its time worrying about the big guys and the aircraft manufacturers and not enough time worrying about the medium-size and small people who probably have a lot less access to capital than the aircraft manufacturers and other large companies. So I would hope that our discussion on that issue is not closed.

One last question. Your testimony, as I understand it, also opposes the new Office of Export Trade established in title II of the bill. That was the result of an amendment offered on the Senate floor by Senator Garn last year and was intended to give Congress additional information on the role of trading companies in East-West trade, particularly with respect to transactions involving validated licenses. It is not intended, as I understand what Senator Garn wanted to do, simply to carry out the bill's certification and promotion functions.

I can readily appreciate your lack of enthusiasm for a new office. Could you make a commitment to us to provide annually the information on East-West trade that this section of the bill requires, inasmuch as that was the objective of that section?

I would like to know if you could make that commitment without necessitating a change in your present structure?

Secretary BALDRIGE. Senator, we can handle that without putting up a new organization. We have had the experience in so doing in the past. I see nothing there that we could not comply with without building up another organization.

I am trying to shorten the tether up over there. So we will be able to do it and satisfy your desires.

Senator HEINZ. If we eliminated the reference to the creation of a new office and simply left the provision requiring the information, you could do that?

Secretary BALDRIGE. Yes, sir; that would be fine.

Senator HEINZ. Mr. Secretary, thank you.

Let me recognize Senator Proxmire.

Senator PROXMIRE. Secretary Baldrige, let me congratulate you for opposing sections 106 and 107 of this bill. You say you oppose it on economy grounds.

I understood you to speak that \$100 million in EDA funds would be very hard right now. We are cutting everything in sight, trying to, as I understand it. There have been at least some discussions that EDA might be eliminated, much less to come up with a \$100 million program for anything.

I think your position is consistent and logical, and I congratulate you on it.

My amendment to the banking section would permit control of export trading companies by bank holding companies and Edge Act corporations subject to the approval of the Federal Reserve Board and subject to a showing of definite export benefits and appropriate safeguards.

Are you familiar, Secretary Baldrige, with my amendment?

Secretary BALDRIGE. Yes; I am, Senator.

Senator PROXMIRE. Could you say whether you would support it or oppose it?

Secretary BALDRIGE. Senator, I have to say I would prefer section 105 as it is, because I believe it does result in a careful balancing of those two competing interests, encouraging U.S. banks to get involved in export trading companies and having the safeguards necessary for the U.S. banking system to keep the problem of banks involved in commerce at a minimum. I think that section 105 does handle that; so I would prefer that, sir.

CENTRALIZED CONTROL NEEDED

Senator PROXMIRE. You see, unless we centralize the control of this kind of activity in a single agency, it seems to me we have the same problem that Dr. Arthur Burns spoke about in competition in laxity. If the Comptroller of the Currency has one kind of policy, the FDIC another, the Federal Reserve still another, in the first place, it's not coherent; it's not fair. It tends to be a lot of pressure on the agency that is following what they think is the public interest to do what the weaker regulators are doing.

So the purpose of my amendment would be to concentrate this authority in the Federal Reserve Board. They have the competence—they have, certainly, an understanding of our banking system not surpassed by any other agency—and to provide in the law that they should approve this if the export benefits would override the interest in keeping the banks from becoming involved in nonbanking activities.

Secretary BALDRIGE. Yes, sir; but that puts the burden of proof in this case on the banks and the export trading companies, which section 105, in effect, does not. It's the other way around.

Senator PROXMIRE. Why shouldn't the burden of proof be on them to show benefits?

Secretary BALDRIGE. Well, it depends on whether we are trying to encourage exports or not, Senator. That is the basic question. I think that we are living in a world that is going to become much more competitive with every country trying to increase its slice of the pie, and a pie that is growing more slowly than it has in the past.

We are in a situation where we have perhaps 200 U.S. companies doing 80 percent of our exports now, 100 U.S. companies doing half. We have got to get small business and medium business in this. To do that, we have got to get small banks in it.

I think that S. 144 as it stands now would actually create the kind of a situation where you would see a comparatively much larger increase in the activities of smaller banks in this area than you would larger banks. I think that that is a very desirable one. We have the safeguards necessary to stop both the antitrust implications and the banking failure possibilities there that I would have to support the act as it stands.

Senator PROXMIRE. Well, I understand your position. It's just that my strong feeling is that the Federal Reserve Board could be a judge of that and that they have the same interest all of us have in wanting to increase our exports.

Secretary BALDRIGE, this legislation seeks to involve banks in export trading in order to increase exports of small- and medium-sized firms, as you have stressed over and over, and as the chairman and other members of the committee have, too.

What experience do banks have in acquiring title of goods from small firms, inventorying goods, that would lead you to believe they would be helpful in increasing export trade?

Secretary BALDRIGE. Well, not all banks have, Senator, obviously. I think we would all be surprised at how many regional banks, small banks on both coasts of our country have actually had that kind of experience. Many banks, many banks we could call medium and small banks, have offices in places like London and Tokyo now, to get foreign business.

Banks have always had experience in inventory controls in that they have, in lending money in the United States, seen every kind of an inventory possibility, and have lent money based on their judgment in that area. I think they are really the only commercial entity we have now that has the kind of experience that can pull one of these together.

The manufacturers, small- and medium-size manufacturers, cannot do the job themselves.

Senator PROXMIRE. Banks undoubtedly have a lot of experience as financiers, but not in actually selling or inventorying as owners, isn't that correct?

This would be something new for them, in effect?

Secretary BALDRIGE. Yes; but they wouldn't necessarily have to own the inventory. That is a possibility, but it is not a prerequisite.

Senator PROXMIRE. That is what I would like to prevent.

Secretary BALDRIGE. But owning inventory is no different than any other kind of commercial transaction.

You have to know what you are doing first, but there are plenty of examples and plenty of help you could get.

Senator PROXMIRE. How much would you expect that bank export trading companies to cut down on the merchandise trade imbalance in 1981 and 1982 if it did not have my amendment, as compared with if it did?

Do you think this would make a really significant difference?

Secretary BALDRIGE. I do, Senator. That is hard to quantify exactly.

But we are going to be facing, in the next few years, a different situation on exports than we have in the past few years.

Our exports have been helped, our trade balance has been helped because we have just come through a recession where our imports have been cut down because of it.

We have seen the dollar devalued in 1977 and 1978, which has helped exports temporarily.

Both of those are temporary factors affecting the trade balance. Now we are looking in the next few years where we have our high-technology exports, a big share of the increase for us, seeing more and more competition from other countries.

We are having less-developed countries getting into the export race. It is the only possible way I can see for us to increase our share and help industry do that over and above just our regular Government program that this administration proposes.

But this is a positive step.

Senator PROXMIRE. Certainly you would agree the best way we could encourage exports is to get inflation under control.

Secretary BALDRIGE. Absolutely.

Senator PROXMIRE. Hold down costs and become competitive in that way. Wouldn't you also agree, even with the very serious inflation we have suffered, that we have done quite well in increasing exports in the last 3 or 4 years, that we have, that we are the only developed country that I know of that has a balance on current account, including investment income, as well as our trade balance, an offset which, it seems to me, is reasonable to do.

Under those circumstances, why can't we proceed within our present framework and then modify it, as I say, with trading companies approved by the Federal Reserve Board?

Secretary BALDRIGE. Senator, as I tried to point out before, part of the reason we have increased our trade balance favorably in the past few years has been because of the recession we had that restricted our imports.

Another reason was a devaluation of the dollar. That is going the other way now.

That made a big difference in our trade balance and that is not going to be with us in the next 10 years.

Senator PROXMIRE. I am talking about, not the trade balance, but increase in exports. Well, all right, balance on current accounts, that's right.

ADMINISTERING ANTITRUST SECTIONS

Let me ask you about this. You also, I think, are dead right in saying that Commerce can administer the antitrust sections without more personnel, your opposition to creating the Special Office of Export Trade to carry out the provisions, I agree with that.

That is certainly consistent with the administration's position to hold down spending.

How will the Commerce Department administer antitrust sections? Do you have a staff of antitrust experts that can be pressed into service, or will you rely on consultations with Justice Department or higher Justice Department lawyers to do the job?

Secretary BALDRIGE. We are relying on Justice Department and I am sure they will be glad to help us in that regard.

Senator PROXMIRE. How do you provide any effective input? Why shouldn't we lodge the authority with Justice?

Secretary BALDRIGE. We have the background, the statistics, the figures, we have the experience that comes with dealing with East-West trade, as well as commerce within the United States.

We have all the promotional experience with offices all over the country. We can give them all of the background information they need.

Senator PROXMIRE. That is fine. That is the present situation, as I understand it.

You have got cooperation with Justice Department. But now you are called upon to make antitrust judgments. You haven't done that before. That's been the Justice Department. We have concentrated and centralized it.

Secretary BALDRIGE. Senator, we are talking about antitrust problems outside the United States, exports only.

This law clearly says that if any of those export trading companies result in reducing the competition inside the United States, or preventing competition outside, trying to reduce other market shares outside the United States, the Justice Department will have to take action.

They wouldn't go along with it in the first place. We have to use their facilities. We don't have that many lawyers.

But we do have the information. I don't see why, working together, we can't make the right decisions on this.

Senator PROXMIRE. My time's up, Mr. Chairman.

Senator HEINZ. Thank you.

Before I yield to Senator Chafee, I would just observe, as the Secretary has noted, that there is a distinction in this bill between the certification process, which Commerce has the expertise in and is affirmatively charged with and the enforcement process, which is carried out by Justice.

And it is worth noting that the previous Justice Department asked for that separation. They did not want to be in the business of both certifying and then being the policeman on the beat, checking up on their own certifications.

They saw that as a conflict of interest. In my judgment, they were right, and in my judgment, the way the Secretary has stated it is absolutely correct and well-taken.

Senator Chafee.

Senator PROXMIRE. Will the Chairman just consider the possibility of inviting the Justice Department up to testify on this?

They are not invited, as I understand.

Senator HEINZ. We do have a third day of hearings scheduled.

Senator PROXMIRE. Very good.

Senator CHAFEE. Thank you, Mr. Chairman.

Mr. Secretary, I want to commend you for holding fast to your position that the bank not have to prove that its actions are going to increase exports before it gets involved in trading company activities.

I think that subjects the process to objections by a rival trading company and lawsuits.

Whenever one must proceed to prove that exports are going to increase a handicap is placed in the way of the objective of this legislation, which is to increase exports.

So, I want to commend you for sticking to your guns on that position.

TRADE POLICY COMMITTEE

Mr. Secretary, as I understand it, within the Executive Office of the President there has been set up a Trade Policy Committee.

Is that correct?

Secretary BALDRIGE. Yes.

Senator CHAFEE. And that Trade Policy Committee is chaired by the USTR and you are vice chairman.

It includes a series of Cabinet positions—Commerce, Agriculture, Economic Advisers, Defense, Energy, Interior, Justice, Treasury, Transportation, State, OMB, National Security, Labor, and the U.S. International Trade Development Cooperation Agency. Is that not correct?

Secretary BALDRIGE. Senator, that is the Trade Policy Committee, which meets on questions of policy.

Then, as you have probably read, there will be a cabinet-level Council on Commerce and Trade that will get into all aspects of trade.

Senator CHAFEE. Mr. Secretary, I think that one of the important things is that the administration come to Congress and speak with one voice.

It makes it much easier on us, who are trying to foster legislation to increase exports.

I am delighted that you are going to head up one of these councils.

And that when you come forward, as you have today, you are speaking for the administration.

Secretary BALDRIGE. Yes, Senator, I am speaking for the administration.

Senator CHAFEE. That is just what we need, because, as I mentioned before, there is a series of other export-related legislation that will come up with which I know you are familiar; for example, changes in the Foreign Corrupt Practices Act and changes in the taxation of Americans abroad.

Both of those matters I am deeply interested in. I hope that the same speaking-with-one-voice proposition will hold when we consider those pieces of legislation.

Secretary BALDRIGE. We will do our best.

Senator CHAFEE. That is quite a challenge. I am sure you can meet it.

The administration's a big, amorphous body. In the past, we have had USTR saying one thing, Treasury saying another, Commerce in between.

We do encourage you to foster these groups that have been set up and try to arrive at a consensus, so that when someone of your importance comes before us, we will know that that is the position of the administration.

Thank you, Mr. Chairman.

Senator HEINZ. I would like to indicate that the "Executive Summary of the Study of Feasibility of Export Trading Companies

to Promote and Increase Exports by the U.S. Textile Apparel Industries" will be made a part of the record, which the Secretary earlier brought to our attention.

[The document follows:]



ECONOMIC CONSULTING SERVICES INC.

February 6, 1981

Prepared Under Contract No. TA79SAC01336
Of The U.S. Department Of Commerce

A STUDY OF THE FEASIBILITY OF EXPORT TRADING COMPANIES
TO PROMOTE INCREASED EXPORTS BY THE U.S.
TEXTILE AND APPAREL INDUSTRIES

EXECUTIVE SUMMARY

I. INTRODUCTION

In May 1980, Economic Consulting Services Inc. (ECS) was awarded a contract by the U.S. Department of Commerce for "A Study Of The Feasibility Of Export Trading Companies To Promote Increased Exports By The Textile And Apparel Industries." This Executive Summary presents a brief synopsis of the findings of the study, and ECS' resultant policy recommendations.

II. PURPOSE AND SCOPE OF THE STUDY

The U.S. textile and apparel industries have had limited, but recently improving, success in developing their potential export markets; in 1979 only 6.5 percent of the dollar value of U.S. textile shipments and 1.6 percent of U.S. apparel shipments were sold for export. One major reason for this poor export performance is that these two industries consist largely of firms which do not have the resources needed to explore foreign markets fully and effectively. An export trading company (ETC) might make it possible for these small firms to develop their export markets more fully than they have to date.

The study was carried out in four phases. The objectives of these phases were, respectively: (1) to examine the feasibility of export trading companies which specialize in textiles and apparel, and to identify their probable

functions and organizational needs; (2) to construct a preliminary model of an ETC for each of these industries; (3) to develop and conduct two surveys, one to assess the interest of U.S. manufacturers in selling through an ETC and the second to assess the willingness of foreign importers to buy U.S. textiles and/or apparel through an ETC; and (4) to develop "final " organizational models for ETCs specializing in textiles and apparel, along with appropriate policy recommendations.

III. DEFINITION OF AN EXPORT TRADING COMPANY

An export trading company (ETC) is defined in this study as an independent firm (or association of firms) which has the capability to provide a comprehensive range of export services to domestic producers. Such services include: contacting foreign customers; providing market intelligence and research; arranging for freight forwarding; arranging for price quotes, whether on an f.o.b., c.i.f., or landed, duty-paid basis; making necessary credit and other financial arrangements; providing other necessary transaction mechanics; and, possibly, performing broader functions such as product design. In the performance of these services, an ETC should be capable of taking title to the products that it trades and will normally function in this manner, although it is not precluded from exporting on a commission basis or providing specialized export services for a fee. To be effective, an ETC must maintain some level of

"permanent" presence in major foreign markets, through overseas sales representatives, sales offices, showrooms, warehousing facilities, and/or distribution networks. An ETC may also become involved in importing and in international trade among third countries in order to: develop additional sales and revenues, reduce foreign exchange risk, maintain good relations with its customers, consummate barter deals, and use its overseas sales offices/distribution facilities most efficiently.

IV. POTENTIAL ROLE FOR AN EXPORT TRADING COMPANY IN THE TEXTILE AND APPAREL INDUSTRIES

The growth in U.S. exports of textiles and apparel has been limited by barriers which an ETC should be able to overcome. The small size of many firms in the apparel and textile industries makes it difficult or impossible for them to allocate the financial and managerial resources needed to establish an effective export "arm". Many firms are not aware of their export potential and lack an understanding of even the basic mechanics of exporting.

Moreover, many American textile and apparel manufacturers, long accustomed to intense and increasing competition from foreign suppliers in the domestic market, have shied away from any effort to participate in export markets on a sustained basis. To many manufacturers, it is not logical to consider seriously competing abroad, given that certain foreign manufacturers have been so successful in

penetrating the U.S. market. Exporting also involves a different set of problems than does the sale of goods domestically, such as: a different set of customers; longer financing periods; perhaps different styles, different sizes, or other product requirements; additional transportation costs; and additional documentation. Therefore, exporting requires a mix of managerial and financial skills which many domestic producers lack, and which they have had limited incentive to acquire.

An ETC could overcome these barriers to exporting. In most cases, an ETC is likely to take title and perform all subsequent export operations. Such an ETC would be, in essence, another customer for the domestic industry, and would act as a foreign distributor for U.S. textile and/or apparel firms. An ETC could also act as an agent and/or provide certain specialized export services to manufacturers.

Exporting through an ETC also can make it possible for domestic firms to take advantage of various economies of scale that are often possible in exporting. The establishment of overseas offices, transportation and insurance, warehousing, etc., can all be carried out for a much lower per-unit cost when large volumes of products are exported than when only limited quantities are sent abroad. An ETC should be able to pool the exports of several domestic producers, and therefore take advantage of these potential economies. An ETC also might consolidate the shipments of

several domestic producers either to fill very large foreign orders or to offer a full range of complementary products.

Finally, an ETC may be able to market U.S. products abroad more effectively than many textile and apparel manufacturing firms. An ETC should be able to offer a wider range of products, a wider range of product services, and in general be better equipped to recognize potential market opportunities in foreign countries than many individual manufacturers. This may allow an ETC to secure more favorable prices and/or develop additional marketing opportunities that most of the individual manufacturers represented by the ETC could not develop on their own. An ETC may also be in a stronger position to bargain for lower freight, insurance, and storage rates than could be obtained by individual small- or medium-sized producers.

V. INTEREST IN EXPORT TRADING COMPANIES

Two different surveys of individual firms were conducted as part of the study. In the first, questionnaires were mailed to 117 U.S. textile and 235 U.S. apparel firms to assess their attitudes towards exporting through an ETC, and usable responses were received from 57 textile firms and 70 apparel firms. In the second survey, personal interviews were conducted abroad with importers of textile and apparel products in six foreign countries to determine whether they would consider buying U.S. textile and apparel products from an export trading company, and if so what benefits they would hope to derive from purchasing through an ETC.

A. Conclusions: Domestic Textile and Apparel Industry Surveys

Over 70 percent of all of the firms responding to the domestic industry survey in both the textile and apparel industries indicated that they would consider selling through an ETC. A high percentage of positive responses was obtained from firms of all sizes, and from both exporters and non-exporters, although smaller firms and firms with no export experience evidenced the highest level of interest in selling through an ETC. The greatest interest in the ETC concept was shown by textile firms with less than 500 employees, and by apparel firms without regard to the number of employees which either export less than 5 percent of their gross sales or which do not export. Those firms not interested in selling through an ETC either were already successful exporters which were not willing to share control over their export operations, or were firms which appear to have no interest in exporting.

The responses of textile and apparel firms were, with some exceptions, very similar. A substantial majority of both textile and apparel firms, regardless of their size and regardless of whether or not they are exporters, wanted the ETC to take title and assume all subsequent export responsibilities. Therefore, most U.S. textile and apparel firms which would consider selling through an ETC would prefer an ETC that acts as a "one-stop" exporter.

Finally, although most respondents indicated that they were either unwilling to invest in an ETC, or were uncertain

as to their willingness to do so, several firms indicated that they would be willing to invest substantial amounts, ranging from \$50,000 to \$500,000, and in two cases over \$500,000. Therefore, some textile and apparel firms appear to be potential sources of investment capital for an ETC in each industry.

B. Conclusions: Foreign Importer Survey

A number of buyers in each of the countries visited indicated that they would be willing to purchase U.S. textile and/or apparel products from an ETC, although their enthusiasm for the ETC concept, and the range of services that they would expect, varied considerably from country to country. Buyers in the Far East generally expressed a much greater level of interest in buying through an ETC than buyers in Europe.

Importers in all of the countries visited stressed the potential role of an ETC in locating U.S. suppliers and effectively marketing U.S. products in their country. Almost all of the importers contacted stated that the enormous size of the U.S. textile and apparel industries makes it very difficult for foreign importers to locate U.S. firms which (1) are producing the types of products that they want to buy and (2) are willing to export. In addition, many U.S. textile and apparel firms are not effective in identifying which of their products can be marketed in specific foreign markets, and then promoting these products. If an

ETC can help overcome these problems, it will perform a valuable marketing service and should be able to increase U.S. exports of textile and apparel products.

VI. FINAL MODELS

An export trading company that trades in textiles will be very similar to one that trades in apparel.^{1/} In both cases, the ETC will "domesticate" the foreign sales of U.S. manufacturers by making the terms and conditions of foreign sales as similar as possible to those of domestic sales. To do this effectively, an export trading company exporting the products of U.S. firms in either industry will have the following features:

- The ETC should be organized as an independent, privately-owned, profit-motivated corporation.
- Product expertise is essential for the ETC's success. Therefore, the most likely source of entrepreneurs for a textile/apparel ETC lies with firms/individuals with experience in the textile and/or apparel industries. Other possible sources of investors are other trading organizations, such as export management companies, and banks (if legislation is enacted to allow investments by financial institutions).
- The ETC should be capable of taking title to the products that it handles, essentially acting as a "one-stop" exporter for U.S. textile/apparel firms. This, however, does not preclude the ETC from selling products on a commission basis or from performing more specialized export services.

^{1/} There are some differences between textile and apparel ETCs which have the same sales volume and which offer the same range of services with respect to their organizational structure and financial requirements. These differences are illustrated in two financial models, one each for textiles and apparel, which ECS developed for this purpose and which are presented in the Final (Phase IV) Report.

- To market U.S. products effectively overseas, an ETC must meet the specific needs of foreign buyers, and therefore must be willing, at a minimum: to supply products to foreign buyer specifications; to extend credit in a form acceptable to foreign buyers; to clear shipments through customs; to pay duties and freight; to quote landed, duty-paid prices. At the same time, a number of foreign buyers may not wish to use this entire range of services. Therefore, the ETC must be flexible in this regard.
- There is no optimal size for an ETC. However, an ETC should have the resources to hire its own sales representatives and/or establish its own overseas offices in major foreign markets which require such an office. Moreover, the range of export-related services for which the ETC would be responsible implies a substantial commitment of human and financial resources.
- An ETC must have a large volume of sales in relation to capital in order to earn an adequate return on equity. The expected ratio of capital to sales for an ETC should be within the range of 1:10 and 1:20.
- To obtain the sales volume required for long-term viability and to avoid over-reliance on a single product, an ETC should represent as diverse a range of textile/apparel products as possible. The same ETC may export both textile and apparel products.
- Although an ETC may become involved in two- and three-way trade as well as exporting, few foreign buyers showed any interest in having the ETC act in this role, and a number of U.S. textile and apparel firms indicated that they would be reluctant to export through an ETC that imports competitive products. Therefore, it is anticipated that an ETC will engage in two- and three-way trade primarily as an ancillary operation, and that there will be little or no conflict between the profit-maximizing objectives of the ETC and the policy objectives of improving the U.S. trade balance.

VII. POLICY IMPLICATIONS

The policy implications of this study may be summarized briefly as follows:

- Export trading companies represent a promising vehicle for expanding exports of U.S. textiles and apparel.
- An export trading company should be organized as a private, profit-motivated corporation which is capable of taking title to the merchandise that it handles and acting as a "one-stop" exporter for domestic textile and apparel firms.
- There are no institutional or legal barriers which preclude the establishment of export trading companies in the textile and apparel industries. However, some forms of government encouragement and some legislative changes may provide a valuable impetus for the formation of ETCs.
- Administrative and legislative initiatives which should be taken to encourage the formation of export trading companies in the textile and apparel area include: (1) conducting seminars to publicize the export trading company concept; (2) targeting existing government support for exporters and/or new businesses to encourage the formation of export trading companies; (3) having a single office in the Department of Commerce responsible for coordinating programs applicable to export trading companies; (4) allowing bank investment in export trading companies; and (5) clarifying, and perhaps strengthening, the anti-trust protection provided under the Webb-Pomerene Act. These initiatives can be taken using existing resources, and require no new appropriation of funds.

PARTICIPATION BY REGIONAL AND SMALL BANKS

Senator CHAFEE. Mr. Chairman, could I make one other point? I come from a State that doesn't have any national banks, that is, major banks in the concept of what we are talking generally of here. We have regional banks.

The regional banks in my State are enthusiastic about this export trading company legislation. They don't feel they are going to be squeezed out. They support what you have been saying, Mr. Secretary. They are willing to take their chances, get in there and compete.

Secretary BALDRIGE. As I said, Senator, I personally feel that comparatively, the regional and small banks are going to participate in this more than the large, individual banks.

The large, individual banks, the worldwide banks, are already involved in substantial foreign exposure.

Their customers are large companies, by and large, and most know how to handle exports. The regional, smaller banks, are the ones that can seize this opportunity and do something with it.

Time will tell, but that is my opinion.

Senator CHAFEE. I think you are exactly right. I wouldn't want anybody to think these regional banks are relatively naive country folk. They are sophisticated, and have offices in Singapore, Cairo, and London.

They are perfectly delighted to jump in and participate here. They will fight shoulder to shoulder, head to head, with the big New York banks.

Thank you, Mr. Chairman.

Mr. HEINZ. Mr. Secretary, one thing that I would like to place in the record before I finish up with one or two questions on information that we have referred to earlier regarding our current account surplus, \$2, \$3, or \$4 billion. I think everybody should be clear that, as I believe Senator Stevenson pointed out in his statement, that that is a \$4 billion surplus only because of some \$31 billion in earnings and dividends repatriated to the United States as a result of overseas domestic investment by U.S. companies abroad during the 1950's and 1960's.

It does not represent U.S. jobs and U.S. productivity. It represents something very different. It represents, as Senator Stevenson indicated, something from the past. Nothing bad.

Something obviously we are very glad of. But it should not be taken to mean that are doing an outstanding job of exporting simply because our current account seems to be in surplus.

Would you agree with that statement?

Secretary BALDRIGE. Yes, Senator, I would agree completely. The current account includes repatriated payments, profits that came from investments in the 1950's and 1960's. There is no sign that that, in particular, is necessarily going to increase during the next decade. Although it might.

The figures that I believe we should be watching are the trade deficits because that is what shows the progress of this country in being able to export against import. It shows the progress of the country being able to pay for the oil that we have found so expensive to buy.

Here are just three figures that I think will put our trade deficit in perspective. Through 1970, since World War II, we had no trade deficit. We were always in a surplus position until 1970.

From 1971 through 1976, we had a deficit that for all those years was less than \$5 billion. From 1977 through 1980, we have had a trade deficit of over \$100 billion.

Now, it doesn't take much extension of that kind of performance to give me pause to think very strongly about whether we should not, in fact, do everything we can to help this country export. We simply have to.

Mr. HEINZ. Now, Senator Proxmire brought up the fact that he has an amendment to title I of the bill. In your discussion, I think it is fair to say that you, the administration, opposed his amendment because you thought it would put too much of a burden on the banks to prove that they could export and that the creation of the export trade companies should be freer of unnecessary restrictions than his amendment would create; is that correct?

Secretary BALDRIGE. I don't think I said I opposed his amendment, Senator. I just said I preferred the section as it is in this present act. But I prefer it because of two major reasons. Let me go over them again.

First, it puts the burden of proof to show that the entity will be able to export successfully and not do anything against the public interest and so forth, on the initiator, in this case the company and/or the planner.

That is, it seems to me, very, very difficult to prove. We do not live in a risk-free society. We did not get where we are by being able to prove ahead of time we would be able to get there. There has to be some risk taking.

It is one of those things that is very difficult to prove as when the Senator asked me in the confirmation hearings, how in the world can you show anybody that you would be an adequate Secretary of Commerce? It is a very difficult thing to show before it actually happens.

The second point is the fact that only bank holding companies could have control is going to work, in my opinion, against the small bankers and medium-size bankers in this country. Large bankers, by and large, are the ones that have holding companies. A good many of the smaller ones don't.

Some of them could get together and form bankers banks that would qualify under the Senator's amendment, but I just tend to think it is one more bar toward getting smaller banks involved in this area. I feel particularly strongly about the smaller banks, and the manufacturers getting as many roadblocks out of their way as we can, because our competitors abroad, in Japan, in Germany, in France, in Mexico, have a much greater proportion of medium- and small-size manufacturers exporting now than we do in the United States.

Mr. HEINZ. Mr. Secretary, a question on something you brought up that is not directly related to this legislation, but since you raised it, you confirm the newspaper report that the President intended to set up Cabinet-level councils in six areas, one of them being a Cabinet Council on Commerce and Trade of which you, the

Secretary of Commerce, would be the Chair, as I understand the report.

How would that council be different from the Trade Policy Committee, and is it or is it not supposed to do the same thing as the Trade Policy Committee?

Secretary BALDRIGE. First, on the announcement, I don't think formal announcement will be coming out until later this week. I think the press stated correctly that these Cabinet councils were still being reviewed as to their makeup. So, that is not cast in concrete yet. Let me make that caveat first.

But in general, the theory would be that the Council on Trade and Commerce would cover all facets of that.

For instance, Senator Chafee's point, it would certainly be one of the coordinating bodies to actually make up an administration view on any matter that had to do with trade and commerce. There would be many other functions, too.

The Trade Policy Committee was set up in the Trade Reorganization Act of 1979 which assures that the USTR does have the responsibility for policy and negotiation, and assures him direct access to the President. That would not be changed by this.

But for a cabinet-level council, I think it would cover more subjects than that. The final determination as to the makeup of that body, though, has not yet been determined.

Mr. HEINZ. Mr. Secretary, I raise it because I think you would be concerned about any duplication of function. I know you would be because I know you would be a very efficiency—and results-minded man, a man with a very good record of performance in that area.

On the surface, based on the reports so far, there would be, appear to be, and I stress the words "appear to be," some overlap or duplication of function. You have indicated that is not your intent. Obviously, the statute which creates the Trade Policy Group does specify that STR is the chair of that group.

I hope that as that proposal is refined and developed that you will find the means to eliminate any duplication of function that would appear to fly in the face of the intent of the statute you mentioned.

Secretary BALDRIGE. Senator, you have a point that I agree with very much. There are enough possibilities, as have been evidenced in the past, for USTR and commerce to somehow or other get crosswise. The present USTR, present Secretary of Commerce, have taken every possible step to insure that does not happen.

It is not happening, in fact, and will not happen in the future. There will be no problem there, I guarantee you.

Mr. HEINZ. Mr. Secretary, I am certain you mean every word you say, and that—is the way it will be. Senator Proxmire.

STATISTICS CHALLENGED

Senator PROXMIRE. Thank you, Mr. Chairman. Mr. Chairman, first I think that statistics given by Secretary Baldrige should be challenged to some extent.

You talked about how lately our trade balance has deteriorated very badly. Of course, as you know, the reason for that deterioration is because of the colossal increase in the price of oil and fact

we have to import so much oil. This is true of every single oil-importing country virtually in the world. Every big one certainly.

Furthermore, the United States is one of the very few industrial countries with a trade surplus on current account at the present time. That is goods, services, including investment income and transfers.

Our position stands in sharp contrast with that of continental European countries and Japan, all of which are reporting deficits on current account. So, I think you are right to be concerned about his, but I think we also have to recognize that we have a lot of strength here.

Also, I would like to ask about something that really very much concerns me. I think this administration's fiscal policy is right. I support it enthusiastically. I think we have to cut spending, cut it sharply. We have to balance the budget.

I think we have to make some real and painful sacrifices in the process. But it seems to me that whenever anti-inflation policy, and that is our number one problem, it seems to me in this country, whenever that policy runs against the interest of business with the Reagan administration, so far it seems to collapse in a heap. And the policy toward antitrust and free trade, it seems to me, is a perfect example of that.

S. 144 provides for certification by the Commerce Department with activities such as, and I quote, "Agreements to sell exclusively to or through the association or territorial price maintenance, membership or other restrictions to be imposed on members of the association or export trading company."

The common meaning of those words seems to be exclusive sales or boycott arrangements, geographic market restraints and price fixing.

I am going to quote to you from the Wall Street Journal I referred to. It said the Stevenson bill poses some dangers by endorsing and expanding the principles of export cartels, it undermines U.S. commitment to an open and international trading system. How can we complain about OPEC or Third World cartels if we encourage ourselves to form cartels.

So, what kind of signals does this send out to the world on free trade? We have been the champions of it for many years.

Secretary BALDRIGE. Senator, I think the simple answer to that question is that I do not believe in unilateral disarmament. Sure we have been talking about OPEC, and we have been talking about Japanese trading companies and so forth. That hasn't stopped them. We live in a world that is going to be more competitive in the next 10 years.

If we can't give at the water's edge our own companies the same advantage that their competitors abroad enjoy, we are just going to take a whipping in the next 10 years.

Senator PROXMIRE. You are saying the answer even though as I pointed out we are doing better than our trading competitors in Europe, Japan, the other developed countries on current account which seems to me the fundamental, basic basis of judgment, in spite of the fact we are doing better than they, you say we have to now go to cartelization, to monopoly, where we throw in the sponge on antitrust.

Secretary BALDRIGE. I think there are two points there, Senator, you raised. We are talking about only actions taken outside the United States in exporting. We are not talking about any antitrust in the United States. These are for export purposes only.

Again, I have to go back to the fact that I don't care how you call being in the red or for what reason, but the fact is that we have been in the last 4 years \$100 billion or more out of whack in the red, our trade balance.

Now, I think it's germane to point out that it is due to high oil prices. That is what has caused it. But that doesn't make the problem any less severe.

Senator PROXMIRE. Mr. Baldrige, is there any way we can expect to perpetually run a surplus on current account?

Don't we have to consider many other elements and then come to the ultimate overall conclusion based on what that balance shows?

Secretary BALDRIGE. Yes; that is true. But besides looking behind, one has to look ahead, I believe, sir. In looking ahead I do not like what I see.

Senator PROXMIRE. I agree and I think you're right and think we should pass this bill. All I'm fighting for is the amendment I've suggested.

Senator HEINZ. Would the Senator yield, because as I recollect the testimony not only of Senator Stevenson but people of the Antitrust Division of the Carter administration Justice Department, none to my knowledge testified that title II that the Senator referred to a minute ago embodied any substantive changes in the antitrust laws' application to extra-territorial activity. The changes are all procedural.

This Senator knows of no substantive change in the antitrust law that title II makes. But I raise that for the Senator.

Senator PROXMIRE. Yes; let me respond by asking Secretary Baldrige this question. Suppose the Japanese auto makers and German machine tool industry agreed among themselves to divide up the U.S. market and fix prices. Would we regard that as a friendly act? And should the Europeans or Americans regard this as a friendly act when on its face it would appear that U.S. exporting companies could catch up Europe or Africa that way?

Secretary BALDRIGE. We probably would not, Senator, but I do not believe this bill would result in that kind of action.

Senator PROXMIRE. It will certainly move in that direction, provide the basis for it.

I read the language here. It seems to me that it goes a long way in that direction. Any agreement for pooling tangible or intangible property resources—

Senator CHAFEE. Pardon me, what section are you on?

Senator PROXMIRE. Page 30, lines—

Senator CHAFEE. I don't have that same copy. Do you have the section?

Senator PROXMIRE. Yes; it's section 4, certification, subparagraph 7.

Senator CHAFEE. Which title is that?

Senator HEINZ. Title II.

Senator PROXMIRE. Title XII.

Senator HEINZ. Section 206.

Senator PROXMIRE. Section 206.

Senator CHAFEE. Thank you.

Senator PROXMIRE. Not limit any agreements to sell exclusively or to or through the association or export trading companies any agreements with foreign persons who may act as a foreign selling agent, any agreement for pooling tangible or intangible property or resources or any territorial, price maintenance relationship or other restrictions will be imposed on members of the association or exporting trading company.

That's the language to which I refer when I say should the Europeans or Africans regard that as an unfriendly act, then it would appear they were able to catch up countries that way. Territorial, price maintenance, other restrictions.

Maybe we ought to delete that section.

Secretary BALDRIGE. Senator, I think we're subject to that from companies abroad. We're already the recipients of that in the United States. It's not always known or understood, but that happens. It happens to exporters coming into our market.

If this bill actually turned these export trading companies into any force that, because of their action abroad, would have an effect on antitrust protection in the United States, there are safeguards. The Justice Department could take the appropriate steps.

INTERNATIONAL TRADE PRICE FIXING

Senator PROXMIRE. It certainly has a direct effect on international trading. This is our policy on international trading. We're now moving in the direction of price fixing in international trade.

Senator CHAFEE. this section deals with procedure for the application.

Senator HEINZ. Let me say to my good friend from Wisconsin that the effect of eliminating the section on—section 7, were we to simply eliminate that section, that would simply eliminate a reporting requirement that anybody applying would have to make, because the operative language of section 206 is reporting: An export trading company seeking certification under this act shall file with the secretary a written application for certification setting forth the following, one, two, three, four, five, six, seven. The Senator just read No. 7.

What he is proposing is just eliminating paperwork. If the Senator's suggestion were taken at a face value, I think it would run counter to what he really wants to accomplish.

Senator PROXMIRE. Now, come on, John; what I would like to suggest is, A, eliminate that paragraph and, B, substitute a paragraph prohibiting this.

Senator HEINZ. The Senator is fast on his feet.

Senator PROXMIRE. What this does is say you're going to fix prices.

Senator HEINZ. Any further questions?

Senator PROXMIRE. No; that's fine.

Mr. Secretary, I want to tell you that I've admired you and respected you for sometime. I've known about you. I know about your record.

As you know, I think I'm the only Senator who voted against your confirmation. I did that because of your expressed attitude on the bill that Senator Chafee also wants to destroy, a law, the—

Senator PROXMIRE. The Foreign Corrupt Practices Act. I hope you get that message and will reconsider that.

You're a man of great integrity, great ability. My vote didn't mean to be an insult in any way, but I hope that you will consider how important it is that we follow an antibribery policy.

I think we've started in that direction and I think it's something we ought to give every consideration to before we retreat.

Secretary BALDRIGE. Senator, I agree with you. I just want to make the bill clear enough so the small bank and manufacturer can know whether he is in trouble. Right now they don't know without hiring a \$100,000 Wall Street lawyer. They don't.

Senator PROXMIRE. I want to get into that in greater detail later, but I did want to explain my position. I didn't want you to think I had anything but respect for your background.

Senator CHAFEE. Senator, I wouldn't want my efforts to go into the record being depicted as "destroying" the Foreign Corrupt Practices Act. Your description of my proposal is inaccurate and purposely misleading. I'm trying to make the act work, to make it comprehensible.

It now is one of the major disincentives against exports from this country. People don't want to do business in certain areas of the world because automatically it might be assumed that because they are there, they must be bribing somebody. The act has been a serious hindrance to the exports of this Nation.

I know the Banking Committee will study this issue in some detail. But I wouldn't want that opening shot to go unanswered.

Senator HEINZ. Mr. Secretary, I think we have not only appreciated but enjoyed your testimony and your discussion with the subcommittee today. You've done an excellent job.

Again, I just can't help but note that you've accomplished in 3½ weeks of your tenure what others were unable, unnamed, of course, to accomplish in 2½ years, which is getting it together. We're indeed all grateful to you, even though there may be minor disagreements here and there.

Senator Proxmire is a strong supporter of this legislation. He is one of the 77 people who voted for it. He agrees with you in almost every particular and I'm not going to yield because—

[Laughter.]

Senator HEINZ. I know the trouble that will get me into. Thank you very much.

Secretary BALDRIGE. Thank you, Senator.

Senator HEINZ. I would like to ask the Honorable Henry C. Wallich of the Federal Reserve System and the Honorable John G. Heimann, Comptroller of the Currency, to come forward.

STATEMENTS OF HENRY C. WALLICH, MEMBER, BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM AND JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY

Mr. HEIMANN. Thank you, Mr. Chairman.

Senator HEINZ. Mr. Wallich, we're delighted to have you back before the committee. You were before us last year as was Mr. Heimann. We would like to ask you to please proceed.

Mr. WALLICH. Mr. Chairman, my statement is short. Inasmuch as it may differ from that of others, I wonder if you would allow me to read it.

Senator HEINZ. Please proceed.

Mr. WALLICH. I'm pleased to testify on S. 144, a bill that would facilitate the establishment and operation of export trading companies.

When I submitted a statement on export trading companies on behalf of the Board about 10 months ago, the United States had experienced one of the largest quarterly trade deficits in our history. At the time this was a cause of some concern and comment even though it was recognized as a temporary bulge associated with the sharp rise in the price of imported oil.

Since that time, our exports have remained strong, and as growth of import has slowed, our trade deficit has moderated considerably—by about \$3 billion in 1980, despite an increase of \$20 billion in oil imports. And although we still have a sizable trade deficit—as do nearly all oil importing countries—unlike most other industrial countries, we have the benefit of large and rising net receipts on investment income and other nontrade transactions which more than outweigh our trade deficit.

In sum, the United States is one of the few industrial countries with a surplus on current account at this time—goods, services—including investment income—and transfers. Our position stands in sharp contrast, with that of continental European countries and Japan, all of which are recording deficits on current account.

Recognition of the underlying strength of the U.S. external position evidenced by this current account surplus has been one factor contributing to the recent strength of the dollar in foreign exchange markets.

In providing this background, Mr. Chairman, I mean to emphasize two points:

First, it is important for the United States to continue to have a strong and expanding export sector—one that encompasses a broad range of domestic industries and firms.

Second, we are not faced with a crisis in our trade position or an overall deterioration in international competitiveness, although particular industries certainly face strong foreign competition. Our present position enables us to address issues of export policy from the perspective of our long-term policy goals rather than as a reaction to a crisis situation.

In that context, I believe that there are a number of Government policies that could be amended in ways that would contribute materially to the exploitation of export opportunities by the private sector. Among impediments to our exports that have been cited are environmental regulations, the absence of clear guidelines under the Foreign Corrupt Practices Act, and requirements that certain U.S. exports be shipped in American vessels.

I may add personally that I read in the press today that something is moving in the administration along these lines, and I'm very gratified.

BANK OWNERSHIP

The export trading company concept, properly circumscribed to avoid undue exposure of domestic banks, could also be useful in developing our export capacity. The bill under consideration, however, has provisions relating to bank ownership of export trading companies that the Board finds troublesome. My statement will be confined to issues involving bank ownership.

Our concern has been over the degree of bank ownership and participation in management of trading companies that can prudently be permitted, in light of the wide range of activities in which trading companies have traditionally engaged. The Board believes its concerns would be met by generally limiting banks to noncontrolling investments in trading companies.

By contrast, S. 144 would permit banks to make controlling investments and to engage actively in the management of trading companies, and would place on bank supervisory agencies the responsibility for developing regulations for bank-owned trading companies that would hold down the risks to banks to acceptable levels.

The issue of bank control of trading companies goes to the heart of issues that have been long standing in legislation and policy. The separation of banking and commerce has served this Nation well in promoting economic competition and a strong banking system. A breach of that traditional separation in the case of trading companies could be an important precedent for other areas. This would adversely affect not only the safety and soundness of our banks, but also their role as impartial arbiters of credit.

Control of an enterprise often implies a commitment by a bank to place its full resources behind the subsidiary. This is a generally accepted corporate policy, and it is recognized in the marketplace. Although a banking organization may judge that it can operate an international commercial banking business more efficiently and safely through controlling investments in affiliates, we believe that bank control and involvement in management of nonfinancial affiliates would increase the potential financial risk to the owning banks, as I will detail later. For this reason, the Board has recommended that, as a rule, bank ownership interest be limited to less than 20 percent of the stock of an export trading company.

At the level of ownership interest of 20 percent a bank can include in its earnings a proportionate share of the earnings of a trading company. Under this rule so called of equity accounting, a bank may have an incentive to push a trading company into relatively risky types of operations, in the hope of realizing immediate gains for the bank's earnings. Such risky operations could increase substantially the possibility that banks would sustain losses from operation of trading companies.

In the Board's view it is appropriate to hold to a minimum the incentives for banks to seek to aim at short-term profits in trading companies in which they hold investments, and we believe that this result can best be achieved by setting the level of bank ownership interest at less than 20 percent. At this lower level of ownership, a bank could take into its earnings only the dividends received from the trading company.

This recommendation is more conservative than the level of control specified in the Bank Holding Company Act, and used in S. 144, because the risks to banks from investments in trading companies appear potentially much larger than the risks associated with investments in nonbanking activities that are now permissible under the Bank Holding Company Act.

In particular, trading companies are likely to be leveraged; moreover, as commercial concerns they would operate outside the traditional financial areas where banks have developed expertise.

The risks to banks from this exposure would be especially large if particular banks became identified with and had a significant management interest in trading companies. The bill provides that the name of a trading company shall not be similar to that of an investing bank. This precaution would help insulate the bank from the risks that attach to the operation of trading companies, so long as the bank was similarly insulated from participation in management, and the ownership interests of the bank was relatively small. Otherwise, the market would soon recognize the reality of control by the bank, and would associate the trading company with the bank regardless of differences in names.

Losses that might result from failure of trading companies could be large, especially with high leveraging. One need not anticipate a loss as large as that experienced several years ago by a major Japanese bank—about \$500 million—to recognize the potential threat to a single institution. If such a shock occurred in an uncertain financial environment, there could develop a general distrust of other banks engaged in similar lines of activity, and a threat to the banking system as a whole. Thus, the issue of bank involvement with the trading companies is related to the potential soundness of the banking system.

The bill before this subcommittee, S. 144, seeks to limit these risks by providing that controlling investments by banks be subject to prior approval by bank supervisors, and to certain statutory safeguards. These provisions would inevitably involve the bank supervisors to a substantial degree in decisions regarding operations of export trading companies. Bank supervisors are not likely to be able to anticipate all future eventualities in acting on applications. Even with a high level of supervisory effort, there will always be risks that cannot be foreseen because of the broad range of activities of trading companies.

The detailed supervision of trading companies that might be called for under S. 144 would be contrary to the philosophy adopted by the Board in its recent amendments to regulation K, which sought to reduce the need for detailed supervisory review and regulation of international bank operations. I would expect that U.S. export trading companies would be able to operate much more effectively in competing with foreign companies if they were not subject to supervisory restraints arising from the fact that they were controlled by banks.

A U.S. trading company might well have difficulty in competing with foreign trading companies if the U.S. company was subject to limitations on types of activities or to capital ratios because it was controlled by a bank. Yet limitations clearly would be needed if banks owned trading companies. We can best unleash the entrepre-

neurial talents of our trading companies if we avoid bank involvement in their ownership and management, and rely on banks to provide financing and related services.

I would stress, as I have on other occasions, that bank capital is a scarce resource. If we expect banks to play their part in financing the increased capital investment needed in this country, we will need to resist the temptation to encourage banks to divert capital from its traditional role as a support for lending activity—which in my view is the way in which bank capital can be used most productively.

Now, I recognize that there might be room for a limited number of exceptions from this general norm. There might, for example, be instances in which an export trading company designed for a specialized purpose—for example, a particular project—might require strong bank sponsorship. In such a circumstance, the risks associated with bank control of a trading company might be outweighed by the beneficial effect for U.S. exports from trading company operations, and the public interest might be served by permitting one or more U.S. banks that have special expertise to acquire ownership interests of more than 20 percent, provided that the exposure of the trading company was reasonable in relation to its activities.

I would expect that the number of exceptions would be relatively few, and would not encompass large general or multipurpose export trading companies that would be capable of standing on their own feet without bank sponsorship. Nor would an exception be available to banking organizations that did not possess the requisite expertise.

In general, it would appear appropriate to structure these exceptional cases so that the investing banking organization is a bank holding company rather than the bank. This approach would be consistent with the general scheme of Federal banking laws under which nonbanking activities are performed by corporate entities separate from banks.

If control of trading companies by banks were permitted only where there was a clear need, the purposes of the bill could be accomplished, and at the same time the banking system would not be exposed to undue risk.

Thank you, Mr. Chairman.

Senator HEINZ. Mr. Wallich, thank you very much.

Comptroller Heimann.

Mr. HEIMANN. Thank you, Mr. Chairman.

My statement is a long one. Therefore, I would request that it be entirely included in the record.

Senator HEINZ. Without objection, your entire statement will be a part of the record.

[The complete statement follows:]



NEWS RELEASE

Comptroller of the Currency
Administrator of National Banks

Washington, D. C. 20219

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Date February 17, 1981

STATEMENT OF
JOHN G. HEIMANN
COMPTROLLER OF THE CURRENCY
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL FINANCE AND MONETARY POLICY
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS
U.S. SENATE
FEBRUARY 17, 1981

This statement is being submitted in response to the Subcommittee's request for the views of the Office of the Comptroller of the Currency on the "Export Trading Company Act of 1981" (S. 144). We welcome the opportunity to comment on this legislative proposal. We understand that the Departments of Justice and Commerce will present the views of the Administration regarding the provisions of S. 144 concerning

the Webb-Pomerene Act. Accordingly, our comments are limited to those provisions which permit bank equity participation in export trading companies.

S. 144 is designed to promote the expansion of U.S. exports through the formation and operation of export trading companies ("ETCs") to facilitate the export of goods and services on behalf of small and medium-sized and minority firms. The bill provides for a significant role for U.S. banking organizations in the promotion of exports by permitting their investment in and ownership of ETCs.

This Office supports the concept of export trading companies and urges the enactment of implementing legislation. The national interest requires that the U.S. become more competitive in world markets. ETCs should help achieve that national objective. Testimony on S. 2718 and similar bills during the 96th Congress strongly advocated bank participation as an essential element to successful trading company operations. ETCs require the capital, financing, financially related services and marketing capacities which U.S. banking organizations can provide through their national and international networks. We believe that it is necessary for a significant role to be taken by banks to assure the success of ETC operations.

While the nature and degree of future bank participation in ETCs is not fully predictable at this time, we do anticipate a wide range of bank lending to and investment in ETCs. This would reflect the diversity of probable bank participants as well as the diversity of the local and regional businesses which ETCs would serve. Permitting banking organizations to have equity interests in ETCs would also create a long-term incentive for them to establish the additional organizational forms necessary to provide a complete range of services to promote exports of goods and services. It may be prudent for a banking organization to require a controlling interest in an ETC in which it becomes an active participant. Accordingly, we support ownership of ETCs by banking organizations, subject to reasonable supervisory safeguards.

Equity participation by banking organizations in ETCs would to a limited extent breach the traditional policy of separating banking and commerce. However, we believe that S. 144, in general, addresses the national interest of export promotion in a way which preserves the safety and soundness of the banking system. The Congress has previously permitted limited bank participation in commercial activities to accommodate particular national needs. Our current trade imbalances require similar legislative action.

A healthy and expanding export sector has become increasingly essential to a strong U.S. economy, the stability of our external accounts, and our critical fight against inflation. Exports contribute significantly to U.S. employment, production and growth; help create economies of scale which contribute to the efficient use of resources and reduced prices; and are the primary source of income needed to pay for U.S. imports of essential and desired commodities. U.S. industries must be able to compete abroad if they are to maintain their ability to compete at home.

The Commerce Department reports that only 10% of the 250,000 U.S. manufacturing firms export their products and total U.S. exports account for the lowest percentage of gross national product of any industrialized nation. Also, 95% of U.S. manufacturing firms are small or medium-sized companies which employ less than a thousand persons. These companies represent a small share, about 10-15%, of total U.S. exports. Conversely, approximately 100 U.S. firms account for 50% of the total exports of U.S. manufacturers. The purpose of this bill is to strengthen the international competitiveness of the U.S. by providing small and medium-sized and minority U.S. firms increased opportunities to export. At present, these firms face a number of structural obstacles and disincentives to exporting which are difficult for them to overcome.

Flexible ETC Services

At the present time, small and medium-sized U.S. firms have four primary methods available by which they may export goods and services. They may: sell directly to foreign end-users; sell through foreign agents or brokers; sell through U.S. export management companies; or find a large U.S. multinational firm that needs certain products for specific overseas activities. These methods often entail problems for small and medium-sized and minority firms which act as disincentives to exporting. Such practical barriers include:

- Foreign export agents or brokers often demand total product control and extremely flexible pricing.
- The majority of export management companies lack the expertise to handle more than one or two specialized product lines. Most of these companies do not have the management and capital necessary to expand geographically and to establish overseas sales offices.
- Selling directly overseas ties up the current cash flow of U.S. firms because payment times are slower than in the domestic market.
- Generally, large U.S. multinational firms do not directly involve smaller firms in foreign trade.

Apart from these difficulties, U.S. firms lack other necessary capabilities and expertise such as specialized knowledge of markets to match specific product demands, funds for the development of a foreign market for their particular products, adequate working capital, and adequate financing for foreign purchasers of goods or services. These problems have

substantially contributed to the lack of participation of U.S. firms in export trade.

Export trading companies would be an alternative to the existing cumbersome export mechanisms and would encourage the involvement of small and medium-sized and minority firms in export trade. As demonstrated by the successful operation of export trading companies in other countries, an export trading company can develop and provide an integrated package of managerial and financial services to facilitate exports. Export trading companies, through volume transactions, also permit economies of scale that would reduce the costs of exporting goods or services by U.S. firms.

Export trading companies abroad have proved to be effective. They not only function as a bridge between suppliers and users of products but also provide many other services essential to successful exporting. For example, an export trading company may offer expertise in financing, credit services, market analysis, distribution channels, documentation, leasing, communications, accounting, foreign exchange and advertising. Essentially, an export trading company reduces the requirements for special expertise and capital investment of firms interested in exporting. U.S. businesses should not be deprived of the same advantages as those enjoyed by foreign competitors through their access to such foreign ETC exporting assistance.

The Role For Banks

U.S. banking organizations should play a significant role in the development of export trading companies, since ETCs will enable them to expand the export-related capabilities they already have in place. Many U.S. banking organizations have extensive national and international networks comprised of branches, subsidiaries, affiliates, representative offices and correspondent relationships. These networks not only can provide essential marketing and other services abroad but, more importantly, these networks extend throughout the U.S., touching virtually all small and medium-sized firms. U.S. banking organizations can provide through that network a wide range of export-related financing as well as ancillary services, such as assistance and guidance in the identification of foreign markets, foreign exchange, trade documentation, transportation and warehousing.

Major foreign banks which are associated with export trading companies provide a convenient single-source service for exporters abroad. U.S. banks, however, are not authorized under existing laws to offer the complete range of services needed to induce small and medium-sized and minority firms to export their goods and services. Traditionally, the level of export promotion efforts by U.S. banking organizations has been a function of their overall commercial lending strategies

because their operations have been legally confined to those activities which are considered to be closely related to the business of banking. A number of U.S. banking organizations have most of the systems, skills, and experience necessary to provide one-stop export services to U.S. firms but need broader authority to do so. S. 144 would provide that authority by permitting investment in ETCs by U.S. banking organizations, thereby also providing the incentive to create the long-term organizational framework necessary to accommodate export promotion as a mainstream function. In addition, by permitting U.S. banking organizations to hold equity investments in ETCs, S. 144 would rationalize the present system of authorities, since U.S. banks are presently permitted to own interests in foreign ETCs which can buy and sell goods and services abroad and foreign banks operating in the United States may own a foreign ETC which can export goods to the United States.

We do not know, what forms of participation U.S. banks may develop over time with ETCs, nor can we forecast whether banks would immediately begin to organize ETCs should this bill be enacted. We do anticipate, however, that with the passage of this legislation, U.S. banks would develop ETC relationships suited to the wide range of commercial transactions generated by their own local and regional economies. We are confident that U.S. multinational banks would be encouraged to take advantage of new opportunities in this area. Moreover,

multinational and regional banks would also be likely to offer ETC facilities and participations to local banks and firms through joint ventures.

We support the provisions of S. 144 which provide for U.S. banking organizations to own a controlling interest in ETCs. This Office generally prefers banks to have equity and management control over their affiliate relationships rather than have that capital exposed to decisions by controlling non-bank partners. It also is reasonable to expect banking organizations to be more inclined to form ETCs if they can control their investment and the ETC's activities. The unfavorable bank experiences during the early 1970's with less than controlling participations in REITs, foreign banks and finance companies have led U.S. banks to adopt investment strategies which generally avoid non-controlling positions in affiliates. We recognize that equity participation by U.S. banking organizations in ETCs would represent an exception to the traditional separation of banking and commerce. However, we believe that the proposed legislation is consistent with previous exceptions Congress has made in order to implement national policies. Congress has permitted banks to own equity participations in Edge Act Corporations, international financial or holding companies, commercial corporations oriented towards national or community purposes, and bank service and other banking related entities. Similarly, we

believe this bill generally addresses the national interest in export promotion in a way which preserves the safety and soundness of the U.S. banking system.

Supervisory Safeguards

The proposed legislation contains several necessary supervisory safeguards regarding U.S. bank involvement in ETCs. First, S. 144 addresses entry and aggregate investment limitations: a U.S. banking organization could not invest more than \$10 million or acquire a controlling interest in an ETC without prior agency approval; would not be permitted to invest more than 5% of its capital and surplus in the stock of one or more ETCs; and would be limited to 10% of capital and surplus in the aggregate amount of loans and investments it could make in an ETC. Additionally, no group of banking organizations could acquire more than 50% of an ETC without prior agency approval, even if no one organization were to acquire a controlling interest or to invest \$10 million or more.

Second, the legislation would also establish several other restrictions on banking organization investors and ETCs. For example, the name of an ETC could not be similar in any respect to that of a banking organization investor. If an ETC takes a speculative position in commodities, securities or foreign exchange, all banking organization investors would be required

to terminate their ownership interests. A banking organization would be prohibited from making preferential loans to any ETC in which it has an interest, or to any customers of such an ETC. While we have some technical difficulties with these provisions, the limitations and restrictions generally have been structured for the proper purposes of minimizing financial exposure by banking organizations in ETCs and of preventing conflicts of interest.

Most importantly, S. 144 provides substantial regulatory flexibility to the federal banking agencies to control investments by banking organizations in ETCs. If an agency determines that the anticipated export benefits of an investment are outweighed by adverse banking factors, the agency may disapprove an investment application submitted by a particular bank. Controlling investments in ETCs by banking organizations can otherwise be limited by (1) conditions imposed by the agencies to limit a banking organization's financial exposure or to prevent possible conflicts of interest or unsound banking practices; and (2) standards set by the agencies regarding the taking of title to goods and inventory by the ETC subsidiary, so as to ensure against unsafe or unsound practices that could adversely affect a controlling banking organization. The agencies may examine bank-controlled ETCs and may use their cease-and-desist authority to enforce any and all requirements of the law. The agencies may also

require divestiture of any ETC investment that would constitute a serious risk to a banking organization investor.

These provisions adequately mitigate the supervisory concerns which we expressed regarding earlier proposals as to the safety and soundness of participating national banks. We do not feel, therefore, that additional statutory restrictions such as a specific limit on the maximum interest a banking organization may have in an ETC need be enacted. The administrative authority granted to the federal agencies by S. 144, in our opinion, will allow any needed requirements to be imposed upon ETCs through implementing regulations, with appropriate variations to take account of different types of permissible ETC activities. We believe that the proposed regulatory authority to fashion particular limitations is preferable to a specific statutory provision.

Recommendations

Edge Act Corporations and bank holding companies traditionally have been the vehicles through which U.S. public policy has channeled controversial experiments and advances in U.S. bank participation in commercial affairs. The essential objectives of export trading legislation could be attained by a proposal which permits a 20% or more controlling interest by an Edge Corporation or a bank holding company provided the bank safety and soundness elements of S. 144 are retained.

We recommend consideration of this approach as an alternative which would be responsive to some of the concerns expressed about controlling bank ownership of export trading companies. We, of course, favor retention of the various supervisory controls in S. 144 previously discussed. In addition, we would consider confining control situations to those banking organizations experienced in international trade financing.

Additional flexibility should be provided the Federal banking agencies so they may properly supervise, consistent with the stated purposes of S. 144, export trading companies controlled by banking organizations.

- The Board of Governors of the Federal Reserve System and the OCC should be given the discretion to exempt, by rule, regulation or order, the collateral requirements of 12 U.S.C. 371c (Section 23A of the Federal Reserve Act) regarding loans or extensions of credit made by a member bank to an export trading company affiliate. The present language of S. 144 and existing U.S. banking laws would preclude unsecured extensions of credit by a member bank to or on behalf of its affiliated ETC unless the ETC were an Edge Act Corporation wholly-owned by the member bank. Present U.S. banking laws not only require that most credit between a member bank and its affiliates be secured, but also specify the types of collateral required and margin requirements. Therefore, it appears fundamental to the success of S. 144 that the Federal Reserve Board and OCC be granted some flexibility in administering Section 23A in the case of export trading companies. We also suggest that the definition of "affiliate" in S. 144 be revised so that it is consistent with its definition under the federal banking laws.

- The specific time limits for agency disposition of investment notifications should be extended. S. 144 requires agency action within 60 days of written notice from a banking organization of its intention to make additional investments or to have an ETC undertake certain activities. We suggest that this time limit be extended to 90 days. In this case, an agency's failure to disapprove or impose conditions on a notified investment within the specified time limit would result in the investment being deemed approved. The additional 30 days will allow the appropriate agencies to give more extensive consideration to new investment or activity proposals. At a minimum, specific statutory authority should be provided for the agencies to extend when necessary the time period for the review of a notification or an application for an investment in an ETC by a banking organization.
- The language of Section 105(d)(3) which restricts the authority of the federal banking agencies to impose conditions or set standards regarding the taking of title to goods should be modified. We believe that the restriction as now worded, would impede the authority of the banking agencies to ensure adequate supervision and the safety and soundness of banking organizations which invest in ETCs.
- A banking organization should not be automatically required to terminate its ETC ownership when the ETC takes positions in commodities, securities, or foreign exchange other than is necessary in the course of its business operations. We believe that such mandatory divestiture may, in some cases, be unnecessarily severe to the U.S. banking organizations involved and to other owners of an ETC. Furthermore, this Office has learned from experience that certain statutory requirements of divestiture may not result in a safe and sound resolution to a technical or nominal violation of a statute. We believe the best approach, in the public interest, is to provide the Federal banking agencies flexible authority to take necessary remedial actions on a case-by-case basis.
- An ETC should be able to bear the name, logo, and other items of identification of its controlling banking organization whenever the banking organization is legally responsible for the affairs of the ETC. Prohibiting such identification serves no prudential purpose given the other supervisory safeguards in S. 144, and may be contrary to the purpose of S. 144 which is to promote effective

export trading companies. If a controlling banking organization has legal responsibility for an ETC, it will manage the ETC accordingly and therefore should receive the benefits of that responsibility, group marketing. We believe the prohibition on common identification in S. 144 is a proper supervisory safeguard only in those situations where the investing banking organization is not legally responsible for the affairs of the ETC.

We fully support the objectives of S. 144 -- encouraging the efficient provision of export trade services to U.S. producers and suppliers. The restrictions on equity involvement by banking organizations, coupled with other supervisory authorities, should adequately protect depositors of banking organizations which choose to participate in the management of ETCs. The limited opening of this area of activity to banks will create a unique U.S. export trading company system that should allow more U.S. producers to benefit from existing international market networks and trade financing expertise. We would appreciate the opportunity to discuss additional suggestions we have concerning S. 144 with the Subcommittee staff and to provide any technical assistance necessary to resolve these issues.

Mr. HEIMANN. If I may, I would like to trace its contents and partially respond to some of the comments Governor Wallich has just made, because our view is somewhat different than that of the view of the Board and the Governor.

SEPARATION OF BANKING AND COMMERCE

Question No. 1 is the separation of banking and commerce. It is within the province of the Congress to make that decision. They have done so in the past when it has been deemed to be in the national interest.

I don't think that is a question which should be answered by the bank supervisors, that is, whether it is necessary to retain the traditional separation of banking and commerce.

The Comptroller's Office supports this bill and the concept of commercial banks participating in the ownership of export trading companies.

But if one crosses that bridge, that there exists a need for the export trading company-type of vehicle, then the question of who can operate and own these export trade companies is, indeed, pertinent.

From our point of view, the question is whether a bank should or should not participate in the ownership of export trading companies. Clearly, there has been an opportunity over the past 20 years to create export trading companies without bank participation. However, there appears to be a real need for small and minority businesses to engage in exporting, but that has not taken place in this country.

Therefore, it may be assumed that there is a need for some other type of intermediary, some other source, necessary to foster the establishment of export trading companies. This source has been identified as the commercial bank. We believe that banks may successfully fulfill such a role.

Regarding the question of risk of ownership, we disagree with the Governor's statement. From our experience, we basically prefer to see the banks, when they make investments in businesses, which may be slightly outside of the normal course of their operations, have an ownership interest which is of a sufficient magnitude to focus their attention on it.

History indicates that a meaningful ownership position tends to focus the attention of senior management of all organizations, including a financial organization.

We do not agree that bank participation should be restricted so they may not own controlling interests; we would like to see controlling interests in certain cases, subject in all cases to supervisory control.

I would also like to note that the questions of leverage, manipulation for earnings and the like, can and should be overseen by the banking supervising agencies.

That, indeed, it is possible that an individual institution might do that, but there are supervisory recourses to prevent that from happening, or to stop it when it begins to happen.

This also applies to the issue of bank capital, since that fits into the supervisory process.

So, in sum, very briefly, we support the essence of S. 144. We have no objection to bank participation under proper supervisory controls.

We believe that most of the restrictions placed in S. 144 are correct and good ones.

As you know, Mr. Chairman, we have a number of technical amendments which we will not discuss at this time, but which we believe will solve some problems which exist with the present bill.

Generally, we believe export trade is an important issue. Commercial banks may provide the network which is now missing for small-, medium-size and minority businesses, and that with proper supervision, that, in fact, that could be important for the export position of this country.

Thank you, sir.

Senator HEINZ. Thank you, Mr. Heimann.

CONTRASTING VIEWPOINTS

You support the bill. You believe that banks should, subject to appropriate supervisory constraints, have controlling interests.

You do not believe that this significantly increases the risk to banks. Mr. Wallich takes a very different point of view.

And the point of view appears to differ because of your views on the extent to which controlling interest in trading companies would get banks into trouble.

I think that is a fair statement. Would you agree that is the principal difference between your points of view?

Mr. Wallich?

Mr. WALLICH. Well, we see the possibility for such difficulties, and we think it increases as the degree of control increases.

I recognize that Mr. Heimann's point, that management's attention would be more focused if they stand to lose a lot of money than if they stand to lose little.

But, essentially I think the nature of U.S. banking regulation as structured under the Bank Holding Company Act, indicates that small risks are regarded as permissible; a holding company can buy 5 percent of the shares of other companies without any restriction.

But when we get into higher degrees of participation, greater supervisory and legislative concern arises.

Senator HEINZ. Well, you are both bank regulators. You both approach the same problem.

You look at it very carefully, both with the benefit of a good deal of experience at the State and national level. And you come to very different conclusions.

Mr. Heimann, why do you differ on this point so clearly with Mr. Wallich? Why is he wrong and you right?

Mr. HEIMANN. Oh, Mr. Chairman, I don't think that he is right and I am wrong or that he is wrong and I am right.

I think, perhaps, it is a more philosophical point, assuming banks can become owners in a meaningful way, that there is bound to be, in a system as large as ours, some bank that does very badly.

We have a history in this country with so many banks and so much competition in banking, that not all of the managers of these institutions are as prudent and thoughtful as the rest.

So, certainly, when you open up the area to commercial banking or I suspect any other regulated industry, there are bound to be some mistakes made.

The question to me is a somewhat different one. It is, recognizing that there is the possibility of error on the part of bank management in terms of an individual bank in the spectrum, whether the overall risk of one or two or three banks making some mistakes, and they could be rather serious mistakes, I would agree with Governor Wallich, as against the thrust for export financing and the other banks doing it correctly, and are thoughtful and are prudent and well managed.

This has been historically the lowest denominator-type of legislation in many areas. The question of whether we permit the banking system to compete effectively internationally in such an area, or to say we have to set up ground rules that will protect the worse-managed bank from making a serious mistake, I would opt for more flexibility and the authority for, in that sense, bank supervisors to exercise supervisory control in the hopes that the purposes of the bill, as a whole, will be met, recognizing the mistakes that could be made by one or two or three or perhaps five individual institutions.

Senator HEINZ. In your statement, your prepared statement, you referred to the possibility of restricting controlling investment to Edge Act corporations and bank holding companies.

Could you clarify for me and the committee whether you think that alternative is preferable to the provisions of S. 144?

Mr. HEIMANN. Well, this goes to the concepts of Senator Proxmire's amendment.

I am hard-pressed to disagree with it since we agree on the basic concepts of consolidation of banking agencies.

I find myself, conceptually, rather torn between the idea of having all the banking agencies having different regulations or rules with respect to export trading companies or whether or not it should be concentrated in one.

We, of course, believe that we could do an absolute peachy job in the Comptroller's Office but we don't have total authority, therefore, one has to turn to the agency with overall control, which would be the Federal Reserve Board.

Restricting ETC to bank holding companies, the Congress would be putting final control, if you will, in terms of all the supervisory restrictions, et cetera, in the hands of the majors.

I must say conceptually, which has nothing to do with the quality of the persons, but conceptually, I would have to agree.

Senator HEINZ. The interesting practical effect of that, apart from the conceptual neatness of the scheme to reform the bank regulatory structure which has been under discussion for many years—to lump the Comptroller and the Fed and FDIC into one consolidated or super bank regulatory agency—is that in this instance that the Fed would have control over the decisions of trading companies because they regulate the bank holding companies, and they are not inclined, as evidenced by their testimony, to believe that these are very good things for the banking community to get into. In contrast, were we to pass S. 144, while there would be two people looking at these decisions, you believe that a bank

can participate in export trading companies in a meaningful and important way.

So there is an interesting practical effect here that is, in fact, incidental.

Let me ask Mr. Wallich several questions. Mr. Wallich, you are no stranger, as I said at the outset, to us.

You have some very strongly held views on this subject. And in your statement, you indicated two things that I would like to question you on.

First, you indicate that we are not faced with a crisis in our trade position or an overall deterioration in international competitiveness.

I don't choose to argue that point, per se, but we have been through a period over the last 4 years of having had moderately high to high inflation, higher in the last 2 years than the first 2 years, and in terms of the international exchange medium, a sinking dollar, a plummeting dollar at times.

Now, therefore, the disadvantage of having a high inflation was to a certain extent offset by the effect of having a sinking dollar.

And under those circumstances, we got a result, which you maintain is neither a crisis nor a deterioration. But according to the economists that I have seen, that is—that I have seen or that I have heard, that particular scenario would appear to be changing.

The rate of inflation does not appear to be mitigating significantly. It is still high. But the dollar is strengthening.

And it would seem to me that that would result in a deterioration of our international trading position.

Would you agree with that?

Mr. WALLICH. That could happen if we don't get the inflation down. A high dollar will make us less competitive than we have been in the past.

Now, there are so many variables in here, including the state of demand at home and abroad, that one cannot make any prediction. I think clearly our objective has to be to get our inflation down and approach the situation from that point of view, because we do want a strong dollar as one of the means of bringing inflation down.

Senator HEINZ. In your statement on page 2 you, in effect, make a rather strong plea for the current separation of banking and commerce. You say it's served this nation well in promoting economic competition and a strong banking system.

SEPARATION PENALTIES

Are there any penalties of importance to that separation of banking and commerce?

Mr. WALLICH. Mr. Chairman, I have from time to time allowed myself to speculate in a personal way that a price might be being paid for that separation. Other countries do it differently, and some of these countries have been very successful.

However, that is the way we do it in our country. It has very profound roots, not just economic, but political and social. And if there ever were to be any change in that, it seems to me the approach would have to be through a new look at the Bank Holding Company Act and the very limited range of things that it allows banks to do, rather than to come from, as it were, the

outside and inject a quite unrelated additional activity into the banking system.

Senator HEINZ. On June 25 you appeared before the House Government Operations Committee and were being questioned by Congressman Rosenthal. And you said the following:

Thank you, Mr. Chairman. I will then simply draw your attention to the top of page 2 of the statement, where I note that, because of the traditional separation of banking and commerce, little fundamental thinking has been done on the continuing validity of the concept in today's circumstances.

I believe that a country that has lost two-thirds of its productivity growth like ours for a period of 15 years probably needs to rethink whether it can continue to afford the undoubted blessings of its separation of banking and commerce. It has to do with productivity and growth.

I generally agree with the points made in the testimony to the effect that certain countries have given up the benefits of that separation in return for faster growth and more financing by banks of enterprises. This is true in continental countries as well as in Hong Kong. Those countries have enjoyed higher rates of growth.

Mr. Rosenthal then says: "Do you think this is the reason that they have enjoyed a higher rate of growth?"

You respond:

Yes. It is not the only reason, clearly, but when you have an agency that can do equity financing and a variety of other types of financing, it is likely to increase the rate of investment. That leads to higher rates of growth.

Now, it seems to me that that is an endorsement of the bill. Why isn't it?

Mr. WALLICH. I would say it's a statement of a belief that our banking system could be improved in light of the developments that have occurred. But to bring that down to the very technical aspects of this bill seems to me to be shooting with a cannon at—forgive me—a very small bird.

If we wanted to change the banking system of this country, we would have to debate that very thoroughly and very deeply. I don't think the way to approach that topic is by making a wide breach in the present structure on one side without considering all of the other implications that this would carry.

When you look at the so-called laundry list of permissible activities of the Bank Holding Company Act, which restricts banks to a minute range of activities with bank holding companies, and then observe this broad new power they would gain here, there is to me a degree of disproportion.

Now, Mr. Heimann said a minute ago—and I agree with him—this is for the Congress and not for the regulators to decide. But the intent of Congress is very continuously being borne upon the Board. We live under the Bank Holding Company Act, and with similar structural legislation. We cannot help—I cannot help—but be impressed that the legislation before us today deviates very greatly from what I understand to be the basic U.S. banking legislation.

Senator HEINZ. Well, your statement before the House Government Operations Committee in effect says that we have greater economic growth through more investment if we break down some of these barriers between banking and commerce. You have just said that it's got to be an all-or-nothing proposition, you would like to see a very clear, obvious break.

It's not at all apparent to me that to have an all-or-nothing proposition is necessarily the way to go about it. The export trad-

ing companies bill is not a cannon. You are correct. It's a relatively small rifle. In some respects, it's nearly a peashooter, because it's going to deal with something that we haven't paid much attention to over the last several decades, exports.

But nonetheless, it seems to me to be a very good starting place to find out if we can generate some of the same benefits that other countries appear to have benefited and do it at very minimal risks. Other countries seem to have survived.

I am informed that in the case of the Japanese banks, the trading company you referred to, the banks in question actually had a minority interest, a minority interest in this trading company, which tends to support Mr. Heimann's point. It is better for banks to know what is going on and to be able to do something about it than not.

The company apparently went off on its own. It got into trouble. The Japanese bank apparently stood by it because it was the primary lender to the parent Japanese trading company. And there are apparently, unlike our legislation, no lending limits on these Japanese banks.

I would point out and ask the final question—I have gotten a little past what I intended, Senator Proxmire; I apologize.

BILL LIMITATIONS

There are two overall limitations on banks in this bill. One is a limitation on direct investment—that is to say, equity participation—of 5 percent. There is a larger limitation on capital surplus in loans of 10 percent. So there are limits in the bill to the extent that banks might choose to get involved.

Now, two questions. (1) Why aren't those limits sufficient to keep banks from getting in trouble?

And No. 2, you have not proposed reducing those limits. What you have proposed is saying that no bank, for the most part, should have more than 19 percent equity interest in any of these trading companies.

Now, let's assume that you're a bank and you have two choices. One is, you can get in for the 5 percent and the 10 percent in one trading company. And let's say for the purposes of argument, you take 59 percent of one large trading company, which happens to be the 5-percent investment limit that we have. Or if your position were to prevail, the same bank would take positions of 19 percent in three trading companies, coming up in that instance against the 5-percent limit.

Why is it better for the bank to be in three trading companies at 19 percent than in one at 57 percent?

Mr. WALLICH. It is a matter of judgment, of course. But I would see here a certain degree of risk diversification. If one has three irons in the fire, as it were, the chances of losing everything are less than if one has all one's eggs in one basket. But I would say—

Senator HEINZ. Mr. Wallich, let me—please proceed.

Mr. WALLICH. Senator, I was going to say, simply the order of magnitude of these limits, 5 percent of capital, is a reasonable one and has many precedents. The concern is that when a bank is

involved in the management, that it deliberately, or because it is pushed, goes further.

Having made a commitment and being seen by the market as responsible, they would find themselves standing back of losses of the trading company, even though their commitment was very limited. That may occur if they are over 20 percent, because 20 percent is the equity accounting limit.

Senator HEINZ. My time has expired. Let me yield to Senator Proxmire, to whom I apologize for taking more time than I intended in my round of questioning.

Senator PROXMIRE. No, no; that's fine.

Comptroller Heimann, you say toward the conclusion of your statement, on page 12, and I quote—let me say first that I think this appears to be an endorsement, at least a suggestion that you would consider the amendment I have offered as an alternative.

You say this:

Edge Act corporations and bank holding companies traditionally have been the vehicles through which U.S. public policy has channeled controversial experiments.

The essential objective could be attained by a proposal which permits a 20 percent or more controlling interest by an Edge corporation or a bank holding company provided the bank safety and soundness elements of S. 144 are retained.

That would mean if done this way, the Federal Reserve would have exclusive jurisdiction. You go on to say:

We recommend consideration of this approach as an alternative which would be responsive to some of the concerns expressed about controlling bank ownership of export trading companies.

Would that indicate that you are indifferent as to whether we adopt the amendment I propose or whether you favor the amendment?

Mr. HEIMANN. Talking about that section, I would say we are indifferent. We probably would favor it in terms of having some kind of consistency, holding companies and Edge Act corporations.

Senator PROXMIRE. No, 20 percent; is that right? Twenty-percent limitation?

Mr. HEIMANN. No, sir; I would like to try to differentiate between the Edge Act and holding companies. We don't see the 20-percent limitation. We think that anything under 20 percent—

Senator PROXMIRE. That applies only to the Edge Act?

Mr. HEIMANN. And holding companies; yes. As we say in our statement, we have no objection to controlling interest being held, 20 percent—

Senator PROXMIRE. I still want to get as explicit a statement as I can from you. Do you favor the amendment, or do you—you have no objection to it?

Mr. HEIMANN. With respect to the bank holding companies and Edge Act, we would favor the amendment.

Senator HEINZ. There are two parts to the amendment. As I understand your position, you are—you favor part of it and you do not like the other part of it.

Mr. HEIMANN. That is what I was saying. With respect to the Edge Act and holding companies, I favor that part of the amendment.

PARTIAL OBJECTION OF AMENDMENT

Senator PROXMIRE. What part don't you like, and why?

Mr. HEIMANN. I think part of the problem is burden of proof, which Secretary Baldrige was talking about before. It's the question of who bears the responsibility for making the judgment as to whether or not it increases exports of the Nation. I find that a very difficult concept to grasp.

Senator PROXMIRE. Then you would agree that the Federal Reserve would have the sole determination here, is that—that would follow, because they do have jurisdiction over holding companies.

Mr. HEIMANN. Yes, sir.

Senator PROXMIRE. But you would simply delete from the amendment the burden-of-proof provision.

Mr. HEIMANN. I would have to go through the whole amendment. There are a number of other items in there that we have some problems with. I would be glad to submit that for the record, if you would be pleased to do it that way.

Senator PROXMIRE. Dr. Wallich, how would you feel about that kind of modification of the amendment?

Mr. WALLICH. I feel that the amendment as far as bank holding companies and Edges are concerned, is logical in terms of, if anything, having less risk come at the bank directly and aimed more at the bank holding company.

Senator PROXMIRE. On page 5 of your statement, Dr. Wallich, you make a strong statement indicating that if we go ahead with the bill in its present form, it would require much more detailed supervision, redtape, paperwork, overregulation, so forth, the very thing banks complain about, especially smaller banks, than anything else. I'm not clear on how you would correct this.

Would you feel that if this were confined to bank holding companies and Edge Act corporations, that it would take care of that overregulation?

Mr. WALLICH. The Board, if it were charged with this, would have to look at this delicate balance, the burden of proof in one case, that the company could show that the benefits they would derive for exports would exceed possible negative banking and other factors. Then alternatively, if the law read as it is now, or the bill is now, the burden of proof would be, in effect, on the regulator. He would have to find the opposite.

Senator PROXMIRE. So in either event, he would still have to have much more detailed regulation.

Mr. WALLICH. Yes.

Senator PROXMIRE. And supervision.

Mr. WALLICH. There is still a third possibility; namely, that the question would not be posed in terms of: Will this trading company produce benefits for trade, but, will bank ownership of the trading company produce benefits?

That is a further complication and raises a further difficulty. I visualize the Federal Reserve Board debating whether the export of copper, or automobiles, or textiles, or whatever is likely to be improved by certain institutional arrangements. It really would strain the capabilities of the participants.

Senator PROXMIRE. Now, Mr. Heimann, you seem to have somewhat less concern that this whole operation might have an effect in

increasing the risk in our banking system than Governor Wallich has.

Governor Wallich has stressed the scarcity of bank capital, the problems of risk that we have at the present time anyway. As you know, Mr. Greenspan has said that inflation would go from 10 to 20 percent, if the financial system needs to be bailed out. And the regulators have recommended to us trading bank legislation.

Mr. Wallich's statement is full of caution on the high risks of ETC's. Isn't it true that perhaps your euphoria in this situation is because when we have a failing national bank, it becomes the Fed's problem, the FDIC's problem; you don't have to bail them out?

Mr. HEIMANN. Well, Senator, I sit on the Board of the FDIC, so I really have no place to turn it over to. I am stuck on both sides of the problem.

Senator PROXMIRE. The bailout problem becomes one of the other agencies. National bank fails, you don't come into the act except to—you don't have to provide the bailout, do you? You can't.

Mr. HEIMANN. But as a member of the board of the FDIC, I share one-third of the responsibility for that.

Senator PROXMIRE. I see. So you have one-third as much concern as the FDIC.

Mr. HEIMANN. No; I would hope it would be the same. But let me try to comment on this question of risk.

I see nothing in the legislation which states that any bank who so applied can make an investment, controlling interest, specifically in an ETC. There must be supervisory approval.

If we take the kinds of cases we are talking about, a bank which is undercapitalized according to the standards of its supervisor has absolutely no right to make an investment in ETC in a meaningful amount. So that, I think, the bill has built within it and the supervisory system has built within it, protections against increases in risks for individual institutions, and it is not only a question of capital, Senator.

I am troubled about one thing I heard in all of the discussions, if all of the banks in the United States of America have the capacity, the knowledge, and experience to go into foreign trade financing and activities. I think the reality in our system is that there are a number of banks with excellent experience and all the others with no experience.

I cannot see the supervisor, whether it is the Federal Reserve or the Comptroller's Office regardless of how it comes out, sitting there and permitting an investment in an export trading company for a bank or banks that have never dealt internationally.

Senator PROXMIRE. It might help a little bit to limit it to Edge corporations that might have more experience with holding companies, but in addition to that, you would stress the importance of some kind of international expertise, some kind of record, some management competence in that particular area?

BALANCING COMPETING INTERESTS

Mr. HEIMANN. Senator, I am trying to be practical. We have to balance off two competing interests. One has to do with safety and soundness of the banking system. The other has to do with a perceived and real need for improving exports in this country.

Now, I am just speaking as one supervisor. Where our primary legislation speaks to safety and soundness, I would find it hard to see the Comptroller's Office permitting this activity of an institution that could not demonstrate it had the capacity to engage in these activities.

Or if they wanted to build that capacity, we as the supervisor would have them moving in that direction very slowly until we were convinced that they have brought the people and built up the capacity to deal with this area.

I think it is something of a fiction to imagine that all of a sudden 14,600 banks are going to get into export trading companies. I think it just doesn't make sense. So, our view is that by restricting it at the beginning to those that have shown some experience, or those that begin to develop experience, it will also help solve some of the risk equation problems that Governor Wallich has mentioned.

Senator PROXMIRE. If you are going to take care of the risk situation, whatever benefits this may have for a small- or medium-size business, you wouldn't expect many small- and medium-size banks to be able to get into this on a competent basis.

A few do have fine competence, but by and large, the experience in international finance is much stronger in the bigger banks, isn't that true?

Mr. HEIMANN. My own view is that that is true. When we say bigger banks, we are including the regional banks, not just the multinational banks. We have in this country approximately 180 commercial banks that are actively involved in foreign investment activities.

Senator PROXMIRE. 180?

Mr. HEIMANN. Yes, sir, approximately.

Senator PROXMIRE. Out of?

Senator HEINZ. Out of 14,600. My numbers may be slightly off. Say 14,500-some banks.

Senator PROXMIRE. How many of those 180 have holding companies?

Mr. HEIMANN. 158?

Senator PROXMIRE. Ninety percent?

Mr. HEIMANN. I may add that the 180 companies I am talking about are all those over \$1 billion. And they represent 64 percent of the total commercial banking assets of the Nation.

Senator PROXMIRE. Now, you argue that banks have the expertise to assist export firms. You cite the international bank network at home and abroad which could assist in marketing sales and other services. Let's explore that a little bit, it troubles me.

Take, for example, textiles, or oil, or tractors. The example could apply to any industry. The bank trading company would purchase tractors, inventory them, attempt to sell them throughout the world, or contract to build a textile mill, or drill for oil. What experience do the bank holding companies, Edge Act corporations have in maintaining follow-on services that are so necessary?

Mr. HEIMANN. Well, it depends, of course, in which field we are talking about, Senator. It wouldn't be the same for all of the export trading activities.

Senator PROXMIRE. Do they have any real experience—they have experience financing these things, but financing and managing are quite different.

Mr. HEIMANN. Oh, I would agree with you. Absolutely. We would expect to see that happen, the creation of an export trading company by bank participation would have built within it the capacity to manage, which may have likely come from outside of the commercial banking institution.

I think there is a difference. As you have rightly pointed out, the capacity to finance is not 100 percent capacity for running a business operation. It is a piece of it. Of course, the financial side is important because presumably, a well-run bank is more than just lending money. It is also following very closely the operation of a company.

But I would have to agree. I have no disagreement whatsoever that the export trading company will have to bring with it talents that may not be within an individual banking institution but will have to be added.

One of the reasons why we don't have export trading companies at the present time for small business may be that very fact.

Senator PROXMIRE. I want to thank you very much. I think this has been a very helpful colloquy; as I understand it, correct me if I am wrong, you do support a part of the amendment. Not required by the—the balance of proof to be on the side of the holding company, the Edge Act corporation, but you do favor providing, No. 1, that this be handled by Edge Act corporations, and holding companies, and that, therefore, it be under the jurisdiction of a single regulator, with the Federal Reserve?

Mr. HEIMANN. Yes, sir.

Senator HEINZ. Mr. Heimann, could you clarify some statistics you gave a minute ago? You said there were 180 banks that had international operations, 158 of which were associated with holding companies, is that right? All of which are over \$1 billion?

Mr. HEIMANN. Actually, I can stretch the numbers out. I was looking for the bulk. If you take banks of this country over \$500 million of which there are 329, 256 have holding companies.

Senator HEINZ. Of the—

Mr. HEIMANN. The increment there between the 64 percent, if you take those banks over \$500 million and, then it is 65 percent of the total commercial banking assets.

INTERNATIONAL BANKING

Senator HEINZ. My question is really aimed at trying to discover how many banks in total there are with some kind of involvement in international banking.

Mr. HEIMANN. I think that probably becomes a somewhat difficult question to answer very precisely in terms of what do we mean by international banking?

Financing, for example, a letter of credit for a local businessman or a company dealing overseas, it could be a large, much broader number.

The basic 180 comes from the reporting of foreign activities and investments, surveyed semiannually by the Federal Reserve, OCC and FDIC.

Senator HEINZ. These would be banks that have actually bought banks, merged with banks abroad?

Mr. HEIMANN. Banks that have actively lent money abroad.

Senator PROXMIRE. Would the chairman yield so that—

Senator HEINZ. Yes.

Senator PROXMIRE. How about the number of banks that have Edge Act corporations?

Mr. HEIMANN. I don't have that number.

Senator PROXMIRE. Could you give me just a ballpark notion?

Mr. HEIMANN. We can supply that for the record. It is somewhat greater because you can have more than one Edge Act corporation.

Some have more than one, it would be really a question of the number of institutions, not the number of Edges.

Senator HEINZ. Let me ask our staff to work with you to develop a variety of statistics so we have all of those on the record.

Mr. HEIMANN. I would be delighted.

The following data was subsequently received for the record:

U.S. BANKS AFFILIATED WITH EDGE ACT CORPORATIONS OR HOLDING COMPANIES

	Edge	HJ
1,606 banks over \$100,000,000	171	876
327 banks over \$500,000,000	77	213
176 banks over \$1,000,000	71	164

[The following letter and statement received for the record:]



Comptroller of the Currency
Administrator of National Banks

Washington, D. C. 20219

March 11, 1981

The Honorable John Heinz
Chairman
Subcommittee on International Finance
and Monetary Policy
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of February 18 requesting additional comment from this Office on S. 144, the Export Trading Company Act of 1981.

Throughout the OCC's review and study of the various ETC legislative proposals during the past year, we have remained enthusiastic about establishing U.S. export trading companies which would strengthen the competitiveness of U.S. firms in domestic and international markets. During this process, the OCC repeatedly has confirmed its belief that a leading role for banks through equity participation is necessary for successfully developing a U.S. export trading company effort.

The OCC formally supported S. 144 in testimony before your Committee on February 17. Our testimony also specifically suggested that your Committee consider, as an alternative, permitting all U.S. banking organizations to acquire non-controlling equity participation in ETCs and permitting Edge Act Corporations and bank holding companies to acquire controlling interests in ETCs.

The OCC makes these suggestions primarily as an alternative approach to addressing the concerns expressed about U.S. banks controlling export trading companies and thus as an alternative to the delays these concerns have raised for the United States in implementing its trading company initiative. Edge Act Corporations and bank holding companies traditionally have been the vehicles through which U.S. public policy has directed bank ownership in non-financial enterprises. These vehicles could be selected again as the means to proceed with the challenge of establishing a U.S. model of export trading companies.

At this early stage of promoting U.S. trading companies, the OCC does not perceive its suggested alternative would significantly effect the range of possible U.S. bank equity participation in export trading companies which may form if S. 144 is passed. Those formations will reflect parent bank size and sophistication as well as regional and competitive needs. It is likely that the major U.S. multinational banks will establish controlling interests in ETCs which will be national and international in scope. Regional and local banks likely will establish controlling or joint venture interests in ETCs to service local firms. However, most U.S. banks will not establish controlling interests in export trading companies. The OCC expects only those banks which have capacity and experience with international trade and finance to seek a controlling interest in an ETC.

For the above reasons, the OCC does not object to that part of Senator Proxmire's proposed amendment which permits Edge Act Corporations and bank holding companies to hold controlling interests in export trading companies. In response to your question about the new criteria which the proposed amendment to S. 144 would impose on bank applications to acquire controlling interest in ETCs, we cannot endorse certain criteria.

First, the proposed amendment would require the Board of Governors not to approve an application if the investment does not contribute significantly to the export of goods and services. Special emphasis is given to exports of small, medium size and minority firms. The proposed amendment also would require the Federal banking agencies not to approve any application unless the agencies determine there are significant export benefits to be derived from the application.

The OCC prefers the present language in Section 105(d)(1) of S. 144. It seems more appropriate at this initial stage of developing the U.S. model for export trading companies. The language "contribute significantly" or "significant export benefits" in the proposed amendment may be a difficult standard to establish and administer, because there is no operating history of U.S. bank-controlled export trading companies. Various testimony on S. 144 and during 1980 on similar legislation suggests significant export benefits being derived through the aggregate formations and activities of general and specific purpose ETCs over time. An individual application in the short-term is not likely to effect such results.

Furthermore, the important element to an effective ETC effort through a bank controlling ownership is not the bank investment per se, but rather the capacity and experience of the banking organization which would administer the controlling investment. As we stated in our testimony, the OCC would emphasize these capacity and experience factors in reviewing any ETC application.

Second, the proposed amendment provides that the Board of Governors only may approve a banking organization's application for a controlling interest in an ETC if the ETC agrees to operate its business consistent with maintaining a separation of banking and commerce. This additional criteria does not pose any administrative burden on the Federal banking agencies. However, the proposal effectively seems to narrowly confine bank-controlled ETCs. This result would be inconsistent with the bulk of testimony on export trading companies during the past year. The testimony has emphasized that controlling equity participations by U.S. banks in ETCs is essential to a successful U.S. export trading company program and that a limited breach of banking and commerce is necessary to achieve the purposes of the legislation. The OCC supports S. 144 which permits a modest breach of the separation of banking and commerce and provides adequate bank supervisory safeguards.

I believe the above clarifies the position of the OCC on Senator Proxmire's proposed amendment to S. 144. We would be pleased to provide any additional assistance you may need.

Sincerely,



John G. Heimann
Comptroller of the Currency

TESTIMONY OF
WILLIAM E. BROCK
UNITED STATES TRADE REPRESENTATIVE
TO THE
INTERNATIONAL FINANCE SUBCOMMITTEE
SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
February 18, 1981

The United States has experienced significant trade deficits in each of the past 5 years, amounting to a cumulative total of \$103 billion. This experience contrasts sharply with the substantial trade surpluses experienced in most other years since World War II by the United States. Even on a current account basis, while we were in approximate balance in 1980, we experienced deficits in 1979, 1978, and 1977.

While our weak trade performance is largely due to the energy situation and other domestic economic factors, a substantial contributing element is the fact that the U.S. Government has imposed a broad array of disincentives in the path of our exporters. The effect of these disincentives cannot be quantified; however, it is clearly substantial. These disincentives, by inhibiting our exports, have significant adverse economic effects. In the short run, they lead to depreciation of the dollar, which contributes to domestic inflation. Politically, large deficits contribute to the perception of American weakness throughout the world.

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Further, U.S. disincentives particularly impact sales of the high technology and small business sectors, areas where we ought to be doing everything possible to increase our competitiveness, not weaken it.

Other nations strongly support their export sectors. Not only do they do more proportionately to promote exports than does the United States, but they do not impose extensive disincentives to exports. The net result of this situation is that world production patterns are distorted, to our Nation's detriment, from what would be the result of market forces.

Over the last several years, there has been growing concern in the business community and the Congress about Government policies that restrain U.S. exporters and provide promotional support for exports at lesser levels than major foreign governments.

The export community has been frustrated by developments that are perceived as discouraging to U.S. exporters, including passage of the Foreign Corrupt Practices Act, tightening of tax provisions on Americans living abroad, greater use of export controls as a tool of foreign policy, antiboycott legislation enforced by several agencies, and issuance of

regulations to control exports of hazardous substances. There have been some positive steps, such as the multilateral trade negotiation (MTN) agreements concluded in 1979 and the Export Administration Act of 1979, but these have not been adequate to deal with our trade problem. During the last 6 months, major reports (by President Carter to the Congress in September 1980 and by the President's Export Council to President Carter in December 1980) have focused attention on the problems of exporters.

The export community generally has high expectations that the new Administration and the new Congress will remove or alleviate existing export disincentives and hopes that there will be no erosion of existing promotional support.

Early passage of S. 144, a bill to facilitate the formation and operation of export trading companies, would send a strong signal to the export community that the Government understands and supports the need to develop a strong national export posture. The Administration has designated the Secretary of Commerce as its lead spokesman on this piece of legislation, and fully supports S. 144 except as noted by the Secretary. The Office of the U.S. Trade Representative views passage of this legislation as a first step toward developing a positive national export policy.

The focus of S. 144 is to provide a means for small and medium sized businesses, which lack the resources to organize their own export departments and foreign distribution networks, to enter the export market. The Department of Commerce has estimated that as many as 25,000 firms, mostly small and medium sized businesses, are competitive enough to engage in exporting. However, they lack the financial resources and marketing expertise to do so, and in many cases, they simply lack the incentive to export because our domestic market is large and familiar to them. In addition, Government imposed disincentives to exporting are more difficult for modest sized firms to surmount. Unless we make exporting more attractive and feasible, small and medium sized businesses are unlikely to expand into overseas markets.

There are two key provisions of this legislation that are aimed at placing U.S. exporters on a more equal footing with their foreign competitors by reducing two disincentives to exporting. First, a trading company may apply to the Secretary of Commerce for a certification of immunity from U.S. antitrust laws for specified export trade activities. Such certification would only be given if the activities proposed would not substantially lessen competition within the United States.

Most other countries do not have antitrust restrictions and, in fact, often assist their companies in forming export cartels. This provision will particularly assist small business exporters who are unable to cope with the legal expenses involved in investigating the antitrust aspects of doing business abroad. It will also be of great assistance to service businesses, such as accounting, banking, insurance, construction, and engineering firms, which are presently unable to qualify for antitrust immunity for export activities under the Webb-Pomerene Act.

Second, the bill permits commercial banks to hold equity participation in trading companies. In other countries, banks are allowed to participate in commercial ventures, such as exporting. This provision of the bill will place U.S. banks in a more comparable situation for export ventures. The bill contains adequate safeguards to ensure that the integrity of our banking institutions is not endangered by their involvement with export trading companies.

The trading company concept is one that has been used with great success by many of our principal trading partners. There is, however, no single model for a uniquely American export trading company.

If this bill becomes law, we envision that several different forms of trading companies would evolve in the United States. One type of trading company could perform all export marketing services for U.S. producers, a "one stop" facility for any firm interested in exporting. In this capacity, it might provide a full range of export services, including market analysis, documentation, transportation, legal and banking services, and after-sale services. Because it could combine the functions of banks, freight forwarders, export management firms, and so forth, it would achieve greater economies of scale in providing these services than are presently provided by these separate entities.

Another type of trading company might buy and sell on its own account. It would seek out the products of U.S. producers for which it had discovered overseas markets. With sufficient bank financing assured, it could achieve economies of scale, while minimizing the capital outlay of participating small and medium sized firms engaging in exporting for the first time. Such entities might particularly boost exports of industries where there are many small producers, such as textiles, footwear, sporting equipment, toys and games, and so forth.

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A third type of trading company might specialize in obtaining foreign government procurement contracts. In this capacity, it could specialize in putting together the right mix of U.S. goods and services necessary to fill rather large valued foreign government contracts, many of which are only now being opened up to international competition as a result of the MTN procurement code. This would allow trading companies to "piggyback" the products of small and medium sized U.S. firms to the level necessary to obtain the contract, while minimizing the capital outlay for firms.

As I mentioned earlier, passage of this legislation, with its key provisions substantially intact, would constitute a positive first step toward developing a pragmatic national export policy. However, I must emphasize that it is only one desirable step. A great deal more remains to be done.

A comprehensive and positive U.S. export policy is an essential and vital part of this Administration's program to revive our economy and strengthen American influence abroad. Government must cease in assigning exports a low priority relative to other domestic and foreign policy objectives. Export policy must be elevated to a higher national priority, consistent with its important place in our national recovery program and constraints on the Federal budget. In this

regard, the Cabinet-level Trade Policy Committee (TPC), which I chair, held its first meeting last Thursday and agreed on an ambitious agenda for the next several months for developing Administration positions for removing important disincentives to U.S. exports.

Liberalization of many of these disincentives will require Congressional approval. I anticipate that I will be consulting with various members of the Senate and the House of Representatives in the coming months in regard to these issues, and would hope that we can work closely together to develop a bipartisan Administration/Congressional approach to resolving our problems.

Lastly, I wish to express my appreciation to the members of the Senate Export Caucus for their support of the export trading company legislation, and particularly to Senators Heinz and Danforth who have spent a considerable amount of their time during two sessions of Congress on this subject.

Senator HEINZ. Secretary Baldrige, when he was here, felt that it would be a mistake to restrict participation in ETC's to bank holding companies.

And I believe his point was that it would make it difficult or impossible for the small regional banks to get involved.

Is that accurate or not?

Mr. HEIMANN. I don't have all the statistics.

Mr. WALLICH. There is a fringe of banks that become very large toward the lower end that have no bank holding companies.

Then there are the bank holding companies that are very small. That is, again, a different category.

I think we are talking, in any event, about a small minority of the 14,600.

Senator HEINZ. Let me get to, I think, the bottom line question on the bill, which does have a variety of limitations on participation, as measured by the commitment of the bank's capital, capital and surplus.

In fact, the way we got those limitations into the bill is, we listened to your advice earlier. We have placed those limitations there with a view to limiting the bank's exposure in any given instance, in any given set of investments in ETC's, to the point where, to take the worst case of one or three or all the ETC's that a bank might invest in failing, the bank wouldn't fail, but would simply suffer a loss in earnings.

Is it, or is it not, the case that given those limitations and the worst-case scenario, the failure of an investment—an export trading company, that the banks would, in effect, be protected from themselves because of the relatively stringent limit?

Mr. WALLICH. One could say that with a good degree of probability if the investment were less than 20 percent, on the grounds that this is a relatively passive nonmanagerial investment.

Now, if it goes beyond that, the concerns that I have tried to express become operative.

Isn't the bank really responsible for the entire commitment of the trading company, even though the bank's interest in it only is 50 percent or whatever?

And historically——

Senator HEINZ. But limited to 5 percent in terms of investment, direct investment of its capital and surplus, and including loans, 10 percent.

Mr. WALLICH. Suppose this holding company has leveraged itself strongly and has very large losses?

Somebody either suffers those losses, or the bank puts up the difference. That difference could go much beyond what the bank already has in the ETC.

Senator HEINZ. So you would maintain that a situation that would threaten the security of a bank would only take place where a bank was standing behind obligations that it wasn't legally required to stand behind?

Mr. WALLICH. Not legally, but some might say morally, in the custom of the banking business, but probably necessary if they wanted to stay in the international banking business.

Senator HEINZ. Did you have a point, Mr. Heimann?

Mr. HEIMANN. Yes. I think Governor Wallich has a good point in that the question of identification, where does a bank stand or not stand, I point out that in the case of the real estate investment trusts, there were many that bore the bank's name, wherein the bank did not stand behind all of the obligations of that trust, because they were a minority interest:

They owned a certain percentage of the shares of the management company, but even though more than X, Y, Z bank, the bank didn't make all the investors whole.

So I think, continually, we come down to the same question. We can set up certain ground rules, but there will be no substitute for the prudent management of individual institutions.

Senator HEINZ. One last question for Mr. Wallich.

There was an exception to permit bank control that you proposed, which would be in the case of an ETC that would have a limited life and he engaged in more or less a single kind of project.

That seems to me to be inconsistent with your argument that you made earlier that it's better for a bank to be diversified in three small participations in ETC's, rather than having majority participation in one.

You said, as I recollect your testimony, that there is a diversification of risk and that's good. Here, in this instance you are proposing, it would seem to me a concentration of risk.

Mr. WALLICH. It is an effort to accommodate the bill and try to make possible something that has a desirable purpose which troubles us because of the implications for banks.

If these special situations are not numerous, then the overall risk for the banking system is correspondingly reduced.

Senator HEINZ. Well, I want to thank both you, Governor Wallich, and you, Comptroller Heimann, for your very helpful testimony.

We are glad to have you down here again. I would only note, before we adjourn the hearing, that the FDIC has submitted a statement for the record and it shall be inserted at this point.

[The complete statement of the FDIC, and a reprint of S. 144 as introduced follow:]

STATEMENT OF
IRVINE H. SPRAGUE, CHAIRMAN
FEDERAL DEPOSIT INSURANCE CORPORATION

I appreciate the opportunity to present this statement to your Subcommittee on S. 144, the Export Trading Company Act of 1981.

Senator Heinz, in your letter of invitation as Chairman of the Subcommittee on International Finance and Monetary Affairs, you asked the FDIC to comment on four questions:

- the necessity for bank participation in trading companies;
- the circumstances under which banks should be permitted control of the trading companies, and what safeguards, if any, are necessary over that control;
- whether an antitrust immunity is necessary to encourage the formation of export trading companies;
- how the various sections of S. 144 resolve the above issues and whether, if the legislation were enacted, the financial provisions of the bill are adequate to successfully implement it.

The stated purpose of S. 144 is "to increase United States exports of products and services ... by encouraging more efficient provision of export trade services to American producers and suppliers." The bill describes export trading companies as companies principally engaged in exporting and facilitating the exportation of goods and services produced in the United States.

S. 144 was introduced with 44 co-sponsors from both sides of the aisle. A companion bill, H. R. 1648, was introduced in the House by Congressman LaFalce. Other versions

of the legislation, including variations that would omit bank participation entirely or that would limit controlling investments to bank holding companies, have also been introduced and are coming under discussion.

Within this context of momentum, I am grateful for this opportunity to express our views as insurer of the people's deposits in our banking system.

Last July, I testified for the FDIC before the Banking, Housing and Urban Affairs Committee on predecessor legislation, S. 2718. The main thrust of our testimony at that time was that the historical separation between banking and commerce has served our country well and should not be altered lightly. Our views today are much the same.

We remain sympathetic with the main purposes of the bill. We recognize the importance of S. 144's objective of strengthening the export of United States products and services by encouraging the improvement of export trade services to American producers and suppliers. We do not oppose export trading companies -- we support them. From our perspective, however, we have questions about the degree and type of bank involvement.

We have a general concern about banking organizations taking any equity position in export trading companies. We recognize, of course, that there are times when compelling

national interest requires a change in traditional practices and that we should not be forever bound to the past. This may be such a case. You must take a broader view of this legislation and its context than we do.

It is important in your deliberations for you to recognize that, notwithstanding the priorities which direct us toward altering the environment of banking, such changes are not made without consequence. You are hearing other points of view expressing the benefits expected to be realized by the legislation. It is our responsibility as insurer of the public's bank deposits to express to you our perception of the potential for increased risk to the United States banking system. We want to highlight the fact that this would represent an historically significant incursion of banking into the province of commerce.

We recognize the fact that S. 144 retains certain safeguards incorporated into the legislation last year in an effort to meet the supervisory concerns expressed by the Federal Reserve, the Comptroller of the Currency and the FDIC. These measures would limit the risk to our banking system, but they would not eliminate it, nor would they overcome the basic conflict inherent in the mingling of banking and commerce.

A passage in Chairman Volcker's letter of August 20, 1980, to your full committee concerning last year's bill is still relevant:

My concern about the provisions of S. 2718 that are designed to give supervisors powers to step in and prevent unsafe practices is that it would involve the supervisors to a substantial degree in decisions regarding operations of export trading companies. Bank supervisors are not able to anticipate all future eventualities in acting on applications and are unlikely to be able to supervise the operations of export trading companies sufficiently closely to ensure that risks to banks could be avoided, when those risks are magnified by bank control and involvement in management.

At this point, a review of the provisions of S. 144 may be useful. Then, I will turn to the four questions put by your letter, Senator Heinz.

PROVISIONS OF S. 144

Section 105 of S. 144 would allow any bank, Edge Act or Agreement Corporation, or bank holding company -- collectively referred to as "banking organizations" -- to invest up to five percent of its consolidated capital and surplus (but not exceeding \$10 million) in one or more export trading companies without prior regulatory approval if the investment does not amount to control. In the case of an Edge Act or Agreement Corporation not engaged in banking, the percentage limit would be 25 percent of its consolidated capital and surplus. Proposed investments exceeding the dollar limit or amounting to control would require prior approval of the appropriate Federal regulatory agency. The agency would be required to act on an application within 120 days.

In reviewing bank proposals for investment exceeding \$10 million or amounting to control, the Federal regulatory agency must consider the financial and managerial resources, the competitive situation, and the future prospects of the banking organization and the export trading company concerned. Additionally, however, the agency must take into account the benefits of the proposal to U.S. business, industrial and agricultural concerns, and the improvement the proposal would bring to the U.S. competitive position in world markets.

Applications for approval of investments exceeding \$10 million or amounting to control could not be approved if the agency finds the probable benefits outweighed by any adverse financial, managerial, competitive or other banking factors. The language indicates that banking risk is to be weighed, not on its own characteristics, but in relation to the benefit to be realized by the economy. The agency could impose conditions it feels would limit a banking organization's financial exposure to an export trading company, or which would prevent conflicts of interest or unsafe or unsound banking practices.

The bill also would prohibit the total of a banking organization's historical cost of the direct and indirect equity investment in and loans to any one export trading company from exceeding 10 percent of the organization's capital and surplus.

Agencies would be authorized to set standards for the taking of title to goods by any export trading company subsidiary of a banking organization to ensure against any unsafe or unsound practices that could adversely affect a controlling banking organization investor. In particular, the appropriate Federal banking agencies may establish inventory-to-capital ratios, based on the capital of the export trading company subsidiary for those circumstances in which the subsidiary may bear a market risk on inventory held.

S. 144 would impose the following additional restrictions:

1. The trading company's name may not be similar in any way to that of the investing banking organization.
 2. A banking organization may not make loans to any export trading company in which it holds an equity interest, or to any customers of the company, on terms more favorable than those afforded similar borrowers in similar circumstances, or involving more than normal risks of repayment or displaying other unfavorable features.
 3. Banking organizations could not own any stock interest in an export trading company which takes positions in commodities or commodities contracts, securities or foreign exchange other than as may be necessary in the course of its business operations.
- S. 144 would empower the regulatory agency to order termination of a banking organization's investment in an export trading company "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. . . ."

In any such case, the banking organization has a right to notice and hearing and ultimate appeal to the courts.

Section 105(a)(13) of S. 144 contains a revised definition of an "export trading company" which, among other things, makes clear that it may be a profit or nonprofit organization and that it is prohibited from engaging in underwriting, selling or distributing securities except to the extent of its banking organization investor and that it is prohibited from engaging in manufacturing or agricultural production activities. Section 105(a)(5) incorporates a new definition of "banker's bank," for purposes of such a bank's participation in export trading companies to make clear that it is an institution insured by the Federal Deposit Insurance Corporation.

CHANGES FROM S. 2718

We recognize and applaud the fact that S. 144 contains many of the changes that we had recommended in our discussion of S. 2718 last year.

Specifically, S. 144 contains a recognition of State authority as we had proposed. Section 105(g) of S. 144 would affirm a State's right to prohibit State-chartered banks from investing in export trading companies or to apply conditions,

limitations or restrictions on such investments in addition to any provided under Federal law.

S. 144 incorporates into Section 105(c)(3) a provision we requested prohibiting export trading companies from speculating in securities or foreign exchange. The same provision also would preclude speculation in commodities and commodity contracts.

S. 144 accommodates our previous concern about language in Section 105(d)(2) which would have given the agencies a 270-day deadline in which to establish standards for taking title to goods and holding inventory. The purpose of standards would be to prevent unsafe and unsound practices. We had said that the issue was too new and complex to lend itself to the formulation of regulations within 270 days. The new bill eliminates the deadline.

S. 144 also accommodates another concern we had raised last year. Section 105(b)(2) and (3) would require the appropriate banking agency to act within 90 days on written notice by banking organizations of their intentions to make additional investments or to undertake certain activities by export trading companies, and to act within 120 days of notice by a banking organization of its intent to make a \$10 million investment or any controlling investment in an export trading company. If the agency fails to act within the time limits, the application would be deemed approved. In the predecessor legislation, S. 2718, the time limits were 60 and 90 days, respectively.

We had recommended that -- in both instances -- the statutory limit be extended to 120 days.

Finally, we believe you have taken the proper course in adopting the stricter definition of "capital and surplus" in Section 105(a)(10), limiting that term to "paid in and unimpaired capital and surplus," including undivided profits. Last year we had expressed our concern that the broader definition in S. 2718 could be interpreted to include subordinated notes and debentures.

RISKS ASSOCIATED WITH CONTROL

Advocates of bank investment in export trading companies point to the expertise in foreign trade the banks could bring to such companies. We are not convinced that banks -- other than a few money center and regional banks -- have any particular expertise in foreign markets.

A bank controlling a foundering trading company may incur legal liability if, for example, the bank provides management or engages in significant intercompany transactions.

Perhaps of greater importance than the legal considerations, a bank might be under considerable pressure to come to the aid of a troubled export trading company it has sponsored. History offers many examples of banks and other companies that have come to the aid of troubled subsidiaries in order to protect the parent company's reputation in the business community.

Experiences in connection with bank-sponsored Real Estate Investment Trusts (REITs) are illustrative of the legal

and practical business obligations banks feel toward undertakings they sponsor. Some banks provided assistance due to legal considerations stemming from interlocking officers and directors and the provision of advisory services. Others came to the aid of the sponsored REITs because they believed failure to do so would severely damage their bank's reputation in its community and in business and financial circles generally.

Whatever the motivation for the assistance, the exposure may be substantially greater than the bank's equity investment due to leveraging and the potential for off-balance sheet losses.

In addition, S. 144 as written, would fail to guard against sale of worthless assets to the bank by the export trading company. Section 105(c)(2) would place a 10-percent of capital and surplus limit on a bank's direct and indirect investments combined with extensions of credit in export trading companies. However, there is no limit on outright sales of assets by an export trading company to a bank. Nor is there a requirement for such transactions to be consummated on an arms-length basis. Transactions with affiliated organizations may well have a legitimate business purpose, as when a bank buys foreign exchange from its export trading company. However, these practices can also result in the transfer of worthless or subinvestment quality assets from the export trading company to the bank or the bolstering of the trading company's reported earnings by the payment of premium prices for the assets. We can point to the example of the Hamilton Bancshares

holding company in 1974 as concrete proof that dealings with related entities can lead to the failure of a financial institution. In our judgment, the bill should be amended to provide a safeguard against such abusive practices.

SPECIFIC QUESTIONS

I would like to respond now to the specific questions in the letter of invitation. The first question was "the necessity for bank participation in trading companies."

We would point out that banks already have an alternative means of participating in the export trading services field. Measures have been taken recently by the Federal Reserve to strengthen U.S. exports by increasing the capabilities of Edge corporations to provide international banking services. Governor Wallich outlined these actions in his April 3, 1980, statement. He said that one change permitted Edge corporations to finance the production of goods for export and another change permitted Edge corporations to establish domestic branches, thereby increasing the possibilities for international banking services to expand into new areas. Governor Wallich noted that U.S. banks can now provide, either directly or through their Edge corporations and affiliates, a wide variety of services relating to exports. He said that in addition to a full range of financing services, these include foreign exchange facilities, information on foreign markets and economies, introductions, business references, and advice on arranging shipments.

We are in the position today of testifying on banks' proposed participation in export trading companies before the potential of existing Edge corporation capabilities has been fully demonstrated.

The second question concerned "the circumstances under which banks should be permitted control of the trading companies, and what safeguards, if any, are necessary over that control."

Our strong preference is that banks should not be permitted at the outset to acquire a controlling interest in export trading companies.

We recommend that Section 105 be amended to include a provision that at this time no banking organization, alone or in concert with its affiliates, be permitted to acquire more than 20 percent of the voting stock of an export trading company or to control the company in any other way, and that not more than 50 percent of an export trading company's voting stock be owned by any group of banking organizations.

The rationale for these recommendations is to give the banking industry and the bank regulators an opportunity to gain experience and develop a measurable track record before a final determination is made as to whether banking organizations should be permitted to control export trading companies.

If, however, legislation permitting bank participation and control of export trading companies is reported, we would recommend that the bill include certain amendments to ensure oversight by the appropriate Federal regulatory agency.

Specifically, we recommend that the bill also be amended to require that any investment by a banking organization in an export trading company, regardless of amount, be subject to prior approval by the appropriate Federal banking agency. This would assure that the appropriate Federal supervisory agency would not be precluded from ruling on a matter affecting the safety and soundness of the bank simply because the institution may be a part of a larger banking organization.

Secondly, to deal with the purchase of assets problems we have described, we recommend that the following be added at the end of § 105(c)(2) on page 14, line 2, of S. 144:

For the purposes of this paragraph (c)(2), "extensions of credit" shall be deemed to include (A) the acquisition of any asset from, or the assumption of any liability of, an export trading company which is a subsidiary of the banking organization, other than at fair market value in the normal course of course of business, (B) any such acquisition or assumption while the trading company is in default on any of its obligations or liabilities in an aggregate amount exceeding such trading company's own capital and surplus, (C) any such acquisition or assumption subsequent to issuance of notice by the appropriate Federal banking agency that no such acquisition or

assumption be effected; but such term shall not include the purchase at prevailing market rates of foreign exchange and investment securities of the types eligible for purchase by national banks.

Thirdly, we recommend a technical amendment in order to clarify regulatory jurisdiction. Section 105(a)(12) adopts the definitions of "control" and "subsidiary" found in Section 2 of the Bank Holding Company Act of 1956. In addition to a 25 percent stock ownership test and an election of a majority of directors or trustees test, Section 2(a)(2) of the Bank Holding Company Act of 1956 provides for a finding of control by the Board of Governors if, after notice and opportunity for hearing, the Board determines that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company. This determination, for purposes of the Export Trading Company Act, should be made by the appropriate Federal banking agency, so that the determination of control and approval of an investment by a bank which would constitute control would be made by the same regulatory agency.

We recommend, therefore, that Section 105(a)(12) of S. 144 be amended by insertion of the following after "1956;" at line 16:

provided, however, that for purposes of the Export Trading Company Act of 1981 the determination of control as provided in Section 2(a)(2) of the Bank Holding Company Act of 1956 shall be made by the appropriate federal banking agency;

The third question in the letter is "whether antitrust immunity is necessary to encourage the formation of export trading companies."

We understand that the Department of Justice has engaged with the committee in lengthy consultation on this question, and, in this instance, we would defer to that department.

The fourth question is "how the various sections of S. 144 resolve the above issues and whether, if the legislation were enacted, the financial provisions of the bill are adequate to successfully implement it."

Our major concern is the issue of control, and we have already given you our recommendations in this area. With regard to the financial provisions, we would not favor any increase in the limits on aggregate investment and investment and loans by banks in export trading companies. We are concerned that beyond these statutory limits, there always exists the possibility that investing banks could be sued for additional unlimited amounts as the result of the failure of an export trading company or an act of the export trading company. This would be unusual, but it could occur if the stakes are high

enough, and this would be the circumstance that would arouse our concern about the safety and soundness of the bank. We see no way to circumscribe this liability.

CONCLUSION

We appreciate the opportunity to comment on this bill. Should you be inclined to accept any of our suggestions we would be glad to provide drafting assistance by our staff.

NOTE: In accordance with 12 U.S.C. §250. The views expressed herein are those of this agency and do not necessarily reflect the views of the President.

97TH CONGRESS
1ST SESSION

S. 144

To encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally.

IN THE SENATE OF THE UNITED STATES

JANUARY 19 (legislative day, JANUARY 5), 1981

Mr. HEINZ (for himself, Mr. DANFORTH, Mr. BENTSEN, Mr. TSONGAS, Mr. LEVIN, Mr. PRESSLER, Mr. RANDOLPH, Mr. CHAFEE, Mr. GLENN, Mr. EAST, Mr. BUMPERS, Mr. BOREN, Mr. HEFLIN, Mr. LUGAB, Mr. GOLDWATER, Mr. ABDNOR, Mr. BRADLEY, Mr. HATFIELD, Mr. BAUCUS, Mr. STAFFORD, Mr. GORTON, Mr. RUDMAN, Mr. JOHNSTON, Mr. SCHMITT, Mr. MELCHER, Mr. JEPSEN, Mr. SIMPSON, Mr. MATHIAS, Mr. DURENBERGER, Mr. DIXON, Mr. WALLOP, Mr. ARMSTRONG, Mr. SYMMS, Mr. DOLE, Mr. MATSUNAGA, Mr. MOYNIHAN, Mr. LONG, Mr. ROTH, Mr. WEICKEE, Mr. EAGLETON, Mr. KASTEN, Mr. HUDDLESTON, Mr. SPECTER, and Mr. COHEN) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 TITLE I—EXPORT TRADING COMPANIES

2 SHORT TITLE

3 SEC. 101. This title may be cited as the “Export Trad-
4 ing Company Act of 1981”.

5 FINDINGS

6 SEC. 102. (a) The Congress finds and declares that—

7 (1) tens of thousands of American companies pro-
8 duce exportable goods or services but do not engage in
9 exporting;

10 (2) although the United States is the world’s lead-
11 ing agricultural exporting nation, many farm products
12 are not marketed as widely and effectively abroad as
13 they could be through producer-owned export trading
14 companies;

15 (3) exporting requires extensive specialized knowl-
16 edge and skills and entails additional, unfamiliar risks
17 which present costs for which smaller producers cannot
18 realize economies of scale;

19 (4) export trade intermediaries, such as trading
20 companies, can achieve economies of scale and acquire
21 expertise enabling them to export goods and services
22 profitably, at low per unit cost to producers;

23 (5) the United States lacks well-developed export
24 trade intermediaries to package export trade services
25 at reasonable prices (exporting services are fragmented

1 into a multitude of separate functions; companies at-
2 tempting to offer comprehensive export trade services
3 lack financial leverage to reach a significant portion of
4 potential United States exporters);

5 (6) State and local government activities which
6 initiate, facilitate, or expand export of products and
7 services are an important and irreplaceable source for
8 expansion of total United States exports, as well as for
9 experimentation in the development of innovative
10 export programs keyed to local, State, and regional
11 economic needs;

12 (7) the development of export trading companies
13 in the United States has been hampered by insular
14 business attitudes and by Government regulations; and

15 (8) if United States export trading companies are
16 to be successful in promoting United States exports
17 and in competing with foreign trading companies, they
18 must be able to draw on the resources, expertise, and
19 knowledge of the United States banking system, both
20 in the United States and abroad.

21 (b) The purpose of this Act is to increase United States
22 exports of products and services, particularly by small,
23 medium-size and minority concerns, by encouraging more ef-
24 ficient provision of export trade services to American produc-
25 ers and suppliers.

1 search, advertising, marketing, insurance, product re-
2 search and design, legal assistance, transportation, in-
3 cluding trade documentation and freight forwarding,
4 communication and processing of foreign orders to and
5 for exporters and foreign purchasers, warehousing, for-
6 eign exchange, and financing, when provided in order
7 to facilitate the export of goods or services produced in
8 the United States;

9 (5) the term "export trading company" means a
10 company, whether operated for profit or as a nonprofit
11 organization, which does business under the laws of
12 the United States or any State and which is organized
13 and operated principally for the purposes of—

14 (A) exporting goods and services produced in
15 the United States; and

16 (B) facilitating the exportation of goods and
17 services produced in the United States by unaffil-
18 iated persons by providing one or more export
19 trade services;

20 (6) the term "United States" means the several
21 States of the United States, the District of Columbia,
22 the Commonwealth of Puerto Rico, the Virgin Islands,
23 American Samoa, Guam, the Commonwealth of the
24 Northern Mariana Islands, and the Trust Territory of
25 the Pacific Islands;

1 (7) the term "Secretary" means the Secretary of
2 Commerce; and

3 (8) the term "company" means any corporation,
4 partnership, association, or similar organization, wheth-
5 er operated for profit or as a nonprofit organization.

6 (b) The Secretary is authorized, by regulation, to further
7 define such terms consistent with this section.

8 FUNCTIONS OF THE SECRETARY OF COMMERCE

9 SEC. 104. The Secretary shall promote and encourage
10 the formation and operation of export trading companies by
11 providing information and advice to interested persons and by
12 facilitating contact between producers of exportable goods
13 and services and firms offering export trade services.

14 OWNERSHIP OF EXPORT TRADING COMPANIES BY BANKS,
15 BANK HOLDING COMPANIES, AND INTERNATIONAL
16 BANKING CORPORATIONS

17 SEC. 105. (a) For the purpose of this section—

18 (1) the term "banking organization" means any
19 State bank, national bank, Federal savings bank, bank-
20 ers' bank, bank holding company, Edge Act Corpora-
21 tion, or Agreement Corporation;

22 (2) the term "State bank" means any bank which
23 is incorporated under the laws of any State, any terri-
24 tory of the United States, the Commonwealth of
25 Puerto Rico, Guam, American Samoa, the Common-

1 wealth of the Northern Mariana Islands, or the Virgin
2 Islands, or any bank (except a national bank) which is
3 operating under the Code of Law for the District of
4 Columbia (hereinafter referred to as a "District bank");

5 (3) the term "State member bank" means any
6 State bank, including a bankers' bank, which is a
7 member of the Federal Reserve System;

8 (4) the term "State nonmember insured bank"
9 means any State bank, including a bankers' bank,
10 which is not a member of the Federal Reserve System,
11 but the deposits of which are insured by the Federal
12 Deposit Insurance Corporation;

13 (5) the term "bankers' bank" means any bank in-
14 sured by the Federal Deposit Insurance Corporation if
15 the stock of such bank is owned exclusively by other
16 banks (except to the extent State law requires direc-
17 tors' qualifying shares) and if such bank is engaged ex-
18 clusively in providing banking services for other banks
19 and their officers, directors, or employees;

20 (6) the term "bank holding company" has the
21 same meaning as in the Bank Holding Company Act of
22 1956;

23 (7) the term "Edge Act Corporation" means a
24 corporation organized under section 25(a) of the Fed-
25 eral Reserve Act;

1 (8) the term "Agreement Corporation" means a
2 corporation operating subject to section 25 of the Fed-
3 eral Reserve Act;

4 (9) the term "appropriate Federal banking
5 agency" means—

6 (A) the Comptroller of the Currency with re-
7 spect to a national bank or any District bank;

8 (B) the Board of Governors of the Federal
9 Reserve System with respect to a State member
10 bank, bank holding company, Edge Act Corpora-
11 tion, or Agreement Corporation;

12 (C) the Federal Deposit Insurance Corpora-
13 tion with respect to a State nonmember insured
14 bank except a District bank; and

15 (D) the Federal Home Loan Bank Board
16 with respect to a Federal savings bank.

17 In any situation where the banking organization hold-
18 ing or making an investment in an export trading com-
19 pany is a subsidiary of another banking organization
20 which is subject to the jurisdiction of another agency,
21 and some form of agency approval or notification is re-
22 quired, such approval or notification need only be ob-
23 tained from or made to, as the case may be, the appro-
24 priate Federal banking agency for the banking organi-

1 zation making or holding the investment in the export
2 trading company;

3 (10) the term "capital and surplus" means paid in
4 and unimpaired capital and surplus, and includes un-
5 divided profits;

6 (11) an "affiliate" of a banking organization or
7 export trading company is a person who controls, is
8 controlled by, or is under common control with such
9 banking organization or export trading company;

10 (12) the terms "control" and "subsidiary" shall
11 have the same meanings assigned to those terms in
12 section 2 of the Bank Holding Company Act of 1956,
13 and the terms "controlled" and "controlling" shall be
14 construed consistently with the term "control" as de-
15 fined in section 2 of the Bank Holding Company Act of
16 1956; and

17 (13) for the purposes of this section, the term
18 "export trading company" means a company which
19 does business under the laws of the United States or
20 any State and which is exclusively engaged in activi-
21 ties related to international trade, whether operated for
22 profit or as a nonprofit organization: *Provided, how-*
23 *ever,* That any such company must also either meet
24 the definition of export trading company in section
25 103(a)(5) of this Act, or be organized and operated

1 principally for the purpose of providing export trade
2 services, as defined in section 103(a)(4) of this Act:
3 *Provided further*, That any such company, for purposes
4 of this section, (A) may engage in or hold shares of a
5 company engaged in the business of underwriting, sell-
6 ing, or distributing securities in the United States only
7 to the extent that its banking organization investor
8 may do so under applicable Federal and State banking
9 law and regulations, and (B) may not engage in manu-
10 facturing or agricultural production activities.

11 (b)(1) Notwithstanding any prohibition, restriction, limi-
12 tation, condition, or requirement of any law applicable only
13 to banking organizations, a banking organization, subject to
14 the limitations of subsection (c) and the procedures of this
15 subsection, may invest directly and indirectly in the aggre-
16 gate, up to 5 per centum of its consolidated capital and sur-
17 plus (25 per centum in the case of an Edge Act Corporation
18 or Agreement Corporation not engaged in banking) in the
19 voting stock or other evidences of ownership of one or more
20 export trading companies. A banking organization may—

21 (A) invest up to an aggregate amount of
22 \$10,000,000 in one or more export trading companies
23 without the prior approval of the appropriate Federal
24 banking agency, if such investment does not cause an

1 export trading company to become a subsidiary of the
2 investing banking organization; and

3 (B) make investments in excess of an aggregate
4 amount of \$10,000,000 in one or more export trading
5 companies, or make any investment or take any other
6 action which causes an export trading company to
7 become a subsidiary of the investing banking organiza-
8 tion of which will cause more than 50 per centum of
9 the voting stock of an export trading company to be
10 owned or controlled by banking organizations, only
11 with the prior approval of the appropriate Federal
12 banking agency.

13 Any banking organization which makes an investment under
14 authority of clause (A) of the preceding sentence shall
15 promptly notify the appropriate Federal banking agency of
16 such investment and shall file such reports on such invest-
17 ment as such agency may require. If, after receipt of any
18 such notification, the appropriate Federal banking agency de-
19 termines, after notice and opportunity for hearing, that the
20 export trading company is a subsidiary of the investing bank-
21 ing organization, it shall have authority to disapprove the
22 investment or impose conditions on such investment under
23 authority of subsection (d). In furtherance of such authority,
24 the appropriate Federal banking agency may require divesti-
25 ture of any voting stock or other evidences of ownership pre-

1 viously acquired, and may impose conditions necessary for
2 the termination of any controlling relationship.

3 (2) If a banking organization proposes to make any in-
4 vestment or engage in any activity included within the fol-
5 lowing two subparagraphs, it must give the appropriate Fed-
6 eral banking agency ninety days prior written notice before it
7 makes such investment or engages in such activity:

8 (A) any additional investment in an export trading
9 company subsidiary; or

10 (B) the engagement by any export trading
11 company subsidiary in any line of activity, including
12 specifically the taking of title to goods, wares, mer-
13 chandise, or commodities, if such activity was not dis-
14 closed in any prior application for approval.

15 During the notification period provided under this paragraph,
16 the appropriate Federal banking agency may, by written
17 notice, disapprove the proposed investment or activity or
18 impose conditions on such investment or activity under au-
19 thority of subsection (d). An additional investment or activity
20 covered by this paragraph may be made or engaged in, as the
21 case may be, prior to the expiration of the notification period
22 if the appropriate Federal banking agency issues written
23 notice of its intent not to disapprove.

24 (3) In the event of the failure of the appropriate Federal
25 banking agency to act on any application for approval under

1 paragraph (1)(B) of this subsection within a period of one
2 hundred and twenty days, which period begins on the date
3 the application has been accepted for processing by the ap-
4 propriate Federal banking agency, the application shall be
5 deemed to have been granted. In the event of the failure of
6 the appropriate Federal banking agency either to disapprove
7 or to impose conditions on any investment or activity subject
8 to the prior notification requirements of paragraph (2) of this
9 subsection within the sixty-day period provided therein, such
10 period beginning on the date the notification has been re-
11 ceived by the appropriate Federal banking agency, such in-
12 vestment or activity may be made or engaged in, as the case
13 may be, any time after the expiration of such period.

14 (c) The following limitations apply to export trading
15 companies and the investments in such companies by banking
16 organizations:

17 (1) The name of any export trading company shall
18 not be similar in any respect to that of a banking orga-
19 nization that owns any of its voting stock or other evi-
20 dences of ownership.

21 (2) The total historical cost of the direct and indi-
22 rect investments by a banking organization in an
23 export trading company combined with extensions of
24 credit by the banking organization and its direct and
25 indirect subsidiaries to such export trading company

1 shall not exceed 10 per centum of the banking organi-
2 zation's capital and surplus.

3 (3) A banking organization that owns any voting
4 stock or other evidences of ownership of an export
5 trading company shall terminate its ownership of such
6 stock if the export trading company takes positions in
7 commodities or commodities contracts, in securities, or
8 in foreign exchange, other than as may be necessary in
9 the course of its business operations.

10 (4) No banking organization holding voting stock
11 or other evidences of ownership of any export trading
12 company may extend credit or cause any affiliate to
13 extend credit to any export trading company or to cus-
14 tomers of such company on terms more favorable than
15 those afforded similar borrowers in similar circum-
16 stances, and such extension of credit shall not involve
17 more than the normal risk of repayment or present
18 other unfavorable features.

19 (d)(1) In the case of every application under subsection
20 (b)(1)(B) of this section, the appropriate Federal banking
21 agency shall take into consideration the financial and man-
22 agerial resources, competitive situation, and future prospects
23 of the banking organization and export trading company con-
24 cerned, and the benefits of the proposal to United States
25 business, industrial, and agricultural concerns (with special

1 emphasis on small, medium-size and minority concerns), and
2 to improving United States competitiveness in world mar-
3 kets. The appropriate Federal banking agency may not ap-
4 prove any investment for which an application has been filed
5 under subsection (b)(1)(B) if it finds that the export benefits of
6 such proposal are outweighed in the public interest by any
7 adverse financial, managerial, competitive, or other banking
8 factors associated with the particular investment. Any disap-
9 proval order issued under this section must contain a state-
10 ment of the reasons for disapproval.

11 (2) In approving any application submitted under sub-
12 section (b)(1)(B), the appropriate Federal banking agency
13 may impose such conditions which, under the circumstances
14 of such case, it may deem necessary (A) to limit a banking
15 organization's financial exposure to an export trading com-
16 pany, or (B) to prevent possible conflicts of interest or unsafe
17 or unsound banking practices. With respect to the taking of
18 title to goods, wares, merchandise, or commodities by any
19 export trading company subsidiary of a banking organization,
20 the appropriate Federal banking agencies may, by order, reg-
21 ulation, or guidelines, establish standards designed to ensure
22 against any unsafe or unsound practices that could adversely
23 affect a controlling banking organization investor. In particu-
24 lar, the appropriate Federal banking agencies may establish
25 inventory-to-capital ratios, based on the capital of the export

1 trading company subsidiary, for those circumstances in which
2 the export trading company subsidiary may bear a market
3 risk on inventory held.

4 (3) In determining whether to impose any condition
5 under the preceding paragraph (2), or in imposing such condi-
6 tion, the appropriate Federal banking agency must give due
7 consideration to the size of the banking organization and
8 export trading company involved, the degree of investment
9 and other support to be provided by the banking organization
10 to the export trading company, and the identity, character,
11 and financial strength of any other investors in the export
12 trading company. The appropriate Federal banking agency
13 shall not impose any conditions or set standards for the
14 taking of title which unnecessarily disadvantage, restrict or
15 limit export trading companies in competing in world markets
16 or in achieving the purposes of section 102 of this Act. In
17 particular, in setting standards for the taking of title under
18 the preceding paragraph (2), the appropriate Federal banking
19 agencies shall give special weight to the need to take title in
20 certain kinds of trade transactions, such as international
21 barter transactions.

22 (4) Notwithstanding any other provision of this Act, the
23 appropriate Federal banking agency may, whenever it has
24 reasonable cause to believe that the ownership or control of
25 any investment in an export trading company constitutes a

1 serious risk to the financial safety, soundness, or stability of
2 the banking organization and is inconsistent with sound bank-
3 ing principles or with the purposes of this Act or with the
4 Financial Institutions Supervisory Act of 1966, order the
5 banking organization, after due notice and opportunity for
6 hearing, to terminate (within one hundred and twenty days or
7 such longer period as the Board may direct in unusual cir-
8 cumstances) its investment in the export trading company.

9 (5) On or before two years after enactment of this Act,
10 the appropriate Federal banking agencies shall jointly report
11 to the Committee on Banking, Housing, and Urban Affairs of
12 the Senate and the Committee on Banking, Finance and
13 Urban Affairs of the House of Representatives their recom-
14 mendations with respect to the implementation of this sec-
15 tion, their recommendations on any changes in United States
16 law to facilitate the financing of United States exports, espe-
17 cially by small, medium-size and minority business concerns,
18 and their recommendations on the effects of ownership of
19 United States banks by foreign banking organizations affili-
20 ated with trading companies doing business in the United
21 States.

22 (e)(1) Any party aggrieved by an order of an appropriate
23 Federal banking agency under this section may obtain a
24 review of such order in the United States court of appeals
25 within any circuit wherein such organization has its principal

1 place of business, or in the court of appeals for the District of
2 Columbia Circuit, by filing a notice of appeal in such court
3 within thirty days from the date of such order, and simulta-
4 neously sending a copy of such notice by registered or certi-
5 fied mail to the appropriate Federal banking agency. The
6 appropriate Federal banking agency shall promptly certify
7 and file in such court the record upon which the order was
8 based. The court shall set aside any order found to be (A)
9 arbitrary, capricious, an abuse of discretion, or otherwise not
10 in accordance with law; (B) contrary to constitutional right,
11 power, privilege or immunity; or, (C) in excess of statutory
12 jurisdiction, authority, or limitations, or short of statutory
13 right; or (D) without observance of procedure required by
14 law. Except for violations of subsection (b)(3) of this section,
15 the court shall remand for further consideration by the appro-
16 priate Federal banking agency any order set aside solely for
17 procedural errors and may remand for further consideration
18 by the appropriate Federal banking agency any order set
19 aside for substantive errors. Upon remand, the appropriate
20 Federal banking agency shall have no more than sixty days
21 from date of issuance of the court's order to cure any proce-
22 dural error or reconsider its prior order. If the agency fails to
23 act within this period, the application or other matter subject
24 to review shall be deemed to have been granted as a matter
25 of law.

1 (f)(1) The appropriate Federal banking agencies are au-
2 thORIZED and empowered to issue such rules, regulations, and
3 orders, to require such reports, to delegate such functions,
4 and to conduct such examinations of subsidiary export trad-
5 ing companies, as each of them may deem necessary in order
6 to perform their respective duties and functions under this
7 section and to administer and carry out the provisions and
8 purposes of this section and prevent evasions thereof.

9 (2) In addition to any powers, remedies, or sanctions
10 otherwise provided by law, compliance with the requirements
11 imposed under this section may be enforced under section 8
12 of the Federal Deposit Insurance Act by any appropriate
13 Federal banking agency defined in that Act.

14 (g) Nothing in this section shall at any time prevent any
15 State from adopting a law prohibiting banks chartered under
16 the laws of such State from investing in export trading com-
17 panies or applying conditions, limitations, or restrictions on
18 investments by banks chartered under the laws of such State
19 in export trading companies in addition to any conditions,
20 limitations, or restrictions provided under this section.

21 INITIAL INVESTMENTS AND OPERATING EXPENSES

22 SEC. 106. (a) The Economic Development Administra-
23 tion and the Small Business Administration are directed, in
24 their consideration of applications by export trading compa-
25 nies for loans and guarantees, and operating grants to non-

1 profit organizations, including applications to make new in-
2 vestments related to the export of goods or services produced
3 in the United States and to meet operating expenses, to give
4 special weight to export-related benefits, including opening
5 new markets for United States goods and services abroad and
6 encouraging the involvement of small, medium-size and mi-
7 nority businesses or agricultural concerns in the export
8 market.

9 (b) There are authorized to be appropriated as necessary
10 to meet the purposes of this section, \$20,000,000 for each
11 fiscal year, 1981, 1982, 1983, 1984, and 1985. Amounts
12 appropriated pursuant to the authority of this subsection shall
13 be in addition to amounts appropriated under the authority of
14 other Acts.

15 GUARANTEES FOR EXPORT ACCOUNTS RECEIVABLE AND
16 INVENTORY

17 SEC. 107. The Export-Import Bank of the United
18 States is authorized and directed to establish a program to
19 provide guarantees for loans extended by financial institu-
20 tions or other private creditors to export trading companies
21 as defined in section 103(5) of this Act, or to other exporters,
22 when such loans are secured by export accounts receivable or
23 inventories of exportable goods, and when in the judgment of
24 the Board of Directors—

1 (1) the private credit market is not providing ade-
2 quate financing to enable otherwise creditworthy
3 export trading companies or exporters to consummate
4 export transactions; and

5 (2) such guarantees would facilitate expansion of
6 exports which would not otherwise occur.

7 The Board of Directors shall attempt to insure that a major
8 share of any loan guarantees ultimately serves to promote
9 exports from small, medium-size and minority businesses or
10 agricultural concerns. Guarantees provided under the author-
11 ity of this section shall be subject to limitations contained in
12 annual appropriations Acts.

13 TITLE II—EXPORT TRADE ASSOCIATIONS

14 SHORT TITLE

15 SEC. 201. This title may be cited as the “Export Trade
16 Association Act of 1981”.

17 FINDINGS; DECLARATION OF PURPOSE

18 SEC. 202. (a) FINDINGS.—The Congress finds and de-
19 clares that—

20 (1) the exports of the American economy are re-
21 sponsible for creating and maintaining one out of every
22 nine manufacturing jobs in the United States and for
23 generating \$1 out of every \$7 of total United States
24 goods produced;

1 (2) exports will play an even larger role in the
2 United States economy in the future in the face of
3 severe competition from foreign government-owned and
4 subsidized commercial entities;

5 (3) between 1968 and 1977 the United States
6 share of total world exports fell from 19 per centum to
7 13 per centum;

8 (4) trade deficits contribute to the decline of the
9 dollar on international currency markets, fueling infla-
10 tion at home;

11 (5) service-related industries are vital to the well-
12 being of the American economy inasmuch as they
13 create jobs for seven out of every ten Americans, pro-
14 vide 65 per centum of the Nation's gross national
15 product, and represent a small but rapidly rising per-
16 centage of United States international trade;

17 (6) small and medium-sized firms are prime bene-
18 ficiaries of joint exporting, through pooling of technical
19 expertise, help in achieving economies of scale, and as-
20 sistance in competing effectively in foreign markets;
21 and

22 (7) the Department of Commerce has as one of its
23 responsibilities the development and promotion of
24 United States exports.

1 (b) PURPOSE.—It is the purpose of this Act to encour-
2 age American exports by establishing an office within the
3 Department of Commerce to encourage and promote the for-
4 mation of export trade associations through the Webb-
5 Pomerene Act, by making the provisions of that Act explic-
6 itly applicable to the exportation of services, and by transfer-
7 ring the responsibility for administering that Act from the
8 Federal Trade Commission to the Secretary of Commerce.

9

DEFINITIONS

10 SEC. 203. The Webb-Pomerene Act (15 U.S.C. 61-66)
11 is amended by striking out the first section (15 U.S.C. 61)
12 and inserting in lieu thereof the following:

13 "SECTION 1. DEFINITIONS.

14 "As used in this Act—

15 "(1) EXPORT TRADE.—The term 'export trade'
16 means trade or commerce in goods, wares, merchan-
17 dise, or services exported, or in the course of being ex-
18 ported from the United States or any territory thereof
19 to any foreign nation.

20 "(2) SERVICE.—The term 'service' means intangi-
21 ble economic output, including, but not limited to—

22 "(A) business, repair, and amusement
23 services;

24 "(B) management, legal, engineering, archi-
25 tectural, and other professional services; and

1 “(C) financial, insurance, transportation, and
2 communication services.

3 “(3) EXPORT TRADE ACTIVITIES.—The term
4 ‘export trade activities’ means activities or agreements
5 in the course of export trade.

6 “(4) METHODS OF OPERATION.—The term
7 ‘methods of operation’ means the methods by which an
8 association or export trading company conducts or pro-
9 poses to conduct export trade.

10 “(5) TRADE WITHIN THE UNITED STATES.—The
11 term ‘trade within the United States’ whenever used in
12 this Act means trade or commerce among the several
13 States or in any territory of the United States, or in
14 the District of Columbia, or between any such territory
15 and another, or between any such territory or territo-
16 ries and any State or States or the District of Colum-
17 bia, or between the District of Columbia and any State
18 or States.

19 “(6) ASSOCIATION.—The term ‘association’
20 means any combination, by contract or other arrange-
21 ment, of persons who are citizens of the United States,
22 partnerships which are created under and exist pursu-
23 ant to the laws of any State or of the United States, or
24 corporations, whether operated for profit or organized
25 as nonprofit corporations, which are created under and

1 exist pursuant to the laws of any State or of the
2 United States.

3 “(7) EXPORT TRADING COMPANY.—The term
4 ‘export trading company’ means an export trading
5 company as defined in section 103(5) of the Export
6 Trading Company Act of 1980.

7 “(8) ANTITRUST LAWS.—The term ‘antitrust
8 laws’ means the antitrust laws defined in the first sec-
9 tion of the Clayton Act (15 U.S.C. 12), sections 5 and
10 6 of the Federal Trade Commission Act (15 U.S.C.
11 45, 46), and any State antitrust or unfair competition
12 law.

13 “(9) SECRETARY.—The term ‘Secretary’ means
14 the Secretary of Commerce.

15 “(10) ATTORNEY GENERAL.—The term ‘Attorney
16 General’ means the Attorney General of the United
17 States.

18 “(11) COMMISSION.—The term ‘Commission’
19 means the Federal Trade Commission.”.

20 ANTITRUST EXEMPTION

21 SEC. 204. The Webb-Pomerene Act (15 U.S.C. 61-66)
22 is amended by striking out section 2 (15 U.S.C. 62) and
23 inserting in lieu thereof the following:

1 "SEC. 2. EXEMPTION FROM ANTITRUST LAWS.

2 "(a) ELIGIBILITY.—The export trade, export trade
3 activities, and methods of operation of any association, en-
4 tered into for the sole purpose of engaging in export trade,
5 and engaged in or proposed to be engaged in such export
6 trade, and the export trade, export trade activities and meth-
7 ods of operation of any export trading company, that—

8 "(1) serve to preserve or promote export trade;

9 "(2) result in neither a substantial lessening of
10 competition or restraint of trade within the United
11 States nor a substantial restraint of the export trade of
12 any competitor of such association or export trading
13 company;

14 "(3) do not unreasonably enhance, stabilize, or
15 depress prices within the United States of the goods,
16 wares, merchandise, or services of the class exported
17 by such association or export trading company;

18 "(4) do not constitute unfair methods of competi-
19 tion against competitors engaged in the export trade of
20 goods, wares, merchandise, or services of the class ex-
21 ported by such association or export trading company;

22 "(5) do not include any act which results, or may
23 reasonably be expected to result, in the sale for con-
24 sumption or resale within the United States of the
25 goods, wares, merchandise, or services exported by the

1 association or export trading company or its members;
2 and

3 “(6) do not constitute trade or commerce in the
4 licensing of patents, technology, trademarks, or know-
5 how, except as incidental to the sale of the goods,
6 wares, merchandise, or services exported by the associ-
7 ation or export trading company or its members
8 shall, when certified according to the procedures set forth in
9 this Act, be eligible for the exemption provided in subsection
10 (b).

11 “(b) EXEMPTION.—An association or an export trading
12 company and its members are exempt from the operation of
13 the antitrust laws with respect to their export trade, export
14 trade activities and methods of operation that are specified in
15 a certificate issued according to the procedures set forth in
16 this Act, carried out in conformity with the provisions, terms,
17 and conditions prescribed in such certificate and engaged in
18 during the period in which such certificate is in effect. The
19 subsequent revocation or invalidation in whole or in part of
20 such certificate shall not render an association or its members
21 or an export trading company or its members, liable under
22 the antitrust laws for such export trade, export trade activi-
23 ties, or methods of operation engaged in during such period.

24 “(c) DISAGREEMENT OF ATTORNEY GENERAL OR
25 COMMISSION.—Whenever, pursuant to section 4(b)(1) of this

1 Act, the Attorney General or Commission has formally
 2 advised the Secretary of disagreement with his determination
 3 to issue a proposed certificate, and the Secretary has none-
 4 theless issued such proposed certificate or an amended certifi-
 5 cate, the exemption provided by this section shall not be
 6 effective until thirty days after the issuance of such
 7 certificate.”.

8

AMENDMENT OF SECTION 3

9 SEC. 205. (a) CONFORMING CHANGES IN STYLE.—The
 10 Webb-Pomerene Act (15 U.S.C. 61–66) is amended—

11 (1) by inserting immediately before section 3 (15
 12 U.S.C. 63) the following:

13 “SEC. 3. OWNERSHIP INTEREST IN OTHER TRADE ASSOCI-
 14 ATIONS PERMITTED.”,

15 (2) by striking out “SEC. 3. That nothing” in sec-
 16 tion 3 and inserting in lieu thereof “Nothing”.

17

ADMINISTRATION: ENFORCEMENT: REPORTS

18 SEC. 206. (a) IN GENERAL.—The Webb-Pomerene Act
 19 (15 U.S.C. 61–66) is amended by striking out sections 4 and
 20 5 (15 U.S.C. 64 and 65) and inserting in lieu thereof the
 21 following sections:

22 “SEC. 4. CERTIFICATION.

23 “(a) PROCEDURE FOR APPLICATION.—Any associ-
 24 ation, or export trading company seeking certification under

1 this Act shall file with the Secretary a written application for
2 certification setting forth the following:

3 “(1) The name of the association or export trad-
4 ing company.

5 “(2) The location of all of the offices or places of
6 business of the association or export trading company
7 in the United States and abroad.

8 “(3) The names and addresses of all of the offi-
9 cers, stockholders, and members of the association or
10 export trading company.

11 “(4) A copy of the certificate or articles of incor-
12 poration and bylaws, if the association or export trad-
13 ing company is a corporation; or a copy of the articles,
14 partnership, joint venture, or other agreement or con-
15 tract under which the association or export trading
16 company conducts or proposes to conduct its export
17 trade activities, or contract of association, if the associ-
18 ation or export trading company is unincorporated.

19 “(5) A description of the goods, wares, merchan-
20 dise, or services which the association or export trad-
21 ing company or their members export or propose to
22 export.

23 “(6) A description of the domestic and interna-
24 tional conditions, circumstances, and factors which
25 show that the association or export trading company

1 and its activities will serve a specified need in promot-
2 ing the export trade of the described goods, wares,
3 merchandise, or services.

4 “(7) The export trade activities in which the asso-
5 ciation or export trading company intends to engage
6 and the methods by which the association or export
7 trading company conducts or proposes to conduct
8 export trade in the described goods, wares, merchan-
9 dise, or services, including, but not limited to, any
10 agreements to sell exclusively to or through the associ-
11 ation or export trading company, any agreements with
12 foreign persons who may act as joint selling agents,
13 any agreements to acquire a foreign selling agent, any
14 agreements for pooling tangible or intangible property
15 or resources, or any territorial, price-maintenance,
16 membership, or other restrictions to be imposed upon
17 members of the association or export trading company.

18 “(8) The names of all countries where export
19 trade in the described goods, wares, merchandise, or
20 services is conducted or proposed to be conducted by
21 or through the association or export trading company.

22 “(9) Any other information which the Secretary
23 may request concerning the organization, operation,
24 management, or finances of the association or export
25 trading company; the relation of the association or

1 export trading company to other associations, corpora-
2 tions, partnerships, and individuals; and competition or
3 potential competition, and effects of the association or
4 export trading company thereon. The Secretary may
5 request such information as part of an initial applica-
6 tion or as a necessary supplement thereto. The Secre-
7 tary may not request information under this paragraph
8 which is not reasonably available to the person making
9 application or which is not necessary for certification of
10 the prospective association or export trading company.

11 “(b) ISSUANCE OF CERTIFICATE.—

12 “(1) NINETY-DAY PERIOD.—The Secretary shall
13 issue a certificate to an association or export trading
14 company within ninety days after receiving the applica-
15 tion for certification or necessary supplement thereto if
16 the Secretary, after consultation with the Attorney
17 General and Commission, determines that the associ-
18 ation and, its export trade, export trade activities and
19 methods of operation, or export trading company, and
20 its export trade, export trade activities and methods of
21 operation meet the requirements of section 2 of this
22 Act and will serve a specified need in promoting the
23 export trade of the goods, wares, merchandise, or serv-
24 ices described in the application for certification. The
25 certificate shall specify the permissible export trade,

1 export trade activities and methods of operation of the
2 association or export trading company and shall include
3 any terms and conditions the Secretary deems neces-
4 sary to comply with the requirements of section 2 of
5 this Act. The Secretary shall deliver to the Attorney
6 General and the Commission a copy of any certificate
7 that he proposes to issue. The Attorney General or
8 Commission may, within fifteen days thereafter, give
9 written notice to the Secretary of an intent to offer
10 advice on the determination. The Attorney General or
11 Commission may, after giving such written notice and
12 within forty-five days of the time the Secretary has de-
13 livered a copy of a proposed certificate, formally advise
14 the Secretary and the petitioning association or export
15 trading company of disagreement with the Secretary's
16 determination. The Secretary shall not issue any certif-
17 icate prior to the expiration of such forty-five-day
18 period unless he has (A) received no notice of intent to
19 offer advice by the Attorney General or the Commis-
20 sion within fifteen days after delivering a copy of a
21 proposed certificate, or (B) received any noticed formal
22 advice of disagreement or written confirmation that no
23 formal disagreement will be transmitted from the At-
24 torney General and the Commission. After the forty-
25 five-day period or, if no notice of intent to offer advice

1 has been given, after the fifteen-day period, the Secre-
2 tary shall either issue the proposed certificate, issue an
3 amended certificate, or deny the application. Upon
4 agreement of the applicant, the Secretary may delay
5 taking action for not more than thirty additional days
6 after the forty-five-day period. Before offering advice
7 on a proposed certification, the Attorney General and
8 Commission shall consult in an effort to avoid, wher-
9 ever possible, having both agencies offer advice on any
10 application.

11 “(2) EXPEDITED CERTIFICATION.—In those in-
12 stances where the temporary nature of the export trade
13 activities, deadlines for bidding on contracts or filling
14 orders, or any other circumstances beyond the control
15 of the association or export trading company which
16 have a significant impact on its export trade, make the
17 90-day period for application approval described in
18 paragraph (1) of this subsection, or an amended appli-
19 cation approval as provided in subsection (c) of this
20 section, impractical for the association or export trad-
21 ing company seeking certification, such association or
22 export trading company may request and may receive
23 expedited action on its application for certification.

24 “(3) AUTOMATIC CERTIFICATION FOR EXISTING
25 ASSOCIATIONS.—Any association registered with the

1 Federal Trade Commission under this Act as of April
2 3, 1980, may file with the Secretary an application for
3 automatic certification of any export trade, export
4 trade activities, and methods of operation in which it
5 was engaged prior to enactment of the Export Trade
6 Association Act of 1980. Any such application must be
7 filed within 180 days after the date of enactment of
8 such Act and shall be acted upon by the Secretary in
9 accordance with the procedures provided by this sec-
10 tion. The Secretary shall issue to the association a cer-
11 tificate specifying the permissible export trade, export
12 trade activities, and methods of operation that he de-
13 termines are shown by the application (including any
14 necessary supplement thereto), on its face, to be eligi-
15 ble for certification under this Act, and including any
16 terms and conditions the Secretary deems necessary to
17 comply with the requirements of section 2(a) of this
18 Act, unless the Secretary possesses information clearly
19 indicating that the requirements of section 2(a) are not
20 met.

21 “(4) APPEAL OF DETERMINATION.—If the Secre-
22 tary determines not to issue a certificate to an associ-
23 ation or export trading company which has submitted
24 an application or an amended application for certifica-
25 tion, then he shall—

1 “(A) notify the association or export trading
2 company of his determination and the reasons for
3 his determination, and

4 “(B) upon request made by the association or
5 export trading company afford it an opportunity
6 for a hearing with respect to that determination in
7 accordance with section 557 of title 5, United
8 States Code.

9 “(c) MATERIAL CHANGES IN CIRCUMSTANCES;
10 AMENDMENT OF CERTIFICATE.—Whenever there is a ma-
11 terial change in the membership, export trade, export trade
12 activities, or methods of operation, of an association or export
13 trading company then it shall report such change to the Sec-
14 retary and may apply to the Secretary for an amendment of
15 its certificate. Any application for an amendment to a certifi-
16 cate shall set forth the requested amendment of the certifi-
17 cate and the reasons for the requested amendment. Any re-
18 quest for the amendment of a certificate shall be treated in
19 the same manner as an original application for a certificate.
20 If the request is filed within thirty days after a material
21 change which requires the amendment, and if the requested
22 amendment is approved, then there shall be no interruption in
23 the period for which the certificate is in effect.

24 “(d) AMENDMENT OR REVOCATION OF CERTIFICATE
25 BY SECRETARY.—After notifying the association or export

1 trading company involved and after an opportunity for hear-
2 ing pursuant to section 554 of title 5, United States Code,
3 the Secretary, on his own initiative—

4 “(1) may require that the organization or oper-
5 ation of the association or export trading company be
6 modified to correspond with its certification, or

7 “(2) shall, upon a determination that the export
8 trade, export trade activities or methods of operation of
9 the association or export trading company no longer
10 meet the requirements of section 2 of this Act, revoke
11 the certificate or make such amendments as may be
12 necessary to satisfy the requirements of such section.

13 “(e) ACTION FOR INVALIDATION OF CERTIFICATE BY
14 ATTORNEY GENERAL OR COMMISSION.—

15 “(1) The Attorney General or the Commission
16 may bring an action against an association or export
17 trading company or its members to invalidate, in whole
18 or in part, its certificate on the ground that the export
19 trade, export trade activities or methods of operation of
20 the association or export trading company fail or have
21 failed to meet the requirements of section 2 of this Act.
22 Except in the case of an action brought during the
23 period before an antitrust exemption becomes effective,
24 as provided for in section 2(c), the Attorney General or
25 Commission shall notify any association or export trad-

1 ing company or member thereof, against which it in-
2 tends to bring an action for invalidation, thirty days in
3 advance, as to its intent to file an action under this
4 subsection. The district court shall consider any issues
5 presented in any such action de novo and if it finds
6 that the requirements of section 2 are not met, it shall
7 issue an order declaring the certificate invalid or any
8 other order necessary to effectuate the purposes of this
9 Act and the requirements of section 2.

10 “(2) Any action brought under this subsection
11 shall be considered an action described in section 1337
12 of title 28, United States Code. Pending any such
13 action which was brought during the period any ex-
14 emption is held in abeyance pursuant to section 2(c) of
15 this Act, the court may make such temporary restrain-
16 ing order or prohibition as shall be deemed just in the
17 premises.

18 “(3) No person other than the Attorney General
19 or Commission shall have standing to bring an action
20 against an association or export trading company or
21 their respective members for failure of the association
22 or export trading company or their respective export
23 trade, export trade activities or methods of operation to
24 meet the eligibility requirements of section 2 of this
25 Act.

1 “(f) COMPLIANCE WITH OTHER LAWS.—Each associ-
2 ation and each export trading company and any subsidiary
3 thereof shall comply with United States export control laws
4 pertaining to the export or transshipment of any goods on the
5 Commodity Control List to controlled countries. Such laws
6 shall be complied with before actual shipment.

7 “SEC. 5. GUIDELINES.

8 “(a) INITIAL PROPOSED GUIDELINES.—Within ninety
9 days after the enactment of the Export Trade Association
10 Act of 1980, the Secretary, after consultation with the Attor-
11 ney General, and the Commission shall publish proposed
12 guidelines for purposes of determining whether export trade,
13 export trade activities and methods of operation of an associ-
14 ation or export trading company will meet the requirements
15 of section 2 of this Act.

16 “(b) PUBLIC COMMENT PERIOD.—Following publica-
17 tion of the proposed guidelines, and any proposed revision of
18 guidelines, interested parties shall have thirty days to com-
19 ment on the proposed guidelines. The Secretary shall review
20 the comments and, after consultation with the Attorney Gen-
21 eral, and Commission, publish final guidelines within thirty
22 days after the last day on which comments may be made
23 under the preceding sentence.

24 “(c) PERIODIC REVISION.—After publication of the
25 final guidelines, the Secretary shall periodically review the

1 role of United States export trading companies or subsidiaries
2 thereof in East-West trade.

3 "SEC. 8. TEMPORARY ANTITRUST EXEMPTION FOR EXISTING
4 ASSOCIATIONS.

5 "(a) ELIGIBILITY.—To be eligible for the antitrust ex-
6 emption provided by this section, an association must have
7 been registered with the Federal Trade Commission under
8 this Act on April 3, 1980.

9 "(b) DURATION.—The antitrust exemption provided by
10 this section shall extend only to the existence of an eligible
11 association, and to agreements made and acts done by such
12 association, prior to one hundred and eighty days after the
13 date of enactment of the Export Trade Association Act of
14 1980, or, in the event that an eligible association files an
15 application for certification pursuant to section 4 of this Act
16 during such one hundred and eighty days, prior to the Secre-
17 tary's determination on such application becoming final.

18 "(c) EXEMPTION.—Subject to the limitations in subsec-
19 tions (a) and (b), nothing contained in sections 1 to 7 of the
20 Sherman Act shall be construed as declaring to be illegal an
21 association entered into for the sole purpose of engaging in
22 export trade and actually engaged solely in such export
23 trade, or an agreement made or act done in the course of
24 export trade by such association, provided such association,
25 agreement, or act is not in restraint of trade within the

1 United States, and is not in restraint of the export trade of
2 any domestic competitor of such association: *Provided*, That
3 such association does not, either in the United States or else-
4 where, enter into any agreement, understanding, or conspir-
5 acy, or do any act which artificially or intentionally enhances
6 or depresses prices within the United States of commodities
7 of the class exported by such association, or which substan-
8 tially lessens competition within the United States or other-
9 wise restrains trade therein.

10 "SEC. 9. CONFIDENTIALITY OF APPLICATION AND ANNUAL
11 REPORT INFORMATION.

12 "(a) GENERAL RULE.—Portions of applications made
13 under section 4, including amendments to such applications,
14 and annual reports made under section 6 that contain trade
15 secrets or confidential business or financial information, the
16 disclosure of which would harm the competitive position of
17 the person submitting such information shall be confidential,
18 and, except as authorized by this section, no officer or em-
19 ployee, or former officer or employee, of the United States
20 shall disclose any such confidential information, obtained by
21 him in any manner in connection with his service as such an
22 officer or employee.

23 "(b) DISCLOSURE TO ATTORNEY GENERAL OR COM-
24 MISSION.—Whenever the Secretary believes that an appli-
25 cant may be eligible for a certificate, or has issued a certifi-

1 cate to an association or export trading company, he shall
2 promptly make available all materials filed by the applicant,
3 association or export trading company, including applications
4 and supplements thereto, reports of material changes, appli-
5 cations for amendments and annual reports, and information
6 derived therefrom, to the Attorney General or Commission,
7 or any employee or officer thereof, for official use in connec-
8 tion with an investigation or judicial or administrative pro-
9 ceeding under this Act or the antitrust laws to which the
10 United States or the Commission is or may be a party. Such
11 information may only be disclosed by the Secretary upon a
12 prior certification that the information will be maintained in
13 confidence and will only be used for such official law enforce-
14 ment purposes.

15 **"SEC. 10. MODIFICATION OF ASSOCIATION TO COMPLY WITH**
16 **UNITED STATES OBLIGATIONS.**

17 "At such time as the United States undertakes binding
18 international obligations by treaty or statute, to the extent
19 that the operations of any export trade association or export
20 trading company, certified under this Act, are inconsistent
21 with such international obligations, the Secretary may re-
22 quire the association or export trading company to modify its
23 respective operations, and in so doing afford the association
24 or export trading company a reasonable opportunity to

1 comply therewith, so as to be consistent with such interna-
2 tional obligations.

3 "SEC. 11. REGULATIONS.

4 "The Secretary, after consultation with the Attorney
5 General and the Commission, shall promulgate such rules
6 and regulations as may be necessary to carry out the pur-
7 poses of this Act.

8 "SEC. 12. TASK FORCE STUDY.

9 "Seven years after the date of enactment of the Export
10 Trade Association Act of 1980, the President shall appoint,
11 by and with the advice and consent of the Senate, a task
12 force to examine the effect of the operation of this Act on
13 domestic competition and on United States international
14 trade and to recommend either continuation, revision, or ter-
15 mination of the Webb-Pomerene Act. The task force shall
16 have one year to conduct its study and to make its recom-
17 mendations to the President."

18 (b) REDESIGNATION OF SECTION 6.—The Act is
19 amended—

20 (1) by striking out "SEC. 6." in section 6 (15
21 U.S.C. 66), and

22 (2) by inserting immediately before such section
23 the following:

24 "SEC. 13. SHORT TITLE."

[Whereupon, at 12:30 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Wednesday, February 18, 1981.]

EXPORT TRADING COMPANY ACT OF 1981

WEDNESDAY, FEBRUARY 18, 1981

U.S. SENATE,
COMMITTEE ON BANKING,
HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON INTERNATIONAL
FINANCE AND MONETARY POLICY
Washington, D.C.

The subcommittee met at 9:30 a.m., in room 5302 of the Dirksen Senate Office Building, Senator John Heinz (chairman of the subcommittee) presiding.

Present: Senators Heinz and Proxmire.

STATEMENT OF SENATOR HEINZ

Senator HEINZ. Ladies and gentlemen, yesterday the subcommittee began 3 days of hearings on S. 144, the Export Trading Company Act of 1981. This legislation, which passed the Senate unanimously last year, now has 58 cosponsors.

Yesterday's hearings featured testimony by former Senator Adlai Stevenson and Senator Jack Danforth, two of the original authors of the legislation. We also heard a very strong endorsement on behalf of the Reagan administration by Secretary of Commerce Malcolm Baldrige. And the Comptroller of the Currency, John Heimann, also expressed strong support for the bill. Some expressions of concern were heard from Governor Wallich of the Federal Reserve Board.

Today's hearings turn to the private sector to provide some additional perspectives on the bill and on the trading company concept. We begin with a panel of representatives of major banking organizations: The American Bankers Association and the Bankers' Association for Foreign Trade. The Independent Bankers Association was invited to appear but has decided instead to submit a statement for the record.

Following that, we will hear from a panel of businessmen, including a representative of an existing trading company, to discuss what opportunities they see in this legislation for export operations.

Finally, we will conclude with a panel raising a number of issues related to transportation, which is an integral part of the export process.

As I indicated yesterday, after 1 additional day of hearings after today we plan to mark up the bill and bring it to the Senate floor as soon as possible for action there. I am pleased we have gotten off to a good, fast, and solid start, that we have such broad support for the legislation, which legislation I believe is essential to making

our Nation internationally competitive. And I look forward to the comments of today's witnesses.

Let me also note that the Chair will insert in the record, without objection, the statements from the following: Senator Glenn, the Independent Bankers Association, which I mentioned in my opening statement, and a statement from the Consumers for World Trade.

[The complete statements follow:]

STATEMENT OF SENATOR JOHN GLENN

Mr. Chairman, I want to thank you for this opportunity to testify in support of S. 144, a bill to encourage exports by facilitating the formation and operation of export trading companies. I cosponsored this legislation last year; the reasons for supporting it this year are even more compelling. The purpose of this bill is to improve U.S. export performance at a time when American companies are facing increasingly vigorous competition in the international market place. From every corner of the world, government planning and financing of foreign trade challenges the resources of American firms. To meet this challenge, American companies must organize the most efficient business operations possible and we in government must do what we can to help American firms improve their competitive edge.

One way in which we can do this is by facilitating the formation of trading companies. The trading company is not a new idea. It is as old as commerce itself and has enjoyed great success in other countries. In Japan, for example, the top ten trading organizations, the Sogo Shoshas, account for approximately 60 percent of Japan's imports and 50 percent of its exports. Trading companies have also played an important role in the economic growth of many European countries. Yet, despite their historical and international success, trading companies have not flourished in the United States.

There are several reasons—both economic and legal—for this failure. It is my contention that the economic conditions no longer prevail and that the legal restraints are equally outdated. First, we have been generally self-sufficient for the bulk of our economic needs throughout our Nation's history. Second, the industrial revolution occurred early in our history and its effects spread quickly. This made the acquisition and distribution of goods easy and further reduced our need for foreign trade. Third, the large size of our domestic market meant that American businessmen had ample growth opportunities close at hand and involving relatively small risk. These factors, all the products of our unique geographic and economic heritage, limited the attractiveness of and need for foreign trade companies. But these unique conditions no longer prevail. The interdependence and competitiveness of the world market make it impossible for the U.S. to sustain its economic growth while operating on outdated notions of resource self-sufficiency in limited domestic markets.

Unfortunately, Federal laws and regulations limit our ability to respond effectively to these new challenges. For example, government regulations prevent U.S. banks from offering many important trading services. In addition, antitrust uncertainties deter many U.S. firms from cooperating with other U.S. producers in their organization of export activities. These restrictions are anachronisms. They hamper American firms at a time when foreign governments are cooperating with and, in many instances, even subsidizing and directing the export efforts of their own firms. The result is that our unilateral export restrictions cost American businessmen opportunities abroad and cost American workers jobs at home.

S. 144 addresses many of these obstacles and facilitates the formation and operation of export trading companies. It does so by allowing banking organizations to play a significant role in the future success of American export trading companies. In the past, many small and medium-sized firms found foreign markets difficult to penetrate and too costly to do business in. That is one of the reasons why the Commerce Department estimates that some 20,000 smaller U.S. firms who could profitably export presently do not. Bank participation will enhance opportunities for small and medium-sized firms to enter world markets by giving them access to the capital, financing and marketing capabilities heretofore possessed only by larger firms.

While the degree of future bank participation in export trading companies—as well as the forms that such participation may take—remain uncertain at present, Section 105 of the bill sets certain limitations on the level of involvement permitted banking organizations that invest in or finance these companies. S. 144 allows banking organizations to invest up to \$10 million in one or more export trading

companies without prior regulatory agency approval, as long as that investment does not amount to control. Investments in excess of \$10 million, or any investment or action which amounts to control of an export trading company, must be approved by the appropriate Federal banking agency. The bill sets an overall limit on a bank's involvement by prohibiting its direct and indirect investments in the ownership of one or more export trading companies from exceeding 5 percent of the bank's capital and surplus. Total investment by a banking organization, combined with extensions of credits to export trading companies, cannot exceed 10 percent of the bank's capital and surplus.

Some have argued that these restrictions do not go far enough; that banks should not be allowed to gain control of an export trading company, because that would represent a substantial departure from the long-established separation of banking and commerce in our economic system. They fear that the public's deposits may become exposed to undue risk if banks acquire ownership control of trading companies.

Legitimate questions concerning the scope of bank participation do merit careful consideration. It is true that banks, given their international offices, experience in trade financing and familiarity with domestic U.S. producers, will be likely sources of leadership in forming export trading companies. But I feel that S.144 includes important safeguards which not only protect against unsound banking practices, but also against any unfair competitive advantages that might otherwise accrue to an export trading company having a bank investor.

A specific provision of the bill, for example, prohibits banks from extending credit on a preferential basis to an export trading company in which it has an equity interest. This subsection meets a traditional concern of U.S. policy that banks not favor their affiliates in loan transactions. But even without the inclusion of this provision, the Financial Institutions Regulatory and Interest Rate Control Act of 1978 already provides safeguards against such unfair lending practices by banking institutions. Similarly, the 5 percent limit placed on total equity investments, and the 10 percent limit placed on a bank's total investments in or financing of trading companies, protect banking organizations from overexposure.

I see no harm in allowing a bank to own a trading company as long as such limitations exist. In fact, permitting banks to have equity and management control over their affiliate relationships seems far wiser than mandating that bank capital be controlled solely by the decisions of nonbanking partners. Banking organizations will surely be more inclined to form export trading companies if they can control their investments. Such investments, in turn, will provide banks with a long-term incentive to establish the additional framework needed to offer a complete range of export services.

S.144 also stipulates that any bank's proposed or existing investment in trading companies may be terminated by the appropriate Federal regulatory agency upon its determination that the ownership or control of any such investment constitutes a serious risk to the financial safety, soundness or stability of that bank. I believe that these limitations, coupled with the banking agencies' broad regulatory, supervisory and examination powers and other existing legal restrictions, assure that there will be no serious risk to the safety and soundness of bank participation in export trading companies.

The access to capital and international markets provided by Title I of S.144 is a necessary, but not a sufficient, step in facilitating the formation of American trading companies. It is not sufficient because American firms have long been unwilling to risk investments in export activities, given the uncertain climate created by domestic antitrust rulings. So unless we are willing to clarify how our antitrust laws related to export trade, we cannot hope to utilize the full resources of the American business community in our effort to regain a competitive position in international trade.

On this last point, our competitiveness has deteriorated precisely because we have failed to develop a foreign trade policy consistent with changing international realities. Whereas private, multinational firms seeking the most efficient production and distribution of goods and services once dominated world markets, economic nationalism now prevails. In the critical areas of oil, steel and autos, government owned or directed, vertically integrated corporations shape the flow of trade. They do so as instruments of national governments and their actions are directed by political, rather than economic, consideration.

The postwar challenge America issued to her trading partners was not met by a purely American response. Industrial development programs in Italy, France, Great Britain, Japan and the developing nations are hybrids of the American model and their implementation has altered the evolution of world trade. Although I do not advocate the adoption of these nationalistic, economic policies here in the United

States, neither do I believe we can shape a coherent, effective foreign economic policy without recognizing the unsettling effects of those policies on world trade and American industries.

Through the Marshall Plan and other development assistance programs, the U.S. helped Europe, Japan and the developing nations establish their industrial strength. We generously stood back while they nurtured their industries with financial assistance and protectionism. While we continue to provide the shelter of our defense umbrella, they continue along the path of independence and economic nationalism. It is time now to adjust our own policies to the new realities of the global market.

One way in which we can do this is by unleashing the full force of America's private enterprise from the restraints of needless and confusing regulation. I believe that this bill's clarification of long-standing ambiguities in the area of antitrust exemptions for export trading companies is a long overdue step in this direction. Title II of S.144 encourages the formation of export trading companies by expanding the provisions of the Webb-Pomerene Act to include trade in services, as well as that in goods, wares, or merchandise. This feature will greatly expand export opportunities for trading companies in areas where American companies are especially competitive. Furthermore, Title II establishes a clearance procedure whereby firms can determine in advance whether their export activities are immune from antitrust suits. By establishing a certification procedure and codifying the enforcement intentions of our government's antitrust oversight branches, Title II of S.144 eliminates some of the uncertainties in current law that have discouraged the formation of American consortia to bid on significant export projects. At the same time, however, S.144 also protects against any anticompetitive effects that might result from the establishment and operation of export trading companies.

Mr. Chairman, this bill will not, by itself, solve America's foreign trade problems. Restoring the international competitiveness of the American enterprise will require us to do much more in the areas of capital formation, regulatory reform and research and development. But because S.144 recognizes that cooperation between business and government is a critical ingredient in any comprehensive national effort to improve our export performance, I believe it is an important step in the right direction.

President
 THOMAS F. BOLGER, President
 McHenry State Bank
 McHenry, Illinois 60050

First Vice President
 W. C. BENNETT, Chief Executive Officer
 Arthur State Bank
 Union, South Carolina 29379

Second Vice President
 ROBERT L. MCCORMICK JR., President/CEO
 Shawnee National Bank and Trust Company
 Shawnee, Oklahoma 74074

Treasurer
 ROBERT H. FEARON JR., President
 Jechs Valley National Bank
 Oneida, New York 13421



Independent
 BANKERS ASSOCIATION OF AMERICA

OFFICE OF THE
 PRESIDENT

3510 WEST ELM STREET, McHENRY, ILLINOIS 60050

February 18, 1981

Honorable H. John Heinz III, Chairman
 Subcommittee on International Finance
 and Monetary Policy
 Committee on Banking, Housing & Urban Affairs
 United States Senate
 Washington, D. C. 20510

Dear Mr. Chairman:

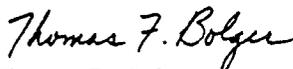
I wish to thank you on behalf of the Independent Bankers Association of America for your kind invitation of January 30, 1981, to testify before the Subcommittee with respect to S. 144, the Export Trading Company Act of 1981.

The IBAA did appear for oral testimony on this measure's predecessor in the last Congress, S. 2718, on February 18, 1980. As we noted at that time, the emphasis of our members' business is heavily domestic. Very few have Edge Act affiliates or are otherwise routinely engaged in international markets. Consequently, IBAA could not then claim to bring a direct expertise on the subject matter of export trading companies to the hearings. Further, we noted that the Association had never formally considered the specifics of any version of an Export Trading Company Act and that, consequently, our undertaking that day was simply to analyze how the traditional philosophies of IBAA generally squared with the provisions of S. 2718.

These circumstances have not altered during the intervening year, and consequently, we believe it is appropriate merely to submit a written statement rather than have a witness appear with respect to S. 144. This is especially so since a number of the technical points we raised in our presentation of February 18, 1980, such as an improved definition of "bankers bank" were incorporated in the Senate passed version of S. 2718 and reappear in S. 144.

If you or the staff have any written questions you wish us to answer subsequently, we will be happy to attempt to do so. Finally, I request that this letter, the attached written statement, and any future written submissions by IBAA be placed in the record.

Sincerely,

A handwritten signature in cursive script that reads "Thomas F. Bolger".

Thomas F. Bolger
President

TFB:ks

Enclosure

WRITTEN STATEMENT
OF THE
INDEPENDENT BANKERS ASSOCIATION OF AMERICA

The Independent Bankers Association of America (IBAA) is a trade group comprised of approximately 7400 national and state commercial banks, better than 50 percent of the total of such institutions in the country. Our typical member ranges in asset size between \$20-25 million and is located in a suburban or rural setting. Many in our constituency, nevertheless, are also in urban areas. The emphasis of our members' business is heavily domestic. Very few have Edge Act affiliates or are otherwise routinely engaged in international markets. Consequently, IBAA cannot claim to bring direct expertise to bear on the subject matter of S. 144, which seeks to strengthen U.S. global trade by facilitating the establishment of exporting companies through permitting U.S. banks, Federal savings banks, bankers' banks, bank holding companies, Edge Act Corporations, and Agreement Corporations to take equity positions in such trading houses.

Further, we cannot claim that the Association has ever formally considered the specifics of S. 144 or any of its predecessor versions or legislative relatives in so much detail as to establish firm positions on all the issues raised by such legislation. This is not because IBAA has been unaware of such legislation, its content, or its potential impact. Rather, it is because, due to the slight direct

export involvement of our membership, it has been considered inappropriate to devote considerable Association resources to wrestling with these complex topics. The undertaking of this written statement is simply to analyze how the traditional philosophies of the IBAA generally square with S. 144.

First, we are strong supporters of improved American exports if on no other grounds than that they benefit the general welfare of the nation. While most IBAA members, as previously noted, are not immediately involved in international business, the Association does monitor its conditions because so many of our constituents finance agricultural production, the health of which is increasingly dependent on strong overseas commodities vending.

At the Association's last convention, we underscored this point by Resolution F which stated:

"With our nation's agricultural plant nearing full production capacity, it is mandatory that a high priority be placed on using markets outside this country for agricultural production which otherwise will become surplus. The inability to export farm products will not only have an adverse effect on this country's balance of trade but will also create financial difficulties for the nation's farmers."

Second, we share the concerns of the many sponsors of this legislation that the trade deficit is deteriorating and are particularly distressed over the possibility of the account being in the red by \$50 to \$60 billion during 1981.

However, difficulties often appear in reconciling one's broad views when it comes to adopting a position on specific statutory proposals. The Export Trading Company Act of 1981 presents such a classic example for IBAA. The bill would seem a definite plus for improved foreign trade. On the other hand, the Association has also been philosophically opposed to trends which would erode the general policy of the separation of depository banking activities from other forms of commerce that has been imbedded in the legal system since the passage of the Banking Act of 1933. S. 144 certainly moves toward a substantial lessening of that separation since it permits nearly any kind of a commercial bank, bank holding company, Edge Act or Agreement Corporation (defined in the bill as "banking organizations") to acquire substantial equity positions in companies which are organized principally for the purpose of exporting goods or services produced in the U.S. or facilitating their export.

The Safety and Soundness Issue

One of the principal reasons the Association is very wary of breachings of the Banking Act of 1933 is our belief that the 1933 statute is a bulwark against the country's drifting into a commercial banking system prone to unsound, imprudent, and excessively speculative investments, as was the case in

the late 1920s and early 1930s. We note that most of the variations on, or exceptions to, the standards of the 1933 Act, as amended, are limited. For instance, national banks can place equity investments, to one degree or another, in the shares of Edge Act and Agreement Corporations, safe deposit companies, bank premise companies, the Federal National Mortgage Association, the Student Loan Marketing Association, the Government National Mortgage Association, small business investment companies, bank service corporations, foreign banks, Title IX firms created by the Housing Act of 1968, state housing corporations, agricultural credit corporations, community development corporations, and minbank capital corporations. In most instances, state banks are similarly limited by state codes.

The Bank Holding Company Act of 1956, as amended, reiterated the basic notion of separating depository banking from other forms of commerce. The records of passage of the 1966 amendments to the Bank Holding Company Act clearly indicated that the Congress wished to continue the division as a device for insuring the safety and soundness of the depository banking system. The national legislature, however, did permit some flexibility, namely, that bank holding companies can hold the shares of firms whose activities could legitimately be

engaged in by the banks themselves or whose activities are of a financial, fiduciary, or insurance nature and are, in the view of the Federal Reserve Board, so closely related to depository banking as to be an appropriate incident thereto.

As far as the "closely related" firms in which bank holding companies can invest, the Federal Reserve has developed an extremely lengthy list which is set out in its Regulation Y and which ranges from the obviously permissible, such as loan service corporations, to the more ambiguous, such as certain kinds of courier services. It should be noted that a bank holding company may, under an additional exemption to the 1966 Amendments, retain a passive investment of up to 5 percent of the voting stock of any company. Yet, even given all these dispensations, and some more limited and technical ones which appear in the Bank Holding Company Act of 1956, that statute still strongly upholds the basic posture of separating depository banking from other forms of commerce.

S. 144 contains a number of restraints on the amount and type of speculative risks to which "banking organizations" could expose themselves. To a considerable degree, these protect the depository banking system from drifting into areas of instability, such as many banks encountered with

respect to real estate investment trusts. However, we continue to believe, as we did last year, it would be prudent to impose one further "safety and soundness" limit on export trading companies (ETCs) in which banks have substantial interests. We realize S. 144 specifically directs the bank regulatory authorities to develop standards for those cases where ETCs, in which banks are involved, actually take title to goods without having orders to resell them. However, it is our view that this is inadequate and that a specific statutory standard of an inventory-to-capital ratio, using the trade company's capital as the base, should be incorporated in the law. Such a standard would clearly install a Congressional policy against an ETC's, with some form of banking ownership or participation, entangling itself in inventory speculation which might have an adverse impact on the banking organizations involved. Nothing should prevent the bank regulatory agencies from imposing stricter standards on a case by case basis, however.

The Concentration of Economic Power Issue

A second consideration in IBAA's long-standing support for the general approach of the Banking Act of 1933, as amended, and reiterated in the Bank Holding Company Act of 1956, as amended, is that dividing the essentials of depository banking from other

forms of commerce has prevented concentration of economic power in ever fewer firms. It is a common apprehension that if commercial banks could range into other commercial areas, their access to funds through deposits would eventually allow them enough leverage to control a high percentage of enterprise in the United States. This is especially true of the so-called megabanks. The Association, therefore, finds disturbing comparisons in the Committee's report on S. 2718, which the sponsors of S. 144 still apparently find attractive, between the "success" of European, Japanese, and Korean trading companies and the inadequacies of the U.S. environment. On that continent and in those countries, economic power is, indeed, concentrated in the hands of a restricted number of consortiums of merchant banks, depository banks, investment banks, and interlocked trading companies.

Additionally, we would note that economic concentration seems to us very much on the rise in the United States. Ironically, it is moving forward under the guise of "deregulation" and "increased competitive ability", both of which have been claimed to be some of the supposed virtues of S. 144. Deregulation has meant consolidation in the securities business, with the advent of negotiated rates, and mergers in the airline and railroad industry. Within months of passage of the Depository

Institutions Deregulation and Monetary Control Act of 1980, we already see an increase in acquisitions and mergers in the depository industry with the thrift sector being particularly prominent. Special care seems warranted to avoid a further drift toward economic concentration in the depository industry where myriad statutes, ranging from the Bank Holding Company Act with its Douglas Amendment, through the Bank Merger Act, to the McFadden Act, as amended, have been effective preventatives against concentration of economic power and effective substitutes for the general, domestic, and woefully inadequate antitrust laws. In short, while Europe, Japan and Korea might have accomplished some very admirable achievements in the field of exports, our attempts to parallel their successes should not sacrifice our economic decision making or otherwise facilitate consolidation of economic might.

S. 144 has a number of improvements over S. 2718, as it reached the Senate floor, that touch the concentration issue. We are especially pleased to see that ETCs will be limited in their ability to deal in securities except to the extent their banking investors are permitted to do so by the applicable state and federal statutes. The embargo on ETCs actually engaging in manufacturing and agricultural production is also welcome.

However, if Congress decides to enact S. 144, IBAA believes an additional modification which was under discussion last year should be incorporated into the bill. We understand that ETCs having bank participation under S. 144 are limited "principally" to the export business, but additional direct and specific prohibitions in these areas might be advisable in order to remove the possibility of their pushing out from this area of endeavor. The suggestion of the Federal Deposit Insurance Corporation, contained in its letter to Senator Stevenson of June 27, 1980, to the effect that the word "principally", as it appears at Section 103(a)(5) and 105(a)(13) should be defined, seems meritorious. The Corporation's letter advised the insertion of a definition of "principally" which would specify that some percentage of gross or net earnings of an ETC would have to relate directly to the export or the facilitation of the export of U.S. goods and services before a company could qualify as an export trading company, open to banking organization equity ownership. While the Corporation's letter addressed S. 2718, we believe the observation remains valid with respect to S. 144. Such a provision would guard, to some degree, against ETCs ranging from the stated focus of the Act, which is to improve exports, and ETCs serving as a vehicle for depository organizations to concentrate inordinate economic power in domestic commerce.

IBAA also feels that several supplementary limitations on the ownership structure of export trading companies might be suitable. First, any investments made by a banking organization in an export trading company could be subject to the approval of the appropriate Federal banking agency. Presently, S. 144 allows investments up to \$10,000,000 without approval unless the relevant agency finds the investment renders the ETC a subsidiary of the banking organization. Due to the novelty of joining depository banking and export trade in the manner contemplated by S. 144, we believe such a limitation would be advisable.

Second, last year, Senator Proxmire introduced Amendment No. 2276 to S. 2718 which would have encouraged the diffusion of ownership interest among a number of banks and discouraged banking organizations, as a group, from having more than 50 percent control of an ETC. He has reintroduced a version of that amendment which, in its full effect, would prevent a bank, as a corporate entity, from owning more than 19.9 percent of the shares of an ETC at any time. Other banking organizations, meaning bank holding companies, bankers' banks, and Edge Act Corporations, could not individually acquire more than 20 percent of an ETC except in fairly extraordinary circumstances and a group of them could not control more than 50 percent of an ETC except in fairly extraordinary circumstances.

The circumstances of permission to exceed the normal 20/50% levels would be passed on by the Federal Reserve Board. The IBAA supports this provision since it will tend to diffuse banking ownership of ETCs, and retains, in part, the long-standing principle of separating banking and commerce by restricting bank participation in ETCs.

We thank the Subcommittee for the opportunity to submit this written expression of our views on S. 144 and will be pleased to answer in writing any questions it might have.

1346 Connecticut Avenue NW Washington D.C. 20036 (202) 785 4635

consumers  for world trade

STATEMENT
TO THE
U.S. SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS
SUBCOMMITTEE ON INTERNATIONAL FINANCE

February 17, 1981

Re: Export Trading Companies (S.144)

Chairman Heinz and Members of the Subcommittee:

Consumers for World Trade (CWT) submits the following statement in support of S.144, a bill to promote the formation of export trading companies.

CWT, a nonprofit membership organization committed to open, competitive and fair trade, wishes to stress to the Committee how important it is to expand U.S. exports. By increasing export incentives, capabilities, and markets, the U.S. trade deficit, which over the last two years has neared \$60 billion, can be reduced, thus encouraging imports which would benefit the American consumer by lowering prices and increasing options in the marketplace.

In addition, increased exports will create employment opportunities; foster greater productivity; assist in harnessing inflation; enhance the value of the dollar; and create a healthier economic environment, thereby reducing the protectionist and anti-competitive pressures, as well as the risk of potential retaliatory actions, which currently threaten U.S. trade policy.

We urge passage of S.144, which would represent an important signal to our trading partners that the United States is committed to a more open world trading system.

DIRECTORS

Joan R. Braden	Doreen L. Brown	Isaiah Frank	Raymond Garcia	J.M. Colton Hand
Hendrik S. Houthakker	Lonnie King	Peter F. Krogn	William Matson Roth	Seymour J. Rubin
Fred Sanderson	Philip H. Trezise	Shana Gordon, Executive Director		

Senator HEINZ. Before I call our first panel of witnesses to the table, let me yield to Senator Proxmire.

Senator PROXMIRE. Mr. Chairman, I have no formal statement this morning. I would like to point out, however, that both Mr. Heimann and Governor Wallich agreed that there was merit in my proposal which—at least part of my proposal, both Heimann and Wallich approved. I think that the Federal Reserve supports the amendment as it is.

The Comptroller indicated that he would approve the amendment to the extent that the trading companies would be confined to holding companies and to Edge Act corporations. Among other things, that, of course, would mean that the approval would be in the hands of a single agency, to wit, the Federal Reserve Board.

And there was some concern expressed about the antitrust provisions in the present bill, something that I hope that our panelists this morning will give us their opinion on.

I might say that one of our first witnesses—I know you will introduce them, but I want to point out how delighted I am to see we have Mr. Stucky from the First Wisconsin Bank here this morning as one of the principal witnesses. He is an eminent banker representing one of the outstanding banks in the State, and we are happy to welcome him to the committee.

Senator HEINZ. Mr. Chairman—

Senator PROXMIRE. Well, I appreciate that. I will accept it.

Senator HEINZ. We are still not quite used to all the trappings of being the majority.

I would like to call the first panel of witnesses to the table: J. Hallam Dawson, president of the Bankers' Association for Foreign Trade, and president of the Crocker National Bank, San Francisco; and Douglas R. Stucky, first vice president of First Wisconsin National Bank, who I also welcome along with Mr. Dawson.

We are pleased to have you both. I see, Mr. Dawson, you have an associate with you. Would you please introduce him?

Let me ask all our witnesses today, please keep the opening statements to 10 minutes. If you have a very lengthy opening statement, I will put the entire statement in the record. I would appreciate it if you could summarize such a statement.

Mr. Dawson, would you please introduce your associate and proceed. Then I will ask Mr. Stucky to make his comments, and then we will turn to questions and discussion.

STATEMENTS OF J. HALLAM DAWSON, PRESIDENT, BANKERS' ASSOCIATION FOR FOREIGN TRADE, AND PRESIDENT, CROCKER NATIONAL BANK, SAN FRANCISCO, CALIF., ACCOMPANIED BY GARY M. WELSH, COUNSEL, BANKERS' ASSOCIATION FOR FOREIGN TRADE; AND DOUGLAS R. STUCKY, AMERICAN BANKERS ASSOCIATION, FIRST VICE PRESIDENT, FIRST WISCONSIN NATIONAL BANK, MILWAUKEE, WIS.

Mr. Dawson. Thank you, Mr. Chairman. My name is J. Hallam Dawson, and I am president of the Bankers' Association for Foreign Trade. I am also president of the Crocker National Bank of San Francisco. I am accompanied today by the association's counsel, Gary M. Welsh, of the Washington law firm of Prather, Seeger, Doolittle & Farmer.

The Bankers' Association for Foreign Trade, BAFT, was founded in 1921 by a group of banks whose purpose was to expand their knowledge of international trade and to develop sound banking services and procedures in support of trade. Today, BAFT's voting membership of 151 U.S. banks includes virtually all of those having significant international operations. The association also includes as nonvoting members 97 foreign banks maintaining offices in the United States and thus embraces many of the major international banks of the world.

BAFT is pleased to have this opportunity to express its strong support for S. 144, the Export Trading Company Act of 1981. We would also like to commend you, Mr. Chairman, and the members of the subcommittee for taking such prompt action on this legislation in the 97th Congress.

Since S. 144 is virtually identical to legislation which passed the Senate last year and which was strongly supported by BAFT in testimony before the committee, I am submitting for the record a prepared statement which reviews in more detail our views in support of the bank participation section, section 105, of S. 144.

Senator HEINZ. Your entire statement will be part of the record.

Mr. DAWSON. Thank you.

In my oral statement this morning, I would like to focus on why the United States needs this legislation and why, as provided in S. 144, banks should be given the opportunity to make controlling investments in export trading companies (ETC's), subject to appropriate regulatory safeguards and standards.

While there was some improvement in the U.S. trade position last year, U.S. merchandise trade, on a balance-of-payments basis, was in deficit by \$5.6 billion in the fourth quarter of 1980, compared with a deficit of \$2.8 billion in the third quarter. Our merchandise trade deficit for 1980 as a whole was \$26.7 billion, making it 4 years running that our trade deficits have been on the order of \$30 billion a year. Prospects are that we will continue to have deficits of these proportions in the years ahead unless the United States makes increasing exports a national priority.

Given the number of Senators already included in the Senate Export Caucus, I realize that I may be preaching to the converted this morning on the need for a strong U.S. export policy. Nevertheless, it is a point that cannot be reiterated enough, for our future standard of living depends on our ability to compete in an increasingly internationalized world trading and financial system.

As noted in the report of the President's Export Council, increasing exports is more than a problem of paying for the huge increase in our oil imports. Foreign competitors are cutting into the U.S. share of foreign markets for manufactured goods, including areas traditionally dominated by the United States. This latter point is cogently underscored in a recent National Research Council study which reported that U.S. commercial airplane makers have lost more than 20 percent of their business to European companies.

While domestic economic policies on inflation, investment, productivity, and innovation will play a crucial role in our future competitiveness, they are not enough to secure success in overseas markets. We must also remove unnecessary or unwise export disincentives and strengthen our commitment to Eximbank and other

programs designed to promote U.S. exports. And in accordance with the aims of S. 144, we must involve more U.S. firms in exporting by giving them the incentive and means to export.

LARGE POTENTIAL MARKET AVAILABLE

Of the 250,000 U.S. manufacturing companies, only 10 percent export—and only 100 companies account for half of our manufactured goods exports. There is thus a large potential market of small to medium-size companies that could be exporting but are not.

Probably the main reason why more companies do not export is an attitudinal one—they would rather deal in a large, relatively simple internal market. To get these firms interested in selling in external markets, we have to make it as easy for them to sell in Indonesia as Indiana. And that can only be done if we offer them one-stop service.

The essence of the export trading company concept is this provision of a one-stop export service. While we have some export companies that provide these services now, there are not enough of them. They cannot possibly serve every area where a hidden underdeveloped export potential may exist, and they most often lack the size, economies of scale, and financial resources and relationships of the major non-U.S. trading companies.

As we view S. 144, it is designed not only to spur the formation of new export trading companies but also to make our existing export companies more competitive worldwide. S. 144 is thus aimed at creating a bigger export pie in the United States from which greater numbers of firms may benefit.

While S. 144 is not a cure-all for our export problems, it is an important step toward improving our longrun trade competitiveness. I stress the longer term view for two reasons.

First, short-term trade improvements often result from exchange rate and business cycle developments. Export trading companies thus cannot be viewed as shortrun gimmicks to increase exports.

Second, the value of export trading companies can only be judged over a long-term view. Non-U.S. trading companies did not start yesterday. Time will be needed for export trading companies to develop fully in this country. Because the rest of the world will not stand still while we debate the concept, it is thus necessary to get started as soon as possible to determine just how much help export trading companies can provide in perhaps the most critical competitive decade ever to face the United States.

Now, to the need to allow for bank participation and the opportunity for controlling bank ownership. While some say, why should banks be allowed to participate in trading companies? We say, Why not?

The Hay Associates Study for the Commerce Department on a U.S. ETC concept concluded that among the foremost requirements for trading company success is the ability to create credit. As stated in the study, "The ability to offer credit terms to foreign buyers often means the difference between winning and losing sales."

BANKING ORGANIZATIONS OFFER INVALUABLE SERVICES

Credit is of equal importance to U.S. suppliers, particularly small and medium-sized businesses, because the working capital requirements needed for a large international sale are often difficult if not impossible for the small firm to come up with. Banking organizations thus bring to ETC's crucial knowledge and experience in trade financing and ancillary services such as foreign exchange, trade documentation, and warehousing that they will need in order to be successful in competing outside the United States.

Banking organizations bring extensive U.S. and foreign correspondent networks that provide invaluable contacts in reaching potential U.S. exporters and their potential customers abroad.

Banking organizations can bring an extensive knowledge of both internal and external markets across a wide range of industries to an ETC.

Banking organizations often have highly developed and technologically sophisticated operations and communications possibilities for processing trade transactions.

And perhaps most importantly, 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.

I would like to stress this last point, because there seems to be a fundamental difference of viewpoint on whether control is more or less risky for banking organizations. I can tell the subcommittee that banking organizations studying the ETC concept are well aware that commercial risks can be generated in a trading company. Because of such risks, they are for the most part not interested in equity participation in ETC's, unless they can exercise control and institute and enforce procedures and management processes that carefully limit the risks involved. BAFT thus strongly supports those provisions of S. 144 which would give banking organizations the opportunity to acquire control of an ETC with prior agency approval.

S. 144 REGULATIONS MEET LEGITIMATE CONCERNS

With equity participation or control, there must, of course, be appropriate statutory and regulatory safeguards and standards. S. 144 contains a full arsenal of prohibitions, limitations, and restrictions designed to meet concerns fundamental to our overall policies separating banking and commerce. In fact, S. 144 not only draws from existing banking laws and regulations but also contains special supervisory provisions which are tougher than anything which now exists in the banking laws.

While banks might prefer less regulation, we believe that each of the regulatory or supervisory provisions in S. 144 meets legitimate concerns. It is thus entirely appropriate to include such provisions in this legislation to protect against abuses that could occur but which we, in fact, believe should not occur in a well-managed banking organization.

As more experience were gained with ETC's by bankers and regulators alike, certain changes might be suggested in the statutory limitations and restrictions to make them less burdensome. S.

144 does, however, contain a good deal of regulatory flexibility that should permit many forms and degrees of bank participation in ETC's without continuing requests for statutory amendments.

Finally, I would like to dispel the notion, so often raised when it is suggested that banks be permitted entry in a new activity, that this legislation is some sort of camel's nose under the tent for banks. The problem is in defining the tent.

The multitude of restrictions and prohibitions in S. 144 keep secure the tents of commerce and investment banking from commercial bank encroachment. Looking at S. 144 from inside the banking tent, as it were, we find it quickly becoming crowded with camels of all sorts, which have everything from their noses to their backsides inside.

Most recently, the Congress permitted the Farm Credit System Banks for Cooperatives to have full commercial international banking powers. Export trading company legislation results in but another camel in this banking tent, since, as noted above, ETC's must inevitably get involved in the export credit business.

If there is indeed a nonbank tent whose flaps are being nudged by this legislation, it is the enclave of non-U.S. trading companies which have been successful with the active involvement and support of their home-country banks. While we are not sure exactly what is in this tent and whether we will be successful in getting inside, it seems to us that to the extent we are successful, we will be on the road to maintaining and improving U.S. competitiveness in the vast sands of world trade, where the foreign competition is staking out new tents every day.

In conclusion, I hope my testimony this morning has proved useful to the committee and my colleagues and I would, of course, be pleased to answer any questions you might have. I would also like to take this opportunity to express our willingness to work with your staff on any aspects of this legislation where our further input may be of assistance.

Thank you very much.

[Complete statement follows:]

PREPARED STATEMENT OF J. HALLAM DAWSON, PRESIDENT, BANKERS' ASSOCIATION FOR FOREIGN TRADE AND PRESIDENT, CROCKER NATIONAL BANK

Mr. Chairman and members of the subcommittee, my name is J. Hallam Dawson and I am President of the Bankers' Association for Foreign Trade. I am also President of the Crocker National Bank of San Francisco. I am accompanied today by the Association's Counsel, Gary M. Welsh of the Washington law firm of Prather Seeger Doolittle & Farmer.

The Bankers' Association for Foreign Trade ("BAFT") was founded in 1921 by a group of banks whose purpose was to expand their knowledge of international trade and to develop sound banking services and procedures in support of trade. Today, BAFT's voting membership of 151 U.S. banks include virtually all of those having significant international operations. The Association also includes as non-voting members 97 foreign banks maintaining offices in the United States, and thus embraces many of the major international banks of the world.

BAFT is pleased to have this opportunity to express its strong support for S. 144, "The Export Trading Company Act of 1981," because the promotion and support of U.S. exports has been one of BAFT's fundamental priorities since its inception. We would also like to commend you, Mr. Chairman, and the Members of the Subcommittee for taking such prompt action on this legislation in the 97th Congress.

In this prepared statement, I would like to address four major topics that have surrounded this legislation since its inception in the last Congress; namely, (1) the need for export trading companies (ETCs) to stimulate U.S. exports, (2) the contributions that banking organizations can make to their development and organization,

(3) the ways banking organizations might choose to participate in ETCs, and (4) possible public policy concerns over controlling investments by banking organizations in ETCs.

THE NEED FOR U.S. EXPORT TRADING COMPANIES

The nub of our trade problem was aptly summarized by the Joint Economic Committee in its 1980 Economic Report:

[I]t is not only the oil bill that concerns American policymakers.

Nearly all other nations recognize the link between international trade and domestic prosperity. The United States has been slow to adjust to the competitive world of trade. We have tended to view foreign trade as a luxury rather than a necessity. In the meantime, the U.S. market has become the target of integrated, well-financed, and highly successful efforts by our competitors.

The challenge is thus clear. More U.S. firms must export and, to do so, they must be given the means to meet highly-sophisticated foreign trade competition. S. 144 is directed precisely at these most crucial problems.

First, to involve more U.S. firms in exporting, they must be given both the opportunity and the means to export. Export trading companies will be able to provide to small and medium-sized businesses the export know-how and financial resources necessary to carry on a successful export business.

Second, to be competitive in export markets, U.S. firms must be relieved of the export barriers and disincentives that the U.S. imposes from within and which often only serve to benefit our competition and make exporting more difficult than it need be. Among the most important barriers are those which have artificially compartmentalized various segments of the export process and effectively blocked development of U.S. export trading companies in response to natural market forces. S. 144 is a strong step toward reducing or modifying a number of these barriers.

Included among these barriers to the formation of export trading companies are certain legal restrictions established over sixty years ago which have prevented U.S. banking organizations from participating in the development of U.S. export trading companies. In fact, we would call to the Subcommittee's attention the rather anomalous situation under present law, whereby a foreign bank doing business in the U.S. may invest in a foreign trading company that exports to the U.S., and certain types of U.S. banking organizations may invest in foreign trading companies that buy and sell goods abroad, but a U.S. banking organization may not invest in a U.S. export trading company that buys U.S. goods for the purpose of exporting them abroad. In other words, the line separating banking and commerce frustrates the development of U.S., but not foreign trading companies. For reasons I will shortly discuss, BAFT supports section 105 of S. 144 because it moves that line to a point where it will do the most good for U.S. exports and the U.S. economy, without compromising more fundamental concerns about the separation of banking and commerce within domestic markets.

Third, it is vital to our future foreign trade growth to establish trading companies that can facilitate the joint export of U.S. goods and services. United States service industries are facing increasingly stiff government-supported foreign competition. An export trading company will be able to combine the talents of large and small U.S. firms producing complementary goods and services and put together a complete export package better able to meet both foreign demands and foreign competition. It will be able to export a complete textile mill, or complete construction project—not just individual pieces of machinery.

THE CONTRIBUTIONS WHICH BANKING ORGANIZATIONS CAN MAKE TO THE SUCCESS OF EXPORT TRADING COMPANIES

In general, we believe the strength of S. 144 is its reliance on the ingenuity, productivity and efficiency of the American business and financial community. Instead of mandating a particular form of trading company or imposing an inappropriate foreign model on U.S. industry, S. 144 leaves it up to the U.S. private sector to develop what is likely to be a highly diverse group of trading companies—some large, some small, some owned by a single firm, some jointly-owned, some with bank participants, some owned entirely by nonbanking organizations, some formed around particular industries, and some formed for particular markets. The best way to improve U.S. competitiveness is by deregulating instead of regulating, by promoting rather than burdening U.S. business. We live in a highly competitive international environment and we must be prepared to modify barriers or restrictions imposed under vastly different economic circumstances that now only serve to frustrate our broader national interests. Among these restrictions are legal provisions which prevent U.S. banking organizations from investing in firms, such as

U.S. export trading companies, that engage in export trade or in providing export trade services.

The restrictions derive principally from the Edge Act of 1919, and they were based on a concern that U.S. export trade might somehow become dominated by one or two large trading companies involving a few industrial giants and the relatively few banks engaged at that time in trade financing. These restrictions thus bear little relation to today's highly competitive world of international trade, and the internationalization of trade financing. In particular the days when a relatively few money-center banks did most of our trade financing are ancient history. As indicated by the scope of our membership, hundreds of banks—both domestic and foreign—are aggressively competing in trade financing across the country.

We thus support section 105 of S. 144 which would give Edge Corporations, banks, and bank holding companies the opportunity to invest in export trading companies, including firms that engage only in providing export trade services. We believe it is important that banking organizations be permitted to invest in export trade service firms, as well as export trading companies, because many banking organizations, including many smaller and regional banks, would like the opportunity to expand their range of trade services without necessarily having to invest in a trading company that buys and sells goods. This would thus enable banks to present to their customers a more complete, integrated package of services that would facilitate and promote exports.

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 play an important role in introducing Eximbank, FCLIA 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.

WAYS OF BANK PARTICIPATION IN ETC'S

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-stop 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 countertrade 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.

PUBLIC POLICY CONCERNS OVER CONTROLLING INVESTMENTS BY BANKING ORGANIZATIONS

We believe it clear from our discussions within BAFT and the banking industry that banking organizations interested in S. 144 view it solely as a means for expanding the types of international trade services they can provide to U.S. business in order to promote U.S. exports, and not as a means for investing in or combining with U.S. business in contravention of our basic policies separating domestic banking and commerce.

THE ZAIBATSU CONCERN

First, S. 144 only permits banking organizations to invest in ETCs, and limits any such investments to five percent of the banking organization's capital and surplus. An ETC must be principally engaged in exporting and facilitating the exportation of goods and services produced in the United States by unaffiliated persons. A bank-owned ETC may not engage in securities activities prohibited to its banking organization shareholder and is specifically prohibited from engaging in agricultural production activities.

Second, the strict limits on the amount of funds that a banking organization can lend to and invest in a trading company affiliate—a combined limit of 10 percent of the banking organization's consolidated capital and surplus—ensure that a bank-controlled ETC would not have the resources to become a Zaibatsu-like conglomerate even if it had the ability to do so—which, as pointed out above, it does not.

Third, the requirements for antitrust clearance under the Webb-Pomerene provisions and the banking agencies' authority to disapprove any investment over \$10 M having adverse competitive considerations ensure against any combinations of bank and/or nonbank ownership of an ETC that would have deleterious competitive effects in the U.S. or on U.S. trade.

Interestingly, we have found competitive concerns raised in the ETC context similar to concerns raised about bank involvement in Small Business Investment Companies and I would like at this point to quote from a report issued by this Committee in 1976 recommending legislation, which was approved, permitting banks to acquire up to 100 percent of the stock of an SBIC:

"Section 108 of the bill would permit banks to own 100 percent of the voting common stock of a Small Business Investment Company. In 1967, the Small Business Investment Act was amended to prohibit a bank from acquiring 50 percent or more of the voting equity securities of an SBIC. The provision, which was initiated in the House, was provoked by concern over the 'monopolistic potential' of commercial banks in the SBIC program, although there was no evidence of abuse.

"The SBIC industry and SBA have been actively working to bring more private capital into the program. Although many banks have expressed interest in the program, it is frequently difficult to find compatible coinvestors with sufficient assets. A bank's exposure is limited by law to a maximum investment of 5 percent of capital and surplus. Allowing banks to control or wholly own a license would serve to encourage financial institutions which are interested in the sound develop-

ment of the SBIC program and would increase the amount of capital available for small business investment."¹

As in the SBIC case, we see no opportunity for a Zaibatsu-like monopolistic potential in our export trade, and believe that legislating on the basis of such unproven concerns, especially in light of the substantial protections already included in S. 144, would have the principal effect of discouraging bank participation and thus the expansion of small and medium-sized business exports.

SAFETY AND SOUNDNESS CONCERNS

S. 144 contains comprehensive safeguards that carefully limit and control possible banking organization exposure in export trading company investments. These limitations are at least equal to and often exceed those that currently apply to other permissible bank, bank holding company, or Edge Act Corporation investments.

First, as noted above, no banking organization, except an Edge Act Corporation not engaged in banking, may invest more than five percent of its capital and surplus in the stock of one or more ETCs. This five percent limit is well within other recognized prudential limits in our banking laws.

Second, no banking organization can in the aggregate and on a consolidated basis invest and lend more than ten percent of its capital and surplus in or to an ETC. This ensures that the financial limitations of section 23A of the Federal Reserve Act apply to all banking organization/ETC investments, irrespective of whether the ETC is a majority-controlled affiliate. In contrast, bank-sponsored REITs have always been considered outside the limitations of § 23A. This provision thus puts a total prudential cap on exposure to a controlled or non-controlled ETC.

Third, the name of an ETC cannot be similar in any respect to that of a banking organization investor. This prohibition ensures against public confusion between a banking organization and an ETC affiliate and thus avoids the types of problems that arose in the REIT area.

Fourth, a banking organization must terminate its ownership of an ETC if the ETC takes speculative positions in commodities. This protects against an ETC affiliate's engaging in non-productive, purely speculative activities that could put a banking organization's investment at risk. In this regard, this provision will effectively require any banking organization investor to ensure that there are adequate internal controls in an ETC against speculation.

Fifth, S. 144 specifically prohibits a bank from making preferential loans to an ETC in which it has an equity interest, including to any customer of such ETC. The language of the prohibition parallels that in the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRICA) on insider loans, and is thus a type of prohibition regularly enforced by bank examiners and the bank regulatory agencies.

Sixth, the banking agencies are given clear authority to require divestiture of any ETC investment that may constitute a serious risk to a banking organization investor. Again, this parallels powers which the Federal Reserve was given under FIRICA over other bank holding company investments.

While there are additional regulatory safeguards provided over controlling investments which I will discuss next in focussing on the control issues, BAFT believes the above limitations, restrictions and controls are appropriate and, in the aggregate, ensure against any exposure beyond traditional prudential limits for either non-controlling or controlling investments.

REASONS FOR PERMITTING CONTROLLING INVESTMENTS BY BANKING ORGANIZATIONS

Permitting banking organizations to make controlling investments subject to the limitations included in S. 144 should not increase risks or potential competitive or conflict of interest problems, but, as indicated in the Committee's Report last year on S. 2718 (at pp. 10-11), should actually serve to reduce them:

A banking organization with a controlling investment is in a better position to protect its investment and regulate risk exposure. In this regard, many U.S. banking organizations have a policy in their international operations of favoring controlling investments, because equity control ensures operational control and hence better risk management. In this regard, if S. 144 were amended to prohibit controlling investments by banking organizations, it would not in any way change a banking organization's ultimate risk exposure of five percent of its capital and surplus for any investments in ETCs, and ten percent of its capital and surplus for loans and investments in ETCs. What such an amendment would do is make it more difficult for a banking organization to protect its investments and loans to an ETC.

¹S. Rep. No. 94-420, 94th Cong., 2d Sess. 8-9 (1976).

Some banking organizations may only want to organize an ETC for limited purposes *e.g.*, to assist in certain project financing, to export from a local region or to a specific trade area, or to merely expand their range of export trade services. Permitting controlling investments thus encourages the formation of smaller, independent trading companies, with less Zaibatsu-like combinations between banking and industry.

A banking organization may find that conflict of interest problems are minimized when it has control. A banking organization with many export customers may not want to join with any one or two customers in an ETC, but may want to set up its own independent ETC.

An ETC controlled by a banking organization would have no unfair competitive advantage over other ETCs or ETCs with minority bank participation. S. 144's restrictions on total loans and investments and preferential lending are across the board and pertain whether a banking organization has either a minority or majority participation.

In addition to these reasons for permitting controlling investments, it must be noted that S. 144 contains extensive safeguards in the case of controlling investments to protect against unwise risk exposure.

Any controlling investment, even if less than \$10 million, must be approved by a bank regulatory agency.

No group of banks can acquire more than 50 percent of an ETC without prior agency approval.

The agencies could disapprove any application for investment where, in their judgment, export benefits are outweighed by adverse banking factors.

The agencies can impose conditions and limitations on controlling investments to limit a banking organization's financial exposure or prevent possible conflicts of interest or unsound banking practices.

The agencies can examine banking organization-controlled ETCs and use cease-and-desist authority to enforce any and all requirements imposed under the law.

The effect of these safeguards is to make it clear to all concerned that a bank cannot attempt an unwise rescue operation of an ETC, that it must deal with its affiliate on an arms-length basis, and that the ETC must ultimately stand or fall on its own.

CONCLUSION

I hope this statement proves useful to the Committee and we would like to express our willingness to work with your staff on any aspects of this legislation where our further input may be of assistance.

Senator HEINZ. Mr. Dawson, thank you very much.

Mr. Stucky, you've been well introduced and endorsed by your Senator, the senior Senator, Senator Proxmire. I welcome you, too. Please proceed.

Mr. STUCKY. Thank you both for your welcome, Mr. Chairman. May I submit our formal statement for the record, sir?

Senator HEINZ. Without objection, the entire statement will be a part of the record.

Mr. STUCKY. Mr. Chairman, and members of the subcommittee, I am Douglas R. Stucky, first vice president of the First Wisconsin National Bank of Milwaukee and a member of the American Bankers Association's International Banking Division's Executive Committee. In addition, I served as chairman of the task force assigned to study the forerunner of your bill, the Export Trading Company Act of 1980. The American Bankers Association is a trade association with a membership of over 90 percent of the Nation's 14,500 full-service banks.

Gentlemen, we are pleased to have the opportunity to express our strong support for passage of S. 144, the Export Trading Company Act of 1981. As you know, Mr. Chairman, the ABA testified last year in support of S. 2718 which passed the Senate by a vote of 77-0, but eventually expired in the House of Representatives.

It is the feeling of our association that probably two main issues have prevented ETC's from being an accomplished fact, or, an operating entity today, namely: One, should or should not U.S. commercial banks be allowed to invest in and control an ETC? Two, should the legislation proscribe the organizational structure or operating policies that an ETC can have?

Hearings dating back to 1978 in which governmental officials, senior management of major exporters, spokesmen for trade associations, representatives of export management firms, small businessmen, and bankers representing the total spectrum of the banking industry have eloquently addressed the control aspects of bank ownership in an ETC. I believe it is a fair summary that nearly all of the above listed interests felt, after reviewing the comprehensive safeguards contained in the prior legislation, that controlling bank participation in an ETC is deemed to bring far greater benefits to the concept of an export trading company than the minimal public policy issues or concerns that such ownership control might raise.

POSSIBLE AREAS OF PROBLEMS OR CONFLICTS

The negatives that I allude to are: One, diminishment of the traditional separation between commerce and banking; two, unusual risks that banks are unfamiliar with or which might be assumed by an ETC that could ultimately undermine the safety of a bank's deposits or its capital base; three, unreasonable control over the business of the small or medium-size firm, and; four, the possible inability of bank regulators to assess or control the activities of an ETC.

No doubt other concerns have come to your mind. I believe all such concerns have a degree of legitimacy. However, I feel confident that the ingenuity of the business community, the conservative nature of bank regulators, and the prudent minds of commercial bankers will arrive at realistic solutions to each of these possible areas of problems or conflicts as they have traditionally done throughout the history of the United States.

This personal feeling is not a convenient glossing over of the issues to arrive at selfish and self-serving conclusions for an avaricious banking industry. The banking industry realizes that it is assuming a tremendous public responsibility by taking on a limited role in directly engaging in the commerce of the United States. If the banking community does not conduct its ETC affairs prudently or properly, it stands to lose much public respectability and its creditability with the bank regulators.

The basic purpose of S. 144 is to allow or introduce more firms, particularly the small and medium-size ones, to have their goods and services exported into the world market. These smaller businesses have several characteristics, all of which cry out for the special role that an ETC can fulfill for such organizations, namely: they tend to be closely held firms with limited capital and human resources; they have limited ability to gather data about the market for their goods and services; they likely deal with only one or two banks; they recognize the profits that additional businesses—exports—can generate for their firms.

However, smaller businessmen will only undertake or seek such business if it can deal with an intermediary that is willing to assume all the risks, except the product risk, related to such sale.

We believe that an ETC, serving as an intermediary, is the most logical and convenient vehicle to answer the needs of the smaller businessman. Banks should be allowed to invest in and control ETC's for the following principal reasons: Through their calling programs, both in the United States and abroad, banks have the best likelihood of matching up buyer and seller.

BENEFICIAL FUNCTIONS

Banks, if involved during the initial sales or quotations stages, can structure a total package—both price and financing competitive—to assure a better chance that the foreign buyer will purchase U.S. goods and services. Similarly, if the foreign buyer is making miscellaneous purchases from other countries, an ETC can provide a total package for goods of both U.S. and non-U.S. sources. Such convenience is appealing and simple for a foreign purchaser.

Since banks already specialize in the documentary function of an export sale, they can assume the U.S. seller and itself that an ETC firm will do the documentation properly so as not to jeopardize the ultimate payment for an export order due to sloppy or delayed presentation of the export documents. The one-stop shopping has great appeal to both buyer and seller.

U.S. firms have greater confidence in dealing with an ETC, affiliated with their principal bank, than with an unknown foreign bank or foreign customer.

The smaller businessman knows that by concentrating his business, both his exports and imports, that he is likely to receive consistently better interest rates and availability of credit throughout all business cycles. From the bank's standpoint, it has better overall control over the total credit it extends to a smaller business. This latter factor ought to appeal to bank regulators and bank management.

Dealing with an ETC indirectly familiarizes and educates a U.S. supplier—potential exporter—with the nuances of export trading. Ultimately, if total overseas sales grow to a reasonable size because of the efforts of an ETC, the U.S. supplier will be able to become an independent exporter. It is logical to expect that ETC's will have a constant turnover of clients as they reach export sales level that make it more cost efficient to operate independently through their own dealer or distributor network, or even, to set up their own product facilities overseas.

Finally, the ETC will see to it that proper insurance, reputable forwarders, and other export service firms are used in carrying out the total export function for an ETC client.

In the interest of time I have chosen not to list other beneficial functions that bank-affiliated ETC's offers to the small businessman.

The concept of an export trading company is unique to each country that an ETC is chartered in, that is, there is no one pattern that has been or is likely to be successful in all countries of the world. It differs from country to country because of different philosophies between levels of cooperation and control between

government and business, different policies as to exchange controls imposed by the central banks, the differing ability of a country's banking system to serve the total domestic and foreign credit needs of its business community, the extent of regional trade, and preference granted therefor, with a block of countries, and so forth.

All this leads, in our opinion, to the conclusion that the legislation under consideration should not strive to develop an ultimate model for a U.S.-organized ETC, especially if one recognizes the relative degree of independence which the citizens of the United States have preferred between government and the activities of private business in this country.

It has long been the preference of government to allow the private sector of this Nation to operate within broad guidelines sketched out by all levels of government so long as such independent activities did not violate the precepts of our constitution or did not unnecessarily harm its citizens.

Much of the greatness achieved by this Nation is a direct result of our individual ingenuity. The ABA, and its membership, feel that to deviate from this basic principle would potentially frustrate the successful evolution of an ETC to its most efficient form.

It is our feeling that a flexible bill that allows an ETC to evolve, adjust, and improve based upon the needs and trends of the changing international marketplace will ultimately result in an ETC vehicle that will have a favorable, long-term impact on the trade position of the United States. Such flexibility will go a long way in the ultimate development of a commitment to exporting, and a permanent export policy, that has generally been lacking in this country. And to that end, we feel that the provisions contained in S. 144 provide the needed flexibility.

The ABA, and the entire banking industry, is prepared to cooperate closely and informally with the banking regulators to see that such flexibility is not misplaced or abused.

In summary, Mr. Chairman, by no means do we see the enactment of S. 144 as a panacea for our export deficiencies, but the ABA does feel that this legislation is a much needed step in the right direction. It is in this spirit that the American Bankers Association strongly endorses S. 144.

We thank the committee for the opportunity to appear today and we would be pleased to answer any questions you might have.

Thank you, Mr. Chairman.

[Complete statement follows:]

PREPARED STATEMENT OF DOUGLAS R. STUCKY, ON BEHALF OF THE
AMERICAN BANKERS ASSOCIATION

Mr. Chairman, and members of the subcommittee, I am Douglas R. Stucky, First Vice President of the First Wisconsin National Bank of Milwaukee and a member of the American Bankers Association's International Banking Division's Executive Committee. In addition, I served as Chairman of the Task Force assigned to study the forerunner of your bill, the Export Trading Company Act of 1980. The American Bankers Association is a trade association with a membership of over 90 percent of the nation's 14,500 full service banks.

Gentlemen, we are pleased to have the opportunity to express our strong support for passage of S. 144, The Export Trading Company Act of 1981. As you know, Mr. Chairman, the ABA testified last year in support of S. 2718 which passed the Senate by a vote of 77-0, but eventually expired in the House of Representatives.

One need only view the United States continually growing deficit in our balance of payments to realize that the U.S. must increase its exports of high quality goods and services today, if it is to have a chance of reducing the trade deficit tomorrow.

The purpose of this legislation is to improve U.S. export performance by creating U.S. export trading companies which would perform export services for tens of thousands of small and medium-sized producers. The concept of this legislation dates back to early 1978 when this subcommittee recommended the establishment of U.S. export trading companies. Since then, numerous hearings have been held canvassing virtually every sector of the commercial, financial and governmental communities and as a result of those hearings, I believe everyone can draw the same conclusion and that is—Establishing U.S. Export Trading Companies Can Improve Our Export Performance.

Mr. Chairman, the ABA testimony today will attempt to address the following issues:

1. Do small and medium-sized firms actively participate in the U.S. exporting effort? Why or why not?
2. What are the essential elements (i.e., antitrust and trade financing) that must be included in S. 144?
3. Why is it prudent and necessary for banking organizations to have the right to have equity positions (possibly up to 100 percent) or control of export trading companies (ETC's).
4. Competitive equality for firms, both commercial and financial intermediaries, and banking organizations that elect to form export trading companies.

THE PARTICIPATION OF SMALLER FIRMS IN EXPORTING

It is estimated that of the 250,000 business organizations in the United States only about 25,000 directly engage in the sale of their goods and services in overseas markets. Of the 25,000 organizations that export, it is further reported that 250 firms account for 80 percent of U.S. exports. This would certainly seem to support the conclusion that major corporations tend to dominate or account for the nation's present export performance, and, correspondingly that most other firms—regardless of size—are either not committed to or do not have the expertise to actively participate or seek sales in overseas markets. The non-exporting firms to which I allude are indeed the smaller and medium-sized firms of the United States. The Department of Commerce realistically estimates that at least 20,000 U.S. firms could become exporters—primarily those of the economic size just mentioned.

Why don't or aren't small and medium-sized firms involved in exporting? The following reasons are cited:

1. In spite of good efforts and programs by the Department of Commerce, most firms still don't know how to find or assess the size of overseas markets for their products.
2. They do not have the financial resources or flexibility to staff up for an independent, internal group to seek export business. Or, alternatively, they may choose to allocate their resources to the domestic market where lesser risks are perceived or a better return on available capital can be obtained.
3. The documentation required for export sales, the labyrinth of U.S. and foreign regulations that must be contended or complied with, the longer cash flow cycle related to the conclusion of most export orders, and other concerns, are impediments for a businessman trying to decide whether his firm should actively, on an on-going basis, seek sales in offshore markets.
4. Limited—but prior—experience with an export order has been unpleasant or resulted in a potential or real business loss—possibly because the firm did not seek or could not obtain good advice on how to control or minimize the various risks involved in an export sale.
5. Qualified personnel often cannot be obtained to establish a full-fledged export department within the existing wage and salary policies of a corporation.
6. Commercial banks, for various reasons, are not able or prepared to provide facilities to support all the credit needs that a corporation has for both domestic and export sales.

No doubt you could cite other valid reasons besides those just mentioned. In our opinion, a properly organized and staffed ETC offers the smaller exporter the opportunity to overcome the above problems, but yet allows it to gain the "economy of scale" benefits of a larger organization (the ETC) at an affordable price, while transferring or minimizing most of the risks to an export order to an ETC who is experienced and prepared to assume the related political and commercial risks of an overseas sale. In effect, the ETC has the ability to convert an export order to the equivalent of a domestic sale for the smaller firm.

ESSENTIAL ELEMENTS FOR INCORPORATION INTO S. 144

The preamble of S. 144 effectively highlights the needs and reasons why U.S. firms, both financial and non-financial, should be allowed and openly encouraged to form ETC's. The ABA strongly supports the needs and commercial justification for forming trading companies. In our opinion, the following areas of the proposed legislation are critical to the improved export performance of our nation and to the success of ETC's which are formed:

1. *Antitrust exemption.*—It is realistic to assume that successful ETC's will and must deal with numerous smaller firms that have products which in most cases will be complementary but in isolated cases may be competitive. This competitive aspect should not be magnified out of proportion, because there are natural factors in the marketplace, that limit the practical reality of an ETC being able to control or monopolize the smaller firm. Most foreign buyers make the actual purchase decision and will not delegate such responsibility to a little-known ETC. Additionally, the ETC sales representative cannot understand the technical specifications of a product as well as the actual user. Finally, one must not overlook the very real fact that most products—especially capital goods—are produced by multiple manufacturers in both the U.S. and foreign countries. This virtually assures that the competitive, global marketplace will provide an effective counterbalance to the limited, but logical antitrust exemption that an ETC requires to properly represent sizable numbers of smaller firms, some of which may, on occasion, be competing for the same foreign order. We feel that the bill, as proposed, has adequate controls to punish any firms which might intentionally violate the spirit of the antitrust provisions of the bill.

2. *Bank equity participation.*—Mr. Chairman, the ABA is aware of the concerns of this Subcommittee, the federal banking agencies, and other parties have expressed on the issue of controlling interests by a commercial bank in an ETC. Our member banks are just as interested as this Committee in avoiding the problems that some banks have encountered in their REIT ventures, foreign exchange dealings, and other similar experiences in various specialized areas of banking. We also want the legislation to provide reasonable controls or safeguards that would prevent the occurrence of similar difficulties in the activities of bank-controlled export trading companies.

Initially, we wish to declare our position that the American Bankers Association strongly supports the position of the right of banks to have controlling interests in Export Trading Companies. We intend to look at this position from the following viewpoints:

- (a) The implied responsibilities of non-controlled investments by banks.
- (b) Safeguards, through statutory language, that would clearly spell out those activities in which ETC's with controlling bank ownership would be excluded from engaging or arranging through such firms.
- (c) Structural forms in which bank-controlled ETC's might operate.
- (d) The analysis of risks inherent to ETC's and whether such risks need unfavorably impact on a bank or bank holding company.

It is our conviction that the legislation should recognize that while the ETC concept is well-known around the world, it is in its infancy in the United States. Thus, final language should provide for flexibility to allow for the concept to develop in this country in line with actual experience of ETC's, the evolving role ETC's will logically play in a changing world of the future, and provide for administrative freedom to modify permitted activities and roles for an ETC without having to pass amendatory language each time a change is agreed upon by the requisite federal authorities.

NONCONTROLLED INVESTMENT BY BANKS

Many commercial banks regardless of size or location, have had unfavorable experiences with investments in banking affiliates wherein they have had a minority and noncontrolling equity position. This results from the fact that a bank is often—in such situations—not in a position to preclude such activities that it considers unsound simply because it does not have either voting or management control of an affiliate. No matter what public declarations are made, the parent bank is unable to avoid the implied responsibilities that go with any investment made by a bank in a noncontrolled affiliate. Thus, the rationale is adopted that if implied financial responsibility attaches to a bank—regardless of ownership position—then bank management will undoubtedly decide to invest in firms where it has equal responsibility and ownership positions.

Not all commercial banks will want controlling ownership rights in an ETC firm for reasons of policy or philosophy best known to them—but this should not pre-

clude other banks from having controlling ownership in such enterprises. We believe that controlling positions are best processed on a specific application or approval basis by the appropriate Federal banking agencies. This is in line with the present language and controls of S. 144.

STATUTORY SAFEGUARDS

When we appeared here last July concerns were raised that the current language in S. 2718 could conceivably allow bank-related ETC's to use such enterprises to become security dealers or underwriters or even commodity traders. As assessed from discussions by both the ABA Trading Company Task Force and its Government Relations Council, let me assure you that it is not the intent of bank-related ETC's to engage in the above mentioned activity or activities. Furthermore, S. 144 specifically states that a bank-related ETC may engage in security business only to the extent that its bank investor is permitted under Federal and State banking laws and regulations.

Some discussion has also evolved around the meaning of the term "principally engaged" as it relates to ETC's. We would hope that any attempt at defining such term would include language that would allow an ETC to be involved in the exportation or importation of products, or for that matter, permit an ETC to be formed to carry out project-type activities required by buyers desiring a turn-key sales proposal. While the emphasis on exporting activities must predominate, it is realistic to recognize that an ETC can fill a useful role by also handling the importing needs of an existing client as well. From the ETC management viewpoint, it allows them to better rationalize its staff, its fixed assets, and its distribution network, if allowed to serve both the exporting and importing needs of a client. No doubt such additional activities—without undue risk—could also enhance the operating profits and financial substance of an ETC.

From a client standpoint it is advantageous to (a) have "one-stop" shopping for both export and import activities, (b) the cost benefits of larger scale purchases by an ETC, (c) relief from credit facilities of a client at his local bank, and (d) assured compliance with trading regulations and documentation for both buyer and seller.

Additionally, we feel it might be helpful if some clarification could be provided in the legislative language which prohibits bank-related ETC's from engaging in manufacturing or agricultural production activities. We could envision a problem arising out of a possible joint venture arrangement between a bank and a manufacturing or agriculture production concern. The current language appears to be too broad and sweeping and quite frankly a bit discriminating in view of the fact that this prohibition applies exclusively to bank-related export trading companies. Further, we cannot uncover why this prohibition was included in this section of the bill and that is the principal reason why we would hope that this provision could be modified or at least clarified.

STRUCTURE OF EXPORT TRADING COMPANIES

ETC's will be formed in many different ways to capitalize on the ingenuity of different management philosophies of both financial and non-financial corporations. This is sound and appropriate because it allows changing trading customs and patterns to be accommodated by capable marketers operating in the global environment. The final language of S. 144 should attempt to capture this needed flexibility so as not to inhibit the growth and success of the total ETC concept likely to be employed by diverse U.S. firms.

Some banks, with large international branch networks and/or trade services arms, will wish to have wholly-owned ETC subsidiaries to best serve the needs of their existing or potential export clients. This form could result in better risk minimization and more efficient banking systems or forms for both the ETC and the client.

In a different part of the ETC spectrum, other banks—probably the regionals—may wish to enter into joint venture ETC's with certain customers of the bank. The idea of including an existing customer in a joint venture would be to tap the superior marketing or technical skills of a firm that is already highly sophisticated in handling international business. Let it be said that it may be advantageous—in joint venture or consortium arrangement—to have both U.S. or foreign partners that can contribute their own special skills and contacts to the operations of an ETC. The foreign partners could and should be allowed to either banking and/or non-banking partners.

Similarly, it is not unrealistic to assume that private companies, such as grain dealers, could be very successful ETC's. They probably have excellent contacts with foreign government officials who make sizeable purchase commitments on behalf of

their nations. Consumable goods would logically and conveniently be best sold through such ETC related firms. Finally, capital goods manufacturers, who have existing dealer networks spanning the globe in many countries, could very logically form an ETC that would purchase and sell accessory or complementary products used by local buyers of the basic capital goods produced by other U.S. based or multinational firms. Such multinational firms could choose to form an ETC as a wholly-owned subsidiary, or, a joint venture with U.S. and/or foreign partners.

It is clear to us that early passage of ETC legislation is more important than the extent to which the legislation describes the approved organizational structure that an ETC might have. The longer it takes to pass S. 144 the greater time it allows traders in other countries to lock up new markets or obtain greater market shares in existing territories. The job of exporting is now not later.

RISKS INHERENT TO ETC'S

Prior testimony before this Subcommittee on ETC's during the 96th Congress has adequately addressed most of the risks, or such issues may be addressed by other witnesses appearing today. We have thus purposely chosen not to duplicate such efforts.

In summary, Mr. Chairman, by no means do we see the enactment of S. 144 as a panacea for our export deficiencies, but the ABA does feel that this legislation is a much needed step in the right direction. It is in this spirit that the American Bankers Association strongly endorses S. 144.

We thank the Committee for the opportunity to appear today and we would be pleased to answer any questions you might have.

Senator HEINZ. Mr. Stucky, thank you very much.

Gentlemen, both of you make a very strong, very compelling case for bank control.

Mr. Stucky, you have listed in your statement, seven very important aspects of the successful conduct of a trading company and have shown how banks that are knowledgeable in these areas cannot only facilitate the activities of a trading company but, through their expertise, lower the risks associated with trading companies.

BANKS WANT CONTROLLING INTEREST

Mr. Dawson has indicated that the banks that would want to be involved in this would want a controlling interest to minimize the risk of any trading company making bad judgments.

Let me start with you, Mr. Stucky, because you do represent a bank, a regional one, in Wisconsin, a very good one, I am sure.

You are in a sense a regional bank; you are not one of the major money markets. You are, I suppose, fairly good size, but neither small nor huge.

Mr. STUCKY. That is right.

Senator HEINZ. And would your bank, which I understand has a holding company, be interested in the participation and formation of an export trading company?

Mr. STUCKY. Yes, we would, Mr. Chairman.

Senator HEINZ. Would you want to participate in an export trading company if the bank didn't have the option of having a controlling interest?

Mr. STUCKY. Speaking strictly on behalf of my bank and not sharing anything which is truly private, we have reviewed, and this has been touched on in prior testimony that the ABA and others have given, we believe there are several ways that a regional bank may choose to become involved in the ownership or investment in a trading company.

The two that have the most appeal to us are those in which we would join with a group of two or three other regional banks to form a large scale trading company. Such an ETC would encompass middle market customers from the various regions, result in a good mix of products which would spread the credit and product risk, and create the diversification necessary to generate a balanced receivables portfolio for an ETC.

The additional option would be for a regional bank to joint venture with either a consumer goods or a heavy goods manufacturer who has the marketing expertise to sell products overseas, to understand or limit the product warranty risks and to provide the service support necessary for products sold into the international marketplace. Whatever philosophy that would work best with our particular customers would determine how, or if, a joint venturing were formed. If none were interested, we would not hesitate to enter into a joint venture with other banks as previously mentioned.

Now, from the standpoint of the banking industry, particularly—

Senator HEINZ. Before you go on to the banking industry, let me clarify one question. Your bank does not own or control any marketing offices overseas? You don't have an overseas business, do you?

Mr. STUCKY. We do not.

Senator HEINZ. So you are in one sense typical of a lot of banks that do not now engage in international banking; is that correct?

Mr. STUCKY. We have a London branch, but it performs the typical functions of that type of facility. It has not been actively involved in trade financing as the Milwaukee bank has.

Senator HEINZ. Therefore, what you have suggested is that those banks, such as yourselves, that don't have much in the way of overseas operations would find the trading company concept very attractive, either together or singly.

Mr. STUCKY. Yes.

Senator HEINZ. Even though they don't now have immense overseas capabilities.

Mr. STUCKY. That is correct.

Senator HEINZ. That is a point that hasn't been brought forward by any of our previous witnesses. There has been an assumption, perhaps unspoken, that it was only the banks with the international operations that would be interested in setting up a trading company. I think your testimony is very valuable in that regard, and I thank you for it.

Mr. Dawson, you, too, have on behalf of the Bankers Association for Foreign Trade made a very strong case for this legislation. Do you think that the restrictions on the level of bank investment permitted as they are now in the bill, are too heavy, that the limitations are too low?

Mr. DAWSON. Mr. Chairman—

Senator HEINZ. And second, you might comment on whether the conditions for approval as they are now in S. 144 are too strict.

Mr. DAWSON. Mr. Chairman, I would think that if S. 144 passes as it stands, that we might find over time that perhaps they are too strict. But as a starting point I do not think they are too strict. I

think as a starting point they are quite reasonable. There are, after all, legitimate concerns in some of these areas, and I think the restrictions that are there are necessary to deal with those legitimate concerns.

Senator HEINZ. Is the provision of the bill permitting disapproval of a subsequent investment by a bank in an ETC after the initial investment, or moving the ETC into a new line of activity necessary?

Mr. DAWSON. I think as a starting point it probably is necessary. But once again, once a record is established, a favorable record is established, these are things that perhaps are too stringent.

Senator HEINZ. You know, I think you are in a good position to provide some examples of the kinds of experience, for example, an established international network that your banks, the members of your association could bring to an ETC. I think any information you can give us on this would strengthen the record, because I would like to be very clear on the extent to which banks do have expertise and skill in this area.

Mr. DAWSON. Mr. Chairman, I would want to make sure that my mind and mouth are both working well this morning. I have taken the "red-eye" plane flight from California last night, so I hope I am reasonably articulate.

BANKING SKILLS IMPORTANT TO SUCCESS OF ETC'S

If one were to look around American business and ask in which industry one would likely find the kinds of skills that would be most important to the success of an export trading company, the banking industry has to be very high up on the list, possibly at the top of the list, especially among the larger banks that have a most impressive expertise internationally, a network of installations that would tie well with the business.

They seem to be natural participants. The only thing that suggests to anyone, I think, that they are not natural participants is that the banking industry is a very highly, we think, overregulated industry, and it is always subjected to special kinds of considerations.

I agree with Doug Stucky, who incidentally we are proud to have as a director of the BAFT, and he's been very active in our export expansion committee over the years, I agree with Doug that what we want to have and what S. 144 permits is a flexible approach.

Those who require control and, most assuredly, those who have the most to bring are the ones who feel most strongly about control, and that is the larger banks, that they ought to have that right if we want to attract them to the party.

On the other hand, there are a variety of approaches that will be appropriate for other banks, as Doug has explained.

Senator HEINZ. Excuse me. Go ahead.

Mr. DAWSON. To refuse control for the banks is, I believe, to eliminate the interest in those who have the most to bring.

Senator HEINZ. I would also note, although you said this, that on page 7 of your summary statement you make the very strong and I think commendable statement, that because banks are—I am paraphrasing—banks are well aware that commercial risks can be generated in a trading company, banks are for the most part not

interested, not interested in equity participation in ETC's unless they can exercise control and institute the enforcement procedures and management processes that carefully limit the risks involved.

That is probably the strongest statement we have had about the benefits of control in terms of minimizing risk to the banking industry, which is what Governor Wallich is understandably concerned about.

Mr. DAWSON. Absolutely right.

Senator HEINZ. On pages 12 and 13 of your written statement as opposed to the oral statement, you have provided a very interesting insight into history. You note that with respect to the issue that has arisen about the separation of banking and commerce, that there is a very real and compelling precedent involved in small business investment companies.

And you quote from a report issued by the Senate Banking Committee, in 1976, that justifies an explanation why this committee and the Senate recommended 100-percent ownership of small business investment companies by banks.

Prior to that time there had been a 50-percent limitation. This limitation was repealed by this committee's legislation. I won't quote the rather lengthy committee report. But, I would, without objection, ask that the quote from the committee report on page 13 of your prepared statement be inserted in the record at this point.

[The excerpt from Senate Report 94-420, 94th Congress follows:]

Section 108 of the bill would permit banks to own 100 percent of the voting common stock of a Small Business Investment Company. In 1967, the Small Business Investment Act was amended to prohibit a bank from acquiring 50 percent or more of the voting equity securities of an SBIC. The provision, which was initiated in the House, was provoked by concern over the "monopolistic potential" of commercial banks in the SBIC program, although there was no evidence of abuse.

The SBIC industry and SBA have been actively working to bring more private capital into the program. Although many banks have expressed interest in the program, it is frequently difficult to find compatible coinvestors with sufficient assets. A bank's exposure is limited by law to a maximum investment of 5 percent of capital and surplus. Allowing banks to control or wholly own a license would serve to encourage financial institutions which are interested in the sound development of the SBIC program and would increase the amount of capital available for small business investment.¹

Mr. DAWSON. Thank you.

Mr. STUCKY. Mr. Chairman, could I state something into the record on the point you addressed on the possible interest of regional banks in ETC's? You seemed surprised that many regional banks would have a strong interest. I want to share some personal experiences while following this legislation for the better part of 2 years.

I have kept an informal list of the banks that have called me because of the involvement that I have had in this legislation. I can tell you that no less than 25 regional banks have an individual or a task force that are seriously looking at this type of legislation and what it can do to help them serve their local, and middle-market customers best.

I think there is much more support for ETC's amongst the smaller regional banks than this committee is maybe aware of. I also think it is important to stress that, because the smaller customer or exporter is most likely going to be served by a regional bank, it

¹S. Rept. No. 94-420, 94th Cong., 2d sess., 8-9 (1976).

is essential that such have the capability to provide the services readily rendered.

There is no lack of interest and support from my own overview, for ETC's in the regional bankings segment of our industry.

Senator HEINZ. Mr. Stucky, thank you. I am glad you made that point. I, myself, haven't had a chance to review the testimony of the Independent Banking Association which is composed largely of the smaller banks.

I hope that it is exactly as you say and that it takes a similarly positive position. But I am glad that we have your testimony on the record. I appreciate it.

Senator PROXMIRE.

Senator PROXMIRE. Mr. Stucky, how big is your bank, what are the footings?

Mr. STUCKY. The Anchor Bank in Milwaukee, is approximately \$4 billion, while the total holding company is about \$5¼ billion.

Senator PROXMIRE. Where do you rank in the country in size as compared to other banks, you are what?

Mr. STUCKY. The bank would be roughly in the 45 to 50 range amongst U.S. banks.

Senator PROXMIRE. Far and away the biggest bank in Wisconsin?

Mr. STUCKY. Yes, I think that is a true statement.

Senator PROXMIRE. I am not sure I completely, I am completely clear on your position as to whether or not your bank would want to set up and control an ETC, or whether you would want to do that in concert with other banks.

OWN EXPORT TRADING COMPANY

Would you have any plans to have your own export trading company?

Mr. STUCKY. We have looked at all three possibilities. The preference, as I stated before could be one that would jointly be formed with other regional banks.

However, there are a couple of customers, one an export management company, one a major multinational firm, who have, off the record, talked with us about joint venturing in an ETC. Depending on the particular appeal that could be generated from our customer area, we might go that joint venture route.

Now, if both of those alternatives were to fall apart, we might decide independently, in my opinion—I can't speak for bank management, who has talked about this—to form our own trading company and we would want control in that trading company if we were the prime sponsor and mover behind it.

Senator PROXMIRE. So that under those circumstances, those are not necessarily the choices you would prefer, but under certain circumstances you would agree with Mr. Dawson that you would want control?

Mr. STUCKY. Yes.

Senator PROXMIRE. On the other hand, you might prefer one of the other two alternatives if you could work it out. Can you give me any idea how many banks in Wisconsin would be interested in setting up an ETC, if any?

Mr. STUCKY. I know for sure that the three largest banks are all actively looking at it.

Senator PROXMIRE. All actively looking at it?

Mr. STUCKY. Yes.

Senator PROXMIRE. Out of 200 or 300 banks in the State.

Mr. STUCKY. Yes.

Senator PROXMIRE. I would like the judgment of both you and Mr. Dawson as to what effect, if any, the amendment, you are familiar with my amendment?

Mr. STUCKY. Yes.

Senator PROXMIRE. Mr. Dawson, I presume, is familiar with the amendment?

Mr. DAWSON. Yes, sir.

Senator PROXMIRE. What effect, if any, that amendment would have on the, in the first place, I would like to ask you, on increasing exports in Wisconsin. Say we adopt the bill with the amendment I have suggested confining this largely to holding companies and Edge Act corporations, bank holding companies and Edge Act corporations. Would this have any effect, in your judgment, in reducing the export business available in our State?

Mr. STUCKY. Reducing?

Senator PROXMIRE. Reducing it as compared to not having the amendment.

In other words, the alternatives are this. We adopt this bill, and I think it is going to be adopted, it went through the Senate last time unanimously including, of course, my support, but if we adopt this bill with my amendment or without it, my question is, what effect, if any, would that have, in your judgment, on the export business in our State?

Mr. STUCKY. I think, first of all, export trading companies, whether it is Wisconsin or whether it is any State which has products which are sold in the international marketplace, will enhance the total exports of this country because the export trading company is a proper vehicle by which a commercial bank can most conveniently handle the occasional exporter's business.

By itself, the smaller exporter does not offer the potential profit or appeal to a bank to work with it or to train and educate its staff for the occasional transaction. But, if the bank has the assurance that business can be channeled to a trading company which is competent and efficient and knowledgeable about the international marketplace, you can consolidate that business and handle it on a much more efficient basis, and you will, therefore, encourage your calling officers to sell the international services of the bank more actively, especially amongst middle-market customers, than they presently do.

That will enhance total exports in Wisconsin and elsewhere.

Senator PROXMIRE. Now, you have answered my question largely, but not specifically. How will my amendment affect that?

Mr. STUCKY. I think your amendment at first blurb does not have any major objections, either from me personally or from other banks that I have talked with. However, I think there are some banks, and having to speak on behalf of the ABA, you surely must realize that the constituency of the ABA is a bit different than just one bank, that do not have holding companies would be forced to form an Edge Act or a holding company if they wish to provide the services of an ETC firm to their clients.

It might result in a greater concentration of ETC's than maybe desirable in the financial and economic policies of this country, thus, I would opt for the flexibility of S. 144 as introduced.

Senator PROXMIRE. Let me interrupt to say that the testimony we had yesterday from Mr. Heimann and Governor Wallich, particularly Mr. Heimann, indicated that there were few, if any, a very small number at least, of banks who would be qualified to competently operate an ETC that weren't holding companies.

Mr. STUCKY. I think I would agree with the statement, but would not want to preclude others down the road from having to form a holding company to accommodate that type of need. I think Mr. Heimann's statement, which I have read by the way, is a very sensible one.

I think there are indeed risks in doing this type of business. I think much more emphasis ought to be placed as to having the regulators assure themselves, as well as the exporters of this country, that a bank or ETC has the capability to judge risk and to carry out the technical functions of an export transaction.

I think experience and know-how is very important probably moreso than believing, from a regulatory viewpoint, that by imposition of a 20-percent-bank-equity limit, that one can effectively minimize the risk to a banking organization in one export trading firm.

Senator PROXMIRE. Mr. Dawson.

Mr. DAWSON. Senator Proxmire, I would share Mr. Stucky's feeling that from the point of view of requiring bank holding company or Edge corporation ownership of such an activity, that it might preclude some banks from engaging in the activity just because they didn't have that vehicle.

I think, on the other hand, as a practical matter, that those banks that do have holding companies, or do have Edges, will likely elect to place the activity in one of those kinds of vehicles.

But I would also hate to have a bank precluded just because it didn't have the appropriate vehicle or was forced to form it for that specific purpose.

SHARP INCREASE IN AMOUNT OF REGULATION

Senator PROXMIRE. One of the reasons that I raise this issue, too, is because Governor Wallich indicated that one of the very serious problems with this legislation is that it is likely to increase sharply the amount of regulation, the amount of, he said, oversight and so forth, would have to be intensified.

And he would, I think, we all agree, that the banking industry is overregulated. We would like to limit that as much as we can.

One way to do it would be to have it operated uniformly with one agency, the Federal Reserve Board, which would do so if we confined this, of course, to the Edge Act and the holding companies.

Mr. DAWSON. Well, if we could find a way to reduce the amount of regulation on holding company activities, and leave the regulation just with the banks, then I think the banking industry would be forever in the debt of the legislators that produce that approach.

I think the second part, the principal part of your amendment, Senator, the setting of a test as to whether this would be a positive for American exports, I think, frightens us a little bit in that knowing the position of the Fed, we think that we might have an

extremely hard time making the case to the Fed that the activities of the export trading company would meet that kind of test.

Senator PROXMIRE. Yes. My amendment breaks down into two parts.

Supposing we should not include the burden of proof on the applicant that wanted to set up a trading company, but did provide that the trading company would be set up with Edge Act corporations or with holding companies, but eliminated the burden of proof.

Wouldn't that take care of that part of your objection?

Mr. DAWSON. Well, I would say that as between the two items, the one that is most worrisome would be meeting the test.

And the one that is probably less worrisome is the requirement that it be in a holding company or in an Edge, although here, again, I think it is better to permit people to elect whatever vehicle they wish to use.

But, as between the two, the one that I think that we could accept more happily, would be the requirement that it be in a holding company or an Edge.

Senator PROXMIRE. Let me ask you, I think in this legislation, in determining this legislation, it seems to me it is witnesses like you who convince us it would be wise to transfer from the Justice Department Antitrust Division that responsibility of enforcing our antitrust laws, has the expertise, the competence, has the personnel, to the Commerce Department to make the decision as to whether or not antitrust laws are being violated.

What is your case for taking this authority away from the Justice Department with respect to trading companies?

Mr. DAWSON. Senator—

Senator PROXMIRE. Which, as I understand it, the bill does.

Mr. DAWSON. Yes; I am not able to respond effectively to that point, and would prefer just not to answer.

I am not familiar enough with the mechanism that the Commerce Department has in mind to monitor the antitrust provisions, although I think when you are in an industry as tightly regulated as banking, that we are controlled in so many ways that it seems to us very hard to sin.

Senator PROXMIRE. Well, whenever there is a way to sin, most of us will find a way to do it, unfortunately.

Mr. Stucky.

Mr. STUCKY. A personal reaction to that point.

From the simplistic standpoint, I feel that the total trade transaction ought to be viewed in the perspective of a national policy for exporting.

I think the Antitrust Division, per se, concentrates much too much on the domestic side of this, which is their prescribed role, and then they try to extrapolate from that role using the same mechanisms and the same tests for a sale conducted in the international marketplace. Such comparison is, in my opinion, unfair and likely to be misleading.

I don't feel that the FTC has the perspective of what the total U.S. trade position must be. I think the Commerce Department offers a better overall perspective.

For that reason, the Commerce Department deserves the opportunity in conjunction with the Justice Department or the FTC, from whom they are going to have to learn from the Antitrust Division some of the intricacies of the implications of this, the Sherman Act and Clayton Act and the likes of that.

I think initially close cooperation is essential, but I think the Commerce Department can take the role over and give a better perspective in total to the trading role of this country, including the anticompetitive aspects.

Senator PROXMIRE. My time has expired, Mr. Chairman.

Senator HEINZ. Mr. Stucky, I want to continue with the discussion of Senator Proxmire's amendment, if we may.

Mr. Dawson has indicated that the second part of his amendment, where the Board of Governors shall not approve an application unless it determines on the basis of the record that such an investment would contribute significantly to the export, and the export trading company agrees and will operate in a variety of ways as yet unknown, to be prescribed by the Federal Reserve, do you support that part of Senator Proxmire's amendment?

Mr. STUCKY. I personally feel that both of the tests that are required are very difficult to achieve.

I understand the reason why one would impose them. First of all, it is in the national interest to have something like that.

It is kind of like asking a doctor after he's completed cancer surgery on your wife, whether he has gotten all of it.

It's the same conditionality of exports; 5 years from now, the doctor might be able to tell you, or we might be able to tell you.

I think the tests, and I think just by dialog between regulators, the Congress, and operating ETC's, that we will evolve without strict controls and standards initially, the most effective ETC down the road.

To hamstringing it with those tests now, I think, might frustrate the development of successful ETC's.

Senator HEINZ. Now, both you and Mr. Dawson have talked about the first part of Senator Proxmire's amendment, which has at the outset a requirement that only holding—banks with holding companies or Edge Act corporations, could form or participate in a major way in ETC's.

Now, let me ask you both this question.

Should, as a basis of policy, our criteria for judging the appropriateness of a bank or banks entering into an investment in an export trading company be properly judged by whether or not they merely happen to have an Edge Act corporation or a holding company?

Or from the standpoint of public policy, is it not better to have some kind of rationale that is related, not to what kind of appendages happen to be involved with the particular banking institution, but whether the bank has the capabilities to assess the risks, to contribute its skills, to manage wisely.

Would you care to comment?

Mr. DAWSON. I would agree with your suggestion that it is not appropriate nor most desirable to have the requirement that a participant of a holding company or an Edge.

I think, on the other hand, that this need not be a terrible impediment to most of the people that are interested.

I do, in a sense, share, perhaps some of the philosophy behind the approach that perhaps banking and nonbanking activities are different and ought to be housed in different pews, and hopefully, eventually regulated differently.

At the present time, we suffer the full weight of the regulation, whether it is in the bank or the holding company, so there is no advantage to us really to put something in a holding company.

If hope were to be held out to us that the holding company's activities were not really going to have a parade of examiners looking over our shoulders every day, then I would be inclined philosophically to support that distinction.

I don't think we have been given very much encouragement so far, however on that point.

Senator HEINZ. That goes a little bit beyond that bill.

Mr. DAWSON. Yes. Yes; and as I say, our position is that we believe at this stage of the game, the way things are today, that the best approach is to permit participation to anybody, based on the Fed's determination as to their capacity and without regard to where it might be housed in the organization.

Senator HEINZ. Mr. Stucky, I see you basically—

Mr. STUCKY. Wholly agree.

Senator PROXMIRE. You said the Fed's determination.

Without this amendment, you would not have just the Fed's determination.

Mr. DAWSON. Well, the regulator's determination. I misspoke.

Senator HEINZ. Mr. Stucky, I gather you would agree?

Mr. STUCKY. Yes.

Senator HEINZ. Gentlemen, you have been extremely helpful. I appreciate your insights, your frankness, and your good judgment.

Thank you very much.

Mr. DAWSON. Thank you very much.

Senator HEINZ. Would Mr. Boles and Mr. Cooper and Mr. Guttman please come forward.

STATEMENTS OF H. PETER GUTTMANN, PRESIDENT, HPG ASSOCIATES; JOHN M. BOLES, PRESIDENT, BOLES & CO., INC.; W. PAUL COOPER, CHAIRMAN, ACME-CLEVELAND CORP. AND CHAIRMAN, GOVERNMENT RELATIONS COMMITTEE, NATIONAL MACHINE TOOL BUILDERS ASSOCIATION; AND JAMES H. MACK, PUBLIC AFFAIRS DIRECTOR, NATIONAL MACHINE TOOL BUILDERS ASSOCIATION

Mr. COOPER. Thank you, Mr. Chairman.

Senator HEINZ. Gentlemen, would you please introduce yourselves and any associates.

Mr. GUTTMANN. I am Peter Guttman, president of HPG Associates.

Mr. BOLES. I am John Boles, president of Boles & Co.

Mr. COOPER. I am Paul Cooper, chairman of the board of Acme-Cleveland Corp., and accompanying me today is Mr. James H. Mack, public affairs director of the National Machine Tool Builders Association.

That is the trade association which represents Acme-Cleveland, as well as 400 other machine tool builders.

Senator HEINZ. Let me ask Mr. Boles, who has the center seat, to start.

Mr. BOLES. Mr. Chairman, my oral statement is my written statement.

I am John M. Boles, president of Boles & Co., Inc., an international trading company. Our company differs from most export management companies in that we were conceived and organized as a trading company drawing upon the experiences of the large multinational trading companies of Europe and Japan.

Our export activities span a broad range of categories from high technology systems to consumer products. We also import products for distribution in the U.S. domestic market and are engaged in third-country transactions as well. In most instances we act as principal, by purchasing products from our suppliers and reselling to our customers.

One key element in our export success to date has been the long-term credits we provide to our foreign customers while paying our suppliers—manufacturers—on a short-term basis. In combining the two, we finance foreign receivables and domestic inventories thereby reducing cash restraints for both our suppliers and customers.

We perceive our contribution as moving products across international boundaries by reducing the resource load on both the supplier and the foreign customer. In addition, we take on the task of market identification and research, transportation, compliance with foreign regulations, product service, advertising, promotion and all of the other tasks required to penetrate and develop offshore markets.

LONG-TERM CREDIT TO FOREIGN CUSTOMERS

In essence, we are a major customer of our U.S. suppliers. In fact, we are a domestic customer—by taking title to our suppliers' products in the United States. This allows our suppliers to finance their shipments to us through the use of their established bank lines of credit on domestic receivables. We then finance and take the risks associated with the foreign receivables. By offering long-term credits to our foreign customers, the rate of sales growth of any given product becomes a factor of market acceptance and independent of our foreign customers cash availability.

In practice, our foreign customers purchase goods from us; resell in their respective markets; receive payment from their local customers and then pay us. This is both fundamental and critical in the development of international markets.

In our export activities we have specifically targeted at the small- to medium-size manufacturer of technology products and value-added agricultural items. We are convinced that these sectors represent substantial opportunities for long-term continued growth in export sales.

Our market research has convinced us that by the end of the decade U.S. trading companies could account for approximately \$100 billion per year in export sales. It is not our intent to develop as an analog of the large Japanese trading companies but rather to amalgamate theirs and other experiences into a U.S. trading com-

pany which is responsive to the needs, opportunities, and regulations of this country.

Boles & Co., Inc., strongly supports the overall thrust of S. 144 along with its component provisions. We would, however, suggest that consideration be given to some of the more constraining aspects of the bill which would seem to be in conflict with the legislative intent.

It is essential that continuing progress be made in adapting the U.S. economy to the realities of world competition. In that regard, the formation of large U.S. trading companies will play a vital role. It is not our position that these trading companies would compete with existing export mechanisms, but rather would concentrate on those market areas, both products and geographies, outside the resource capabilities of export management companies and those manufacturers who are unable to operate directly in the foreign market.

Should this bill become law we can perceive the rather rapid development of an export trading industry as opposed to the cottage industry complexion our export activities currently have. Furthermore, such an export industry would be an invaluable added resource to this country's manufacturing base and specifically to the thousands of small- and medium-sized firms, many of which have difficulties in marshaling sufficient resource to satisfy their domestic objectives.

The composition of a trading company consists of numerous disciplines and functions, but to the U.S. manufacturer he is viewed as both a large customer and quasi-banker. From that perspective, this is a correct interpretation. From the foreign customer's point of view, the trading company is a supplier and banker—also correct.

The one common denominator in any definition of a trading company will always be the ability to finance trade transactions. From the time of the earliest Syrian and Phoenician traders through England's Charles II and his Hudson Bay Co. to the giant Japanese trading companies of today, the cornerstone of international trade has been that of financing both the supply and redistribution of goods.

U.S. commercial bank participation in trading companies is required. Without their involvement the development of a meaningful export trading industry would be impossible. An alternative might be foreign banking institutions, which is already beginning to occur, but that escapes our definition of a truly U.S.-owned export trading industry.

The critical issues in support of U.S. bank participation include their expertise in the use of credit; foreign collection procedures; the structuring of complicated international transactions from barter to turnkey projects; foreign currency trend analyses and those other financial services which only our banks are well equipped to handle.

We are not convinced that either the domestic or foreign branch operations of a bank would be particularly productive in sourcing or distributing products for the trading company. The branch role would likely be limited to providing useful introductions to potential suppliers and customers.

We, as well as most trading companies, will require approximately \$1 in cash, either debt or equity, for every \$1.5 in sales. As is evident, a trading company is extremely cash intensive and success is largely dependent upon the ability to secure substantial amounts of debt financing.

DEBT TO EQUITY RATIOS

Typically, debt to equity ratios of at least 10 to 1 will be required for the small or slower growing trading companies and as much as 30 to 1 for the larger and faster growing companies.

We have concluded that export trading companies can only be successful through an intimate relationship with U.S. commercial banks, provided they are prepared to either offer the requisite credit facilities or cause them to be offered by other financial institutions.

As U.S. trading companies will compete with foreign trading companies and various consortia, the issue of credibility becomes important. A small U.S. trading company is at a great disadvantage when compared to a Mitsubishi, Mitsui, Jardine Matheson, or Inchcape. However, a U.S. trading company affiliated with, or partially owned by, a major U.S. commercial bank becomes quite a different reality in the eyes of a foreign customer. International trade is predominantly controlled by extremely large enterprises, and small unparented U.S. export companies are likely to become nonevents.

It is difficult to comprehend any logic that would prohibit a commercial bank from owning a minority, majority, or total interest in one or more trading companies. Under title I of the current bill the limitations imposed on bank participation could very well be unworkable. The restriction limiting bank investments to a maximum of 5 percent of capital and surplus is less troublesome than is the \$10 million limit and 50 percent equity ownership provisions.

In view of the substantial amounts of debt and equity required to support trading company operations, unless the banking community can see an uncomplicated route whereby they can assume or exert control, their support is likely to be less than enthusiastic.

We suggest that consideration be given to allowing banks equity positions up to 100 percent, provided their total equity investment in one or more trading companies does not exceed the 5 percent of capital and surplus test. The \$10 million provision could then be eliminated and the decision by either a bank or trading company to combine would be a business judgment based upon the particular circumstances of each situation including the opportunities, resource requirements, and availability.

Depending upon the specific business architecture of any export trading company, antitrust exemptions may or may not be relevant. However, it is necessary that the law be clearly stated. The ability to determine in advance which export activities would be immune from antitrust suits is absolutely required. We support the proposals under title II of the bill and can offer no reasonable alternatives.

Frequently very large offshore procurements will continue to require the Export-Import Bank's involvement. The realities of

foreign competitive pricing, coupled with government subsidies, are such that U.S. suppliers require financing packages beyond what is currently available from the private sector. We endorse and urge that these kinds of programs be expanded by the Export-Import Bank.

Generally U.S. commercial banks are reluctant to finance foreign receivables without the kind of guarantees currently provided by the FCIA. Our lack of a broad-based export experience has resulted in both debt and equity capital sources being uneasy over the perceived risk-reward ratios. Should the United States develop a well constructed export trade industry, spearheaded by private sector interests, the vagaries currently associated with exports will give way to knowledge, sound business procedures, and the comfort needed to sustain entrepreneurial activity.

There is, however, a problem of bridging the gap through a transition period. This will require a much improved guarantee program by the Export-Import Bank and the FCIA. Such a plan should include provisions to finance domestic inventories specifically targeted for export markets in addition to receivables.

Once the U.S. banking community, along with other capital sources, establishes a firm presence and interest in foreign trade the requirement for Export-Import Bank and FCIA guarantee programs should wane.

Regarding the Small Business Administration and the Economic Development Administration, we consider the level of funding to be not inadequate but unnecessary. When coupled with the overall task of developing an export industry, the administrative costs and the natural constituencies of those two agencies, we can see no real benefits accruing from their financial involvement. Although we are all eager to bring small businesses into the stream of export activity, the preferred route would be by way of the export trading companies providing the finance rather than public sector funds.

KEY POINTS

In summarizing, I would like to draw your attention to just a few key points:

First, U.S. export trading companies are required to both diversify export markets and to expand the number of U.S. supplier participants.

Second, these export trading companies could spearhead the development of a substantial export industry by the end of the decade.

Third, enthusiastic U.S. bank participation is vital to the creation of an export industry.

Fourth, U.S. banks are not likely to become enthusiastic participants without the ability to assume controlling interests in trading companies.

Fifth, antitrust immunity will be relevant to some trading companies and of no consequence to others. All trading companies; however, will need to have a clear understanding of their antitrust liabilities.

Sixth, Export-Import Bank participation should be expanded on large offshore procurements and an improved inventories and receivables program implemented.

Seventh, as private sector financial institutions become increasingly conversant with export trade activities, they will tend to move into the role of financing inventories and receivables.

Eighth, Small Business Administration and Economic Development Administration funding programs would not be productive or necessary if private sector financial institutions become involved.

Ninth, finally, the concept of a broad-based export industry is fundamental, transcending more than just the current trade deficit problem. It addresses the broad issues of world markets in a world economy where technology, products, and services flow without regard to national boundaries. It further focuses on the critical questions of capital formation, new job creation, inflation, asset redeployment, and international prestige. Indeed, it is difficult to see how we can formulate and implement domestic economic policy without a parallel policy on international trade.

Thank you, Mr. Chairman.

Senator HEINZ. Mr. Boles, thank you.

Mr. Guttmann.

Mr. GUTTMANN. My name is Peter Guttmann. I am the president of HPG Associates, a small, independent firm of management consultants in architecture, engineering, finance, management and planning, practicing internationally.

I am also an officer of the International Engineering Committee of the American Consulting Engineers Council (ACEC) on whose behalf I appear today.

ACEC is a national organization with a membership of about 3,700 engineering firms in the United States. Although a small percentage of the membership, there are a number of firms, on the order of about 100, which have for many years provided consulting engineering services throughout the world.

The American Consulting Engineers Council also participated in many joint activities with other trade associations which bring together representatives of the service industries for the purpose of analyzing the international trade problems and needs of the service sector.

For example, we chair the Export Trade Promotion Subcommittee of the International Service Industry Committee, of the Chamber of Commerce of the United States.

ACEC is also chair of the International Engineering and Construction Industries Council.

Thus, while I shall speak today from the perspective of the International Engineering and Construction Industries, I believe my comments broadly represent a viewpoint common in most, if not all, U.S. service industries.

VIEWPOINTS OF U.S. SERVICE INDUSTRIES

Consulting architects/engineers render professional services. We plan, study, specify, design, supervise and manage construction.

We provide training, handle operations, and occasionally we trouble shoot. We are part of the engineering and construction industry which contributes about 15 percent of the gross national product of the United States of America.

Through the international marketplaces, American consulting A/E's contribute significantly to the balance of payments and foreign trade of the United States.

This does not follow from our fees, which are relatively small—front end—sums, merely a fraction of the cost of the projects on which we work—but from materials and equipment we specify and against which manufacturers—the exporters of goods—will have to quote.

Moreover, largely as a consequence of the difference in measures, few U.S. builders today can or will bid on overseas projects unless the plans and specifications are written by U.S. architects/engineers.

As for the ratio of consultants' income to the volume of business their specifications generate, the U.S. Department of Commerce has estimated that for every dollar of fees which we earn for our services, \$8 are subsequently exported in construction-building services and equipment, machinery and goods.

Consulting A/E's, as a whole, are recognized promoters of foreign trade, and, as such, it is increasingly the case that foreign governments support their nationals with a substantial array of incentives.

I assume it is not necessary here to recount the litany of disincentives to American consultants' overseas practice with which our Government has distinguished itself.

Allow me to offer one illustration of the landscape of foreign competition into which American A/E consultants regularly enter abroad: One German firm, two British, one French, two Canadians, one Italian, one Scandinavia—eight Americans.

And, of course, never more than one Japanese outfit. If an international technical services proposal typically costs from \$5,000 to \$100,000 just to prepare, consider the economic implications of foreign professional consortia for their American counterparts.

In a word, Mr. Chairman, the situation reduces to the dilemma of extinction or emigration, that is, multinational incorporation.

In foreign countries today, the merchants and manufacturers and businessmen generally are allowed to combine to go out and to seek foreign trade, and they do combine for that purpose.

If we are to meet them on a fair basis of competition, we must place in the hands of our businessmen the same methods which the businessmen of other nations use in seeking foreign trade.

These, Mr. Chairman, are not my words. They were spoken in August 1919, by Senator Atlee Pomerene. The Senator succeeded in persuading a reluctant Congress to pass his bill, but, alas, the U.S. service industries had no lobbyists in place at that time, so the famous Webb-Pomerene legislation failed to include services—only goods.

It may come as a surprise, but as late as 1970, high officials of the U.S. Government thought Webb-Pomerene applicable to architect/engineer services and it became a bitter disappointment to all involved that this was not so. Permit me to explain:

In one of the early moves to promote the export of U.S. goods and services, the U.S. Department of Commerce, in 1969, developed a Joint Export Association program, and invited A/E's to establish

a professional JEA by means of which to solicit engagements in Southeast Asia.

With the support of American Consulting Engineers Council, and under the direct sponsorship of the U.S. Department of Commerce, I founded Amer-Asia Consultants in 1970 and, through the general counsel of the Commerce Department, applied for Webb-Pomerene Association status with the Federal Trade Commission.

Of course, the FTC had no choice. The application was refused, and as attachments Nos. 1 and 2 will show, and I offer these attachments without reading them.

Senator HEINZ. Without objection, the attachments will be included in the record at the appropriate point.

THREAT OF ANTITRUST ACTIONS

Mr. GUTTMANN. The intercession of the Secretary of Commerce was required to afford Amer-Asia—a group of 12 small private U.S. consulting firms—assurance from the Attorney General of the United States that it would not be subjected to criminal antitrust proceedings.

To my knowledge, Amer-Asia was the only U.S. consortium of 12 competing domestic service firms who worked harmoniously and successfully in the international arena.

In the end, in 1974, it was not the U.S. Government, but the threat of antitrust action by domestic U.S. competitors that forced us to dissolve.

While we obtained work overseas and earned reasonable fees, we could not afford the legal defense funds against possible antitrust proceedings.

Since then, I have often referred to the Amer-Asia experiment in efforts to convince the Congress that Webb-Pomerene should be amended to include services.

I have testified on this matter many times. In vain. Other organizations, such as the Chamber of Commerce of the United States, have taken similar positions, also in vain.

Until fairly recently, Webb-Pomerene appeared to be the only vehicle to permit consultants in particular and the service industries in general to meet international competition by joining forces and presenting a united U.S. approach in the foreign markets without also incurring the unacceptable threat of U.S. antitrust action.

The initiative by you, Mr. Chairman, Senator Danforth and former Senator Stevenson to facilitate U.S. exports by legislating the sanction of a U.S. trading company considerably expands the original purpose of the Webb-Pomerene Act and will at last accord the American industry instruments of competition which have long worked to the advantage of our foreign competitors.

I could envision, just for my industry, U.S. architects/engineers and other professionals participating in trading companies activities:

Forming an Amer-Asia type of consortium.

Contributing design-engineering expertise to contractor/builder groups, as well as construction and project management.

Assisting banks, insurance companies, appraisers, as technical partners for specific service areas.

Providing professional guidance/advice in mining, ocean science and technology enterprises, space and communication ventures.

Now, with specific reference to some of the questions that you have posed to me in your invitation to testify:

Yes, I feel that banks must be able to participate in trading companies. Financing is a basic and essential part of foreign operations, sometimes it is the key to success.

So banks are indeed desirable partners to have inside a combine. You will find banks in many of our foreign competitors' consortia.

Not being a banker, I cannot address the circumstances under which banks should be permitted to control trading companies or what safeguards, if any, are necessary over that control.

I can only state that banks in general have been good advisers and provided experience counsel to the service industries seeking international engagements.

We welcome them as prospective partners.

Antitrust immunity is absolutely indispensable to the formation of export trading companies. It is precisely because of antitrust restrictions that the U.S. service industries have shied away from foreign joint-venture associations—losing job after job to foreign competitors who do not suffer this domestic impediment in their international work.

The U.S. service industry sector welcomes the proposed S. 144 legislation as the needed avenue to the amalgamation of our forces.

Members of my profession do not ask for any subsidies or special incentives.

We wish simply to ply our trade overseas, free to compete on relatively equal terms with our foreign counterparts, without undue exposure to what are properly domestic constraints and punitive sanctions.

This the export trading company legislation before the Congress will permit us to do. Hence, we support it and urge you to pass it—the sooner the better.

Thank you for this opportunity to speak personally in favor of the proposed legislation.

[Attachments to statement follow:]

[Attachment No. 1]

U.S. DEPARTMENT OF COMMERCE,
BUREAU OF INTERNATIONAL COMMERCE,
Washington, D.C. April —, 1970.

HON. JOHN N. MITCHELL,
Attorney General, U.S. Department of Justice,
Washington, D.C.

DEAR JOHN: Two years ago this Department established a Joint Export Association (JEA) program offering cooperation and financial assistance from the U.S. Government to groups of U.S. companies joining together to sell abroad. Under the JEA program, the Government shares specified costs of overseas market development activities with cooperating groups on a contract basis.

The JEA activity was the subject of an exchange of letters between Commerce and Justice in December 1967. The Assistant Attorney General, Antitrust Division, offered, in his letter of December 29, 1967, "to consider particular contracts and the proposed activities of associations which may be party to such contracts on a case-by-case basis whenever either the Department of Commerce or the participants involved may consider that antitrust problems may be raised." We should like to avail ourselves of this offer for a proposal now under consideration by Commerce for JEA support.

The typical JEA contract to date has provided for joint overseas marketing activities by or on behalf of groups of manufacturers of noncompeting products. A

group of consulting engineers has now submitted a proposal under which these firms would organize an association to develop and pursue opportunities in Southeast Asia for the sale of their services. Because there is some overlapping of the services offered by the firms, as distinguished from the complementary nature of the firms in JEA's with which we have contracted in the past, I should like to have your views as to the compatibility of the proposal with the antitrust laws.

The following are the chief elements of the proposal: An office of the Association would be established in the region, headed by a general manager who would travel throughout the region to acquire information on prospects and plans for major projects such as power plants, water systems, hospitals, factories, etc. Specific business leads would be forwarded to the Association's headquarters in the United States which would elicit expressions of interest from the Association's members. A selection board would rate interested firms and designate the best qualified. The designated member firm would prepare and submit bids, and, if successful, execute the projects. It would receive assistance from the Association in financing its effort to secure the business. Nonselected members could, if they chose, compete with the selected member for the project, but without financial help from the Association.

The initiative for the formation of this Association was taken by the Consulting Engineers Council of the United States, which circularized its membership and held meetings respecting the JEA program, culminating in the formation of the present group. All CEC members were invited to join the group. CEC has a membership of more than 2,300 firms, of which some 150 are normally interested in international work. The charter members of this Association consist of 12 firms. Several of these have less than 10 employees; only 2 have more than 300. The total group will have about 750 employees. There are about 15 consulting firms in this country affiliated with the CEC that have more than 600 employees. It is estimated that the 12 members of the group perform less than 5 percent of the total work by consulting engineers in the United States.

It is estimated that U.S. firms account for less than 10 percent of the consulting engineering work in Southeast Asia. Despite the very high potential in this area for sales of such services, the U.S. share is considerably lower than elsewhere. Competition is strong and our industry contends that other governments appear to be giving their firms considerable support on a selective basis. Although the U.S. participates substantially in the financing of projects in Southeast Asia through contributions to the World Bank and its affiliates, the United Nations organizations, and the Asian Development Bank, contracts obtained by U.S. engineering consulting firms amount to but a small percentage of U.S. contributions to these organizations.

As you may be aware, consulting engineering firms provide professional services in the field of study, design, supervision of construction, planning, training, and management. A consultant normally acts as an impartial adviser to a host country, a local government, an industry, or an owner. Consulting engineering services, for instance, for the study, the design, and the supervision of construction of a new facility may amount to some 5 percent to 15 percent of the total cost of the project. The consulting engineer's design and specifications, however, will usually define the costs of the acquisition of construction contractors, the equipment and material. Thus, if a United States consultant writes specifications, United States equipment is usually selected, and U.S. construction management becomes involved. It is estimated that for every \$1 in consulting fees, \$5 worth of equipment and services are purchased from the country of the consultant.

You can appreciate from the above the significance we attach to this particular proposal, which we are seeking to fund from fiscal year 1970 appropriations. I am hopeful that the information I have provided will enable you to respond favorably respecting the proposal's compatibility with the antitrust laws. Both the Department and the Association believe that the Justice Department's approval is necessary before any further action should be taken.

Sincerely,

SECRETARY OF COMMERCE.

OITP/JEA: JMurrin: MBERger: PMorris: gjt 4/27/70

cc: Morris, OGC

Baran

Schwartz

Berger, OCFP

Guttman

Subject (Department of Justice)

Chron

[Attachment No. 2]

DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION,
Washington, D.C. July 24, 1970.

Mr. H. PETER GUTTMANN,
Washington, D.C.

DEAR MR. GUTTMANN: This is in response to your letter of June 19, 1970, requesting a statement of the Department of Justice's present enforcement intentions with respect to the proposed formation and operation of a joint export association to be known as Amer-Asia Consultants. This response is pursuant to the Department of Justice's Business Review Procedure, a copy of which is enclosed.

The information you have supplied to us indicates that Amer-Asia Consultants is a proposed joint export association to be made up of eleven consulting engineering firms located in the United States. The sole purpose of the proposed joint venture would be to increase the participation of its members in major capital projects undertaken in Southeast Asia. It is contemplated that an office would be established in Southeast Asia for the purpose of acquiring information with respect to contemplated major projects in that region. Such information would be forwarded to the joint venture headquarters in the United States and expressions of interest in particular projects would be solicited from the members. A neutral selection board would evaluate the proposals of interested members and would designate one as the best qualified for a particular project. The board would not be informed of the price which the potential bidders would offer to the purchasing entity. The member firm designated as best qualified by the selection board would receive assistance from the joint export association in financing the member's efforts to secure the contract on the contemplated Southeast Asia project. Members of the association who were not chosen by the selection board would remain free to compete for the contract, but would not receive financial assistance from the association.

On the basis of the information submitted to us, it appears that the proposed members of the joint venture are not among the largest competitors in the United States or international consulting engineering markets and have not engaged in significant amounts of work in Southeast Asia. The aggregate 1969 domestic billings of all eleven members of the proposed joint venture was slightly less than \$31 million. Their aggregate international billings amounted to only \$2.55 million. Only one of the proposed members of the joint venture did business in Southeast Asia in 1969 and that business amounted to less than \$20,000. Moreover, it appears that some form of joint action between the parties to the proposed joint venture is necessary if they are to become significant competitors in Southeast Asia. Consequently, the Department of Justice, on the basis of the information which has been submitted to us in respect to this manner, does not presently intend to institute any criminal antitrust proceedings with respect to the organization of Amer-Asia Consultants.

As is customary in matters of this kind the Department of Justice reserves the right to institute civil proceedings and to take any other appropriate action in the future in the event that facts presently unknown to us or subsequent developments should warrant it.

Sincerely yours,

RICHARD W. McLAREN,
Assistant Attorney General.

Senator HEINZ. Mr. Guttman, thank you very much. I would like to ask Mr. Cooper to proceed.

Mr. Cooper, I note that your statement is 28 pages long. Would it be possible for you to summarize that?

Mr. COOPER. Yes. This is just excerpts from that statement. And I will be within your 10 minutes, Mr. Chairman.

Senator HEINZ. Fine, thank you.

Mr. COOPER. The legislation which we will be commenting on today, your bill, S. 144, is very similar to the legislation which this subcommittee reported last year, S. 2718.

We strongly supported that legislation, and we strongly support this year's bill. At this time, we would like to address some of the objections raised to last Congress legislation, S. 2718, in the hopes of allaying the fears of those who attempted to block export trading company legislation during the 96th Congress.

We commend you, Mr. Chairman, for your sponsorship of S. 144, a bill designed to stimulate exports, by spurring the creation of large-scale American trading companies that would provide a much needed export vehicle for small- and medium-sized businesses.

As one very important way to accomplish this goal, S. 144 attempts to stimulate investments by U.S. banking institutions in new or existing export trading companies. This, of course, is the aspect of the bill which has been the most controversial and has drawn the criticism of those who believe that commerce and banking should continue to remain separate activities.

Although NMTBA supports the general principle 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 nontraditional international trade competition.

Moreover, we further believe that as drafted, S. 144 contains more than ample provisions 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 CRITICAL FOR EXPORT PROMOTION

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.

As discussed in detail in our written statement, title I of S. 144 contains numerous provisions which are specifically designed to safeguard the financial integrity of banks.

By definition, the bill precludes export trading companies from being used as vehicles for investment in domestic industries. Furthermore, U.S. Government banking regulatory agencies would have clear authority to prevent ETC's from violating this restriction, since any significant investment by bank-owned ETC's would require prior approval from these agencies.

Additionally, S. 144 contains provisions which will specifically insure that bank-owned ETC's will not have unfair competitive advantages over ETC's owned by nonbanking firms.

Under S. 144, bank-owned ETC's will be much more heavily regulated than nonbanking firms. Specifically incorporating the request of the Federal Reserve, S. 144 prohibits a banking organization or any of its affiliates from extending credit "to an export trading company or to customers of such company on terms more

favorable than those afforded similar customers under similar circumstances.”

Therefore, we see no reason why if foreign banks can manage these risks, U.S. banks, which would be under the close scrutiny and supervision of numerous Federal regulatory agencies, would not be able to do so also.

EXIMBANK CAPABLE OF MEETING FINANCIAL NEEDS

Finally, opponents of direct banking participation in export trading companies have alleged that there is no need for direct bank involvement in ETC's because the Export-Import Bank of the United States—Eximbank—is already capable of meeting the financial needs of U.S. exporters.

Our response to such contentions is, simply stated, that whereas Eximbank is designed to offer targeted Government financial assistance in special exporting circumstances, bank-owned ETC's would provide U.S. exporters with a one-stop financing and marketing package designed to address a much broader range of export trading opportunities.

Moreover, although Eximbank is primarily a self-sustaining U.S. corporation, it is, nevertheless, a Government institution subject to official U.S. policy and regulation. Eximbank is, therefore, inherently less flexible than bank-owned ETC's would be in similar commercial circumstances.

As a matter of fact, the very future of Eximbank and its ability to promote U.S. exports is under serious attack as we meet here today.

Even if the proposed cuts in Eximbank's lending authority—cuts, which, I might add, will effectively shut down the bank's role as a major player in the export process—even if these cuts are not enacted, the projected needs of Eximbank are almost certain to go unfilled.

Thus, to expect an underfinanced, or perhaps even an unfinanced, Eximbank to provide a major source of credit for U.S. exports is but a fool's dream. Many of S. 144's strongest opponents are also the strongest and loudest critics of the Eximbank. How do they expect to finance U.S. exports?

Mr. Chairman, to state affirmatively some of the benefits we see accruing to the United States under S. 144, the bill would alter the laws separating banking and commerce only as they apply to the area of export trade, an area where the United States has always recognized the need for special rules to meet foreign competition.

Thus S. 144, rather than unnecessarily involving banks in commercial activities, actually follows the long tradition in U.S. law of not applying domestic rules to export trade activities, when to do so would only impede U.S. competitiveness in world markets.

Clearly, bank expertise would be both transferable and important to ETC management, organization, and operation. Direct bank participation is the fuel needed to power the ETC vehicle. Direct incorporation in U.S. ETC's of the many export services that American banks are able to offer would be of great competitive assistance to U.S. exporters who now incur additional delays and expense in obtaining similar service.

ANTITRUST LAW PROPOSALS

Now addressing briefly antitrust law motivation proposals, title II of the Export Trading Act of 1981, S. 144, modifies the Webb-Pomerene Act in a way that will permit many more American firms to make use of its updated provisions to promote exports.

We note that, as pointed out by Senator Danforth in his comments upon introduction of this legislation, the substantive law of antitrust as modified by the amended Webb-Pomerene Act has not been altered by S. 144.

Instead, these amendments are simply a codification of court interpretations of the Webb-Pomerene exemption to the domestic antitrust laws. These amendments are consistent with the present enforcement policy of both the Department of Justice and the Federal Trade Commission.

Additionally, we strongly support the expanded export trading company concept embodied in S. 144. We believe that the bill's expansion of the scope of export trading companies' current activities under Webb-Pomerene to include both goods and services is a major and significant improvement.

In conclusion, we commend you, Mr. Chairman, as well as the other cosponsors of S. 144 for your legislative initiative in this area.

Finally, we thank this subcommittee for affording us the opportunity. We believe that the proposals contained in the bill we have addressed today, in conjunction with the improved export administration controls and executive branch International Trade Reorganization Plan will do much to encourage and promote overseas trade by both experienced and new exporters.

We thank the subcommittee for its attention and would be happy to respond to questions.

Senator HEINZ. Mr. Cooper, thank you for a very excellent and detailed statement. And of course, the entire statement will be a part of the record.

[The complete statement follows:]

PREPARED STATEMENT OF W. PAUL COOPER, CHAIRMAN OF THE BOARD, ACME-CLEVELAND CORP.

I. INTRODUCTION

Good morning, my name is W. Paul Cooper. I am Chairman of the Board of Acme-Cleveland Corporation. Accompanying me today is Mr. James H. Mack, Public Affairs Director of the National Machine Tool Builders' Association (NMTBA), the national trade association of which Acme-Cleveland is one of over 400 member companies.

Although we are of course pleased to be of service to this Subcommittee, we are here today with somewhat mixed emotions in that it was nearly a year ago that we appeared before a similar panel in the other house. At that time, we conveyed nearly the same message that we will convey to you today. Improved export policy is an area of vital interest to both my own corporation and the U.S. machine tool industry as well as the U.S. economy generally.

The legislation which we will be commenting on today, Sen. Heinz' bill, S. 144, is very similar to the legislation which this Subcommittee reported last year, S. 2718. We strongly supported that legislation, and we strongly support this year's bill. At this time we would like to address some of the objections raised to last Congress' legislation, S. 2718, in the hopes of allaying the fears of those who attempted to block export trading company legislation during the 96th Congress.

To some extent this may be preaching to the choir. The Senate passed S. 2718 during last Congress by an overwhelming vote of 77-0. Nevertheless, we believe it is important to reiterate the reasons why export trading companies are of vital importance to our national interest, in order that a strong and complete record might be

built upon which to base passage of export trading company legislation early in the first session of the 97th Congress. Specifically, we would like to particularly emphasize the importance of drafting this legislation so as to allow U.S. banking institutions to become directly involved as integral parts of export trading companies. Of course, as we are all aware, it was the inclusion of such direct banking involvement provisions in last year's bill which unfortunately blocked passage of ETC legislation in the House of Representatives, even after the Senate had overwhelmingly passed S. 2718. For this reason, we believe it is even more imperative this session of Congress that the Senate take an early aggressive lead in developing and passing export trading company legislation, in order that the objections raised to S. 2718 last year, which will undoubtedly again be raised to S. 144 this year, will be addressed so as to develop a consensus which will ultimately lead to enactment into law of this vitally needed export trading company legislation.

Again, for the sake of completeness of the record, before proceeding with my comments, we would first like to briefly outline Acme-Cleveland's activities in the metalworking manufacturing industry, as well as the corporation's recent experience in the export market.

Acme-Cleveland, a New York Stock Exchange listed corporation, has existed in its present form since 1968. However, several of its predecessor companies and present major components have long histories in the industry, dating back over one hundred years in some cases. The corporation is in the business of manufacturing the tools of metalworking productivity: machine tools, cutting and threading tools, foundry tooling and equipment, electrical and electronic controls, and automated production systems. Currently, these products, including replacement parts, are manufactured by six operating divisions, supported by two service companies with a combined domestic employment of approximately 5,700 workers.

In addition to these domestic U.S. operations, Acme-Cleveland also consists of a number of foreign subsidiaries. Finally, relationships with several foreign licensees and one overseas joint-venture round out the corporation's worldwide business activity.

Acme-Cleveland views foreign trade as an extremely significant part of what has come to be recognized as a worldwide machine tool market. Even prior to Acme-Cleveland's worldwide expansion, several of its predecessor companies enjoyed long and active involvement in foreign trade. A high point of this foreign activity occurred in 1975 when over one fifth (21.5 percent) of Acme-Cleveland's domestic production had its destination in the export market. Unfortunately, however, even with an overall increase in total business volume there has been a steady decline in export sales, until in 1979 only 6.0 percent of domestic production was shipped overseas, for an annual average of 10.3 percent for the years 1975 through 1979.

Shifting from my own corporation's experience to that of the industry generally, it is important to point out that while the domestic U.S. machine tool market has been oscillating with very little real growth since the middle 1960's, the world market has grown substantially. Unfortunately, most of this worldwide expansion has been absorbed by our foreign competitors, eroding our market share.

In the middle 1960's, the American machine tool industry supplied approximately one-third of the total global market. In other words, one out of every three machine tools consumed in the world was produced by an American machine tool builder. However, according to *American Machinist*, as of the end of 1979, that portion had fallen to only 17.1 percent. In short, over the past 13 years, our share of the world market has plummeted by almost 50 percent.

This dramatic decline is the result of two factors. First, our domestic market has been invaded by foreign competitors on a scale never before dreamed of. For example, since 1964, America's imports of foreign machine tools have more than tripled, growing from 7 percent of total consumption 15 years ago to over 25 percent in 1980. It is obvious that, because the United States is the largest open machine tool market in the world, our foreign competitors have pulled out the stops and are aiming their export marketing efforts directly at America.

Second, and this is the aspect that we wish to focus on at this time, our share of the export market has also declined. When we look at the dollar value of our exports, the results of our efforts look encouraging. But if we look at American exports as a percentage of all of the machine tool exports in the world, the results are indeed very discouraging. We have been losing export market share at an alarming rate. Our share of the world's machine tool exports fell from 21 percent in 1964 to just 7 percent last year, placing us well behind West Germany and Japan as a machine tool exporting nation.

Finally, and perhaps most alarmingly, in 1978 the United States suffered its first machine tool trade deficit in history, with imports exceeding exports by some \$155 million. And, to make matters even worse, this deficit trend continued through

1980. Even though our exports grew by 15.8 percent over 1978 levels, imports soared by more than 45 percent to produce an even larger trade deficit of almost \$400 million in 1980.

The National Machine Tool Builders' Association is a national trade association representing over 400 American machine tool manufacturing companies, which account for approximately 90 percent of United States machine tool production. Although the total machine tool industry employs approximately 110,000 people with a combined annual output of around four billion dollars, most NMTBA member companies are small businesses with payrolls of 250 or fewer employees.

While relatively small by some corporate standards, American machine tool builders comprise a very basic segment of the U.S. industrial capacity, with a tremendous impact on America. It is the industry that builds the machines that are the foundation of America's industrial-military strength. Without machine tools, there could be no manufacturing; there would be no trains, no planes, no ships, no cars; there would be no power plants, no electric lights, no refrigerators and no agricultural machinery.

II. NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION EXPORT PROMOTION ACTIVITIES

NMTBA and its member companies have devoted considerable time and effort to increasing exports.

NMTBA, on behalf of the American machine tool industry is devoting its own resources to the development and maintenance of international markets everywhere in the world. The Association has two people who spend virtually their full time overseas promoting United States machine tool exports with considerable assistance from the Department of Commerce.

NMTBA develops seminars and workshops to train our members' people on international financing, export licensing, or any other subject that will benefit a machine tool builder. We conduct market research to locate new and promising markets for industry development. We have conducted roughly thirty Industry Organized, Government Approved (IOGA) trade missions to help gain a foothold in these new markets, and approximately half a dozen are planned for 1981 and 1982. We sponsor foreign exhibitions so that our members will have more opportunities to display their products overseas. In addition, we often work in close conjunction with the Commerce Department on such activities as recruiting exhibitors for export promotion events such as catalog shows, video tape shows and technical seminars. We organize reverse trade missions to bring foreign buyers to our plants. And we bring large groups of foreign visitors to the International Machine Tool Show in Chicago every two years. The Commerce Department has worked closely with us in the development and implementation of these programs, as have the commercial officers in our embassies and trade centers around the world.

III. BANK INVOLVEMENT IN EXPORT TRADING COMPANIES

In an economy which has until only recently been primarily oriented to the domestic market, it is not hard to understand why export trade has been deprived of significant financial resources. Because of such an overwhelmingly domestic orientation, the investment and entrepreneurship to establish export trading companies on an economical scale has been difficult.

With a gigantic domestic market to produce for, many American businessmen have shied away from what they often perceive to be the complex world of international trade. While countries like Canada export 25 percent of their gross national product, Germany 22.6 percent, and the United Kingdom 23 percent, the U.S. consumes all but 7.5 percent of domestic production. Recent statistics indicate that only 8 percent of this country's 250,000 manufacturers ship their goods abroad and, of those, a mere 100 industrial giants account for more than half of all U.S. exports. And while it is true that our enormous trade deficit is caused primarily by oil imports, it is striking to note that had we maintained the share of manufactured exports that we enjoyed in 1960 we could be paying for our oil bill in 1981 without a trade deficit. Since 1960, the U.S. share of manufactured exports has slid from 22.8 percent to 17.4 percent of the world total.

We, therefore, commend you Mr. Chairman for your sponsorship of S. 144, a bill designed to stimulate exports, by spurring the creation of large scale American trading companies that would provide a much needed export vehicle for small and medium-sized businesses, and also facilitate joint-ventures and barter deals by already big exporters. To accomplish these goals, S. 144 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. This third source of increased stimulus—specifically the provision that banks may have ownership participation in export trading companies—is the aspect of the bill which has been the most controversial and has drawn the criticism of those who believe that commerce and banking should continue to remain separate activities.

Presumably, this legislation was inspired to some extent by Japanese “sogo shosha”, multi-billion dollar trading conglomerates with huge asset bases and close ties to government, bankers and manufacturers. These “sogo shosha” in addition to their trading companies, each have numerous subsidiaries in such areas as autos, steel and textiles. The trading arm in turn has its own subsidiaries in manufacturing, farming and resource development, and it draws on the entire conglomerate organization for products to sell and for assistance in financing them.

Moreover, the trading company isn't limited to its organization. It will also buy or sell products from any other source wherever it finds the opportunity. With some 80,000 employees spread around the globe drumming up billions of dollars worth of business, the “sogo shosha” as a group account for more than 50 percent of Japan's exports and imports, and 30 percent of GNP.

Because fundamental differences between our two societies should discourage the belief that America can or should attempt to duplicate the Japanese model for its own economy, we concur in the belief of most trade experts that the U.S. must develop its own brand of trading company that is consistent with our nation's tradition of competitiveness rather than consensus. This, we believe, is what S. 144 is designed to do.

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 principle 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.

In this regard, the following comments are addressed to the specific requirements of S. 144 which we believe are the most advantageous provisions concerning direct bank involvement in export trading companies.

A. PROVISIONS DESIGNED TO PROTECT THE FINANCIAL INTEGRITY OF BANKS PARTICIPATING IN ETC'S

Title I of S. 144 contains numerous provisions which are specifically designed to safeguard the financial integrity of banks. By definition, the bill precludes export trading companies from being used as vehicles for investment in domestic industries. Furthermore, U.S. government banking regulatory agencies would have clear authority to prevent ETCs from violating this restriction, since any significant investment by bank-owned ETCs would require prior approval from these agencies.¹

¹ Senate Bill 144, Sec. 103(a)(9) states: the term “appropriate Federal Banking agencies” means—(A) the Comptroller of the Currency with respect to a national bank or any District bank; (B) the Board of Governors of the Federal Reserve System with respect to a State member bank, bank holding company, Edge Act corporation, or Agreement Corporation; (C) the Federal Deposit Insurance Corporation with respect to a State non-member insured bank, except a District bank; (D) the Federal Home Loan Bank Board with respect to a Federal Savings bank.

Additionally, the many safeguards against undue risks by bank-owned ETCs will insure against the type of public policy concerns which have traditionally been associated with bank involvement in non-banking activities. Moreover, S. 144 has adopted the specific recommendations of the Federal Reserve by incorporating the same restrictions contained in Sec. 23A of the Federal Reserve Act.²

Specifically, Sec. 105 of S. 144 contains the following general guidelines for bank involvement in ETCs:

1. Banks may invest up to an aggregate amount of \$10 million in one or more export trading companies without prior approval of the appropriate federal banking agency, if such investment does not cause an export trading company to become a subsidiary of the investing bank.

2. Banks may make investments in excess of an aggregate amount of \$10 million in one or more export trading companies or make any investment which would cause an export trading company to become a subsidiary or which would cause more than 50 percent of the voting stock of the export trading company to be owned or controlled by the bank only with the prior approval of the appropriate federal agency.

3. The total cost of the direct and indirect investment by a bank in an export trading company combined with extensions of credit by the bank to the trading company shall not exceed 10 percent of the banks capital and surplus.

4. Appropriate federal banking agencies may impose such conditions as they deem necessary to limit a banking organizations financial exposure to an export trading company or to prevent possible conflicts of interest or unsound banking practices.

5. And finally, nothing in this bill would in any way prevent any state from adopting a law prohibiting banks chartered under the laws of such state from investing in the export trading companies or applying conditions, or restrictions on investments by banks chartered under the laws of such state in exporting trading companies in addition to any conditions, limitations, or restrictions provided under the federal law itself.

B. PROVISIONS DESIGNED TO PROTECT AGAINST UNFAIR COMPETITIVE ADVANTAGES BY BANK-OWNED ETCs

In addition to expressing concerns about the potential for impairment of the financial integrity of banking institutions, critics of direct bank involvement in ETCs also expressed the fear that bank-owned ETCs will have unfair competitive advantages over ETCs owned by non-banking firms. Additionally, there is the worry that big banks and big companies would form joint-ventures, increasing what some perceive as an already dangerous trend toward concentration of economic power. However, to allay these fears S. 144 contains provisions which will specifically ensure that such unfair competitive circumstances will not develop.

Under S. 144 bank-owned ETCs will be much more heavily regulated than ETCs owned by non-banking firms. The legislation specifically prohibits banks and their affiliates from making preferential loans to any ETC in which they have an equity interest, including customers of any such ETC. Specifically incorporating the request of the Federal Reserve, S. 144 prohibits a banking organization or any of its affiliates from extending credit "to an export trading company or to customers of such company on terms more favorable than those afforded similar customers under similar circumstances, and such extension of credit shall not involve more than the normal risk of repayment or present other unfavorable features."³

Moreover, prohibitions on direct bank involvement in ETCs will put banks (of all sizes) at a serious disadvantage with so-called "near banks" (such as money market mutual funds), since under such restrictions near banks would be allowed to invest directly in ETCs while regular banks would not. And perhaps most importantly from a competitive perspective, with over 1,400 banks in the United States (certainly not all of which will be investing in ETCs) there will be more than ample financing alternatives for non-bank owned ETCs.

Certainly, if the risks of direct bank involvement in ETCs were so great there should be an experience of foreign failures resulting from unwise operation of

[Moreover] In any situation where the bank organization holding or making an investment in an export trading company is a subsidiary of another banking organization which is subject to jurisdiction of another agency, and some form of agency approval or notification is required, such approvals or notifications need only to be obtained from or made to, as the case may be, the appropriate Federal Banking agency for the banking organization making or holding the investment in the export trading company.

²Sec. 23A of the Federal Reserve Act generally prohibits member banks from lending or investing more than 10 percent of their capital and surplus in any one affiliate, and more than 20 percent of their capital and surplus in all affiliates.

³Senate Bill 144, Sec. 105(c)(4).

trading affiliates. Instead, the reverse appears to be true. Therefore, we see no reason why if foreign banks can manage these risks, U.S. banks, which would be under the close scrutiny and supervision of numerous federal regulatory agencies, would not be able to do so also.

C. CURRENTLY EXISTING EXPORT MANAGEMENT FIRMS AND FINANCING ALTERNATIVES ARE INADEQUATE TO COMPETE EFFECTIVELY WITH FOREIGN BASED EXPORT TRADING COMPANIES

Finally, opponents of direct bank participation in export trading companies have alleged that such vehicles as are proposed by S. 144 are not needed, because there are already existing export management firms or brokers which can adequately handle the needs of U.S. exporters. More specifically, it has also been argued that there is no need for direct bank participation in ETCs because the Export-Import Bank of the United States (Eximbank) already is capable of meeting the financial needs of U.S. exporters. In response to these two erroneous contentions we would point out that although the Department of Commerce estimates that there are about 3,800 export management firms or brokers in the United States, most are quite small (92 percent employing fewer than 5 people). Moreover, these firms normally limit themselves to a specific product line for a geographic area. Additionally, it is also very important to note that one of the major reasons these firms have not continued to grow is that they are normally severely under-capitalized. Banks as a result are unwilling to give them substantial lines of credit. While Japanese trading companies have debt/equity ratios of 15 or 20 to 1, small U.S. companies cannot operate anywhere near that level.

Addressing the argument that bank-owned ETCs are not necessary, because the Eximbank is already capable of providing sufficient export financing assistance, we begin by pointing out that Eximbank is an independent agency of the U.S. Government that works in cooperation with commercial banks to provide special financing services for U.S. exporters. In contrast, bank-owned export trading companies, as foreseen by S. 144, would be private entities with the internal ability to both finance and market goods in foreign commerce. While in no way deprecating the important role that Eximbank plays in furthering U.S. exports in world markets, it is obvious from the above two descriptions that the Eximbank and bank-owned ETCs are generically dissimilar entities with different goals and objectives. Simply stated, Eximbank is designed to offer targeted government financial assistance in special exporting circumstances, whereas bank-owned ETCs would provide U.S. exporters with a one-stop financing and marketing package designed to address a much broader range of export trade opportunities.

However, one response to this position has been to suggest that many, if not all, of these advantages are already currently available via Eximbank assistance, with the supposedly logical conclusion being that there is no need currently unfulfilled by Eximbank to be met by bank-owned ETCs.

Admittedly, Eximbank has a financing network with hundreds of U.S. and foreign financial institutions. Nor is there disagreement that these close working relationships have made it possible to further extend Eximbank's resources in cases where it is critical for American exporters to be able to offer financing which is competitive with that available to government-leveraged foreign sellers. However, although Eximbank may to some extent have access to the financial resources of private banking institutions, a critical factor governing the utilization of these resources is the funding level of Eximbank. Indeed, in the two most recent years for which complete data is available (1978 and 1979) Eximbank financed exports have amounted to only 1.5 percent of total U.S. exports. These figures clearly point out the limited, albeit vital, role Eximbank is designed to serve. Indeed, Eximbank's statutory authorization itself states that "the Bank in the exercise of its functions should supplement and encourage, and not compete with private capital."⁴

Moreover, although Eximbank is primarily a self-sustaining U.S. corporation required to provide adequate earnings to cover costs—just like any other business—it is, nevertheless, also a government institution subject to official United States policy and regulations in a variety of spheres ranging from foreign policy to economic concerns to environmental considerations. Given these additional considerations, Eximbank is therefore inherently less flexible than bank-owned ETCs would be in similar commercial circumstances.

As a matter of fact, the very future of Eximbank and its ability to promote U.S. exports is under serious attack as we meet here today. Even if the proposed cuts in Eximbank's lending authority (cuts, which, I might add, will effectively shut down

⁴ The Export-Import Bank Act of 1945, as amended through November 10, 1978, 12 U.S.C. 635(b).

the Bank's role as a major player in the export process) are not enacted, the projected needs of Eximbank are almost certain to go unfilled. Thus, to expect an under-financed (or perhaps even an un-financed) Eximbank to provide a major source of credit for U.S. exports is but a fool's dream. Many of S. 144's strongest opponents are also the strongest and loudest critics of the Eximbank. How do they expect to finance U.S. exports?

Finally, it appears almost self-evident that the major resource available to Eximbank is the very resource that bank-owned ETCs would tap one step closer to the original source, the financing capacity of private banking institutions. But just as important, bank-owned ETCs would also be able to provide the critical export marketing services necessary for successful export trade. Such export marketing services, which are beyond the capacity and purpose of Eximbank, would be an integral and vital part of bank-owned ETCs.

To reiterate, the Eximbank is a very important effort by the United States Government to give targeted official assistance furthering U.S. overseas trade, and as such is highly commendable. Its lending authority should be increased, not cut back, as some have proposed. However, there remain vast export trade opportunities which for the reasons already stated would be much more effectively pursued via privately operated bank-owned export trading companies.

D. REASONS FOR BANK OWNERSHIP OF ETC'S

Mr. Chairman, to this point in our testimony we have to a great extent been on the defensive, that is, attempting to rebut arguments of the opponents of direct bank participation in export trading companies. At this point we believe it is important to state affirmatively some of the benefits that we see accruing to the United States by virtue of export trading companies as envisioned under S. 144.

We would begin by emphasizing that our domestic laws separating banking and commerce are designed to preserve domestic competitive equality, not to meet the relatively recent challenge of foreign competition. However, because of this new foreign competition direct bank involvement in ETCs is absolutely necessary for American business to be competitive abroad.

In this regard, S. 144 would alter the laws separating banking and commerce only as they apply to the area of export trade, an area where the United States has always recognized the need for special rules to meet foreign competition (e.g., the Eximbank, Commodity Credit Corporation, Webb-Pomerene and DISC legislation, etc.). Thus, S. 144, rather than unnecessarily involving banks in commercial activities, actually follows the long tradition in U.S. law of not applying domestic rules to export trade activities, when to do so would only impede U.S. competitiveness in world markets.

Clearly, bank expertise would be both transferable and important to ETC management, organization and operation. Indeed, banks, with their international offices, experience in trade financing, business contacts at home and abroad, and international marketing knowledge are the most likely source of leadership in forming export trading companies.

Currently, a number of European banks operate some of the largest trading companies, and are able to supply those ETCs with almost all of the supporting facilities and services which U.S. exporters now most lack by contrast with these competitors.

What often happens is that foreign ETCs employ U.S. banks as intermediaries in arranging and financing initial transactions with U.S. exporters. However, after the initial contact with these American firms has been made, the foreign ETCs substitute their own internal financing for that of the original U.S. bank intermediary. The result of this procedure is a short term profit, but a long term loss for both the U.S. bank and America generally. Although more American-made goods are exported (a result we obviously support as highly desirable) export service fees are needlessly being shipped overseas along with U.S. products, with a resulting loss in income and jobs to American financial institutions.

Therefore, NMTBA strongly urges the direct involvement of U.S. banks in U.S. export trading companies. Such direct bank participation is the fuel needed to power the ETC vehicle. Direct incorporation in U.S. ETCs of the many export services that American banks are able to offer would be of great competitive assistance to U.S. exporters who now incur additional delays and expense in obtaining similar service. Furthermore, certain services now either unprofitable or illegal (e.g., putting buyers in touch with sellers for a fee, or providing credit and political risk insurance to U.S. manufacturers) would also be available under this approach.

For all of these reasons, we strongly urge support for the banking provisions of S. 144 in comprehensive U.S. export trading company legislation.

IV. ANTITRUST LAW MODIFICATION PROPOSALS

The Webb-Pomerene Act, enacted in 1918, allows American companies to join together in developing foreign sales while enjoying limited immunity from the U.S. domestic antitrust laws. The current statute is administered by the Federal Trade Commission (FTC).

Unfortunately, the role of Webb-Pomerene associations has declined drastically over the years. From a high-water mark of about 19 percent of total U.S. exports between 1930 and 1935, Webb-Pomerene associations have slipped to less than a 2 percent share today.

Within the past year the merits of the Webb-Pomerene Act have been reexamined by the National Commission for the Review of Antitrust Laws and Procedures. At the conclusion of this study it was the Commission's recommendation that Congress reexamine the Act, and modify it where necessary.

In enacting the Webb-Pomerene Act, Congress envisioned an eager American business community availing itself of the opportunity to pool its facilities, resources, and expertise in such a fashion as to implement an ambitious joint exporting program. As we have seen that vision never materialized. One of the major reasons for the lack of development of export trading companies under the existing Webb-Pomerene Act has been the continuing uncertainty of the American business community as to what would or would not be within the scope of the Webb-Pomerene antitrust exemption.

Throughout the history of the Webb-Pomerene Act there have been a number of advisory opinions issued by the Federal Trade Commission, which in a case by case fashion have attempted to draw the parameters of the law's antitrust exemption.

Further clarification as to the parameter of the antitrust exemption provided under the Webb-Pomerene Act has been gained through adjudication of a number of cases brought by the Department of Justice.

The opinion of the court in the case of *United States v. Minnesota Mining Mfg.* (District Court, Massachusetts, 1950) provides the most authoritative interpretation of the scope and rationale of the antitrust exemption under the Webb-Pomerene Act. As stated by the Court:

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 inevitable 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.

Title II of the Export Trading Company Act of 1981, S. 144, modifies the Webb-Pomerene Act in a way that will permit many more American firms to make use of its updated provisions to promote exports. Title II does the following:

1. 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.)

2. It expands and clarifies the Act's antitrust exemption for export trade associations, and provides an antitrust exemption for export companies formed under Title I of the Act.

3. It requires that the antitrust immunity be made contingent upon a preclearance procedure.

4. It transfers the administration of the Act from the FTC to the Department of Commerce.

5. It creates within the Department of Commerce an office to promote the formation of export trade associations and trading companies.

6. Finally, 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.

We note that, as pointed out by Senator Danforth in his comments upon introduction of this legislation, with the exception of the requirements in paragraphs (1), (4), and (6), of section 2(a) of the Act (provisions which impose additional 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 amended Webb-Pomerene Act has not been altered by S. 144. Instead, these amendments are simply a codification of court interpretations of the Webb-Pomerene exemption to the domestic antitrust laws. Also, according to testimony by a spokesman for the Antitrust Division of the Justice Department during hearings on last Congress legislation, these amendments are consistent with the present enforcement policy of both the Department of Justice and the Federal Trade Commission.

However, we are aware that during debate on S. 2718 last year critics questioned the need for amending this section of the Webb-Pomerene Act if, as we have just stated, these amendments are nothing more than a codification of not only current judicial understanding of Sec. II of the Webb-Pomerene Act but also the enforcement intent of both the Department of Justice and the Federal Trade Commission.

In response to this criticism, we would point out that the record clearly evidences that these amendments are necessary in order to provide certainty to the business community in their international trade activities, assuring them that their activities do not run afoul of domestic antitrust laws. This we believe will alleviate as a deterrent to broader utilization of the Webb-Pomerene Act what has previously been perceived by the business community as the Department of Justice', as well as the Federal Trade Commission's thinly veiled hostility toward Webb-Pomerene associations.

Closely allied with the issue of certain antitrust law exemption for export trading companies formed under the auspices of S. 144 is the question of who would be able to bring an antitrust complaint against such an export trading company. Sec. 4(e) (3) of the Act provides that only the Department of Justice or Federal Trade Commission has standing to bring a cause of action in court against a trading company or Webb-Pomerene association for violation of sec. 2 of the Act. Therefore, apart from the complained against activity being ultravires to the certification, a private party has no standing to bring suit. We fully support these provisions.

Additionally, Sec. 205 of S. 144 authorizes the Secretary of Commerce, with the concurrence of the Attorney General and the Chairman of the Federal Trade Commission, and after a period of public comment, to formulate and publish guidelines to be applied in determining whether an association, its members, and its export trade meet the statutory requirements that would be established by this bill.

Additionally, we strongly support the expanded export trading company concept embodied in S. 144. We believe that S. 144's expansion of the scope of export trading companies current activities under Webb-Pomerene to include both goods and services is a major and significant improvement. It is apparent from this provision that the sponsors of this legislation have recognized that a greater and greater portion of the U.S. economy deals in the service sector, and, therefore, it is entirely appropriate that such service activities be included under the provisions of this legislation.

Finally, we commend and strongly support the requirement of confidentiality for applications and annual reports required under S. 144.

V. CONCLUSION

In conclusion, we commend you Mr. Chairman, as well as the other cosponsors of S. 144 for your legislative initiative in this area.

The expansion of currently permissible activities under Webb-Pomerene to include services in addition to goods is of vital importance if the U.S. is to remain an aggressive and effective competitor in the ever expanding global economy. Additionally, clarification of the antitrust laws in this area, specifically those concerning which government agencies will be empowered to enforce such laws, will remove the legal uncertainties which heretofore have posed significant, and for many insurmountable, barriers to active involvement in the export market.

As we have stated, by restructuring the contours of export trading company activities, this legislation will provide the vehicle for increased export activity. However, the active and integral involvement of banks and other financial institutions in export trading companies is the absolutely essential element needed to power this vehicle. We believe that these two elements working together are the necessary and sufficient requirements of an effective export trading company bill.

We have noted that earlier versions of this legislation contained a third title which would have extended the tax deferral available under the DISC (Domestic International Sales Corporation) provisions of the tax code to exports of export trading companies, including exports of services. Moreover, it would also have allowed in some cases the use of subpart S of the tax code which permits certain passthroughs to shareholders to closely held corporations. However, we understand that the sponsors of S. 144 have for jurisdictional reasons this time decided not to include Title III in this particular piece of legislation, instead apparently anticipate introducing a revised version of Title III as a separate bill. In our testimony on these provisions during last Congress' hearings on S. 2718 we for the most part felt very favorably towards the addition of such provisions to the Internal Revenue Code and continue to do so.

Finally, we thank this Subcommittee for affording us the opportunity to relate the experience of Acme-Cleveland and the U.S. machine tool industry in the export market. We believe that the proposals contained in the bills we have addressed today, in conjunction with the improved export administration controls and execu-

tive branch international trade reorganization plan will do much to encourage and promote overseas trade by both experienced and new exporters. We thank the Subcommittee for its attention and would be happy to respond to questions.

Senator HEINZ. You have always done an excellent job of summarizing. I have been able to follow you through your statement. I think you have picked out the essential and relevant parts of it. I commend you for that.

Indeed, I think all of you, Mr. Guttman, Mr. Boles, Mr. Cooper, deserve to be specially commended for very good statements. You all come through with different perspectives, but that is why they are so valuable.

While the perspectives are different, they reach substantial accord, not only the need for the legislation, but in the way we are going about it. It's very valuable.

Let me start with Mr. Boles, who has had the opportunity to be silent longest.

Mr. BOLES. Thank you.

Senator HEINZ. Why do you think a bank wouldn't be interested in an ETC unless they can control?

BUSINESS CONTROL OF ETC'S

Mr. BOLES. I think this business of control is a much broader issue than banks. If we look at a company in which to make an investment, we are not interested in taking a 5-percent position in the company, we can't manage it. We have no control over the financial and managerial activities. I think, looking at the regulatory agencies here, they are not interested in 5-percent control; they are interested in total control.

I think it is just good business sense. If you are going to make an investment, especially into an entrepreneurial activity, you have to have the visibility to take control of that situation.

That is going to come about as a result of one of two situations developing. One is that the export trading company which a bank is invested in may be very successful. And the bank will view it in the best interest of its shareholders that it ought to have a deeper ownership and they will want to exercise more control in by way of equity.

Another situation is where the company could get into trouble and the bank is exposed with its equity investment, in which case it will want to superimpose its own management. So to me it's a simple tradeoff argument.

Senator HEINZ. Now, you are the president of a real authentic trading company. What kind of relationship do you have with banking institutions and how would you like to see those relationships changed? And second, if we pass this legislation, how do you anticipate that they might be changed?

Mr. BOLES. Our current relationship with banking institutions is strictly that of a borrower under guarantees from the FCIA. We feel very strongly about the legislation because, as I stated in my remarks, the amount of cash that is going to be required to generate meaningful trading companies is not going to be able to be raised through equity. It has got to be raised through debt. The classic debt markets in the United States are banks and, therefore, it would seem to follow.

Now, whether or not we would go into an affiliation with a bank, we haven't decided. When we look for a corporate partner we see three criteria. One is availability of substantial amounts of cash, some familiarity with trading operations and the ability to run affiliated or subsidiary operations without killing them, without sitting on top of them with committee after committee.

All right. The banks have a lot of cash, but it is regulated cash. So perhaps they won't qualify there from our criteria. Whether or not they know anything about trading companies, probably not, but we think they can learn very quickly. They have got the infrastructure to learn that.

As far as operating subsidiary and affiliated companies, I think that depends on the specific bank. We have an open mind on it.

Senator HEINZ. You seem to be doing well without banks owning you, controlling you. Why should we pass this legislation? How would it benefit you?

Mr. BOLES. We are doing well to a point. We will come to a point of diminishing returns probably in mid-1981 to mid-1982 where our rate of growth is going to be severely constrained unless we have an expanded universe to operate in. We define that expanded universe as a corporate partner.

Senator HEINZ. What is the nature of that constraint?

Mr. BOLES. The requirement of approximately \$1 in cash for every dollar and a half in sales.

Senator HEINZ. If I may put words in your mouth, you are saying your equity base will simply not justify additional credit from your friendly banker.

Mr. BOLES. That is correct.

Senator HEINZ. What kind of a debt-to-equity ratio do you have now and what are the kind of limitations that you see?

Mr. BOLES. Our debt-to-equity ratio right now is pretty close to 1 to 1. We would estimate that through 1981 we will approach the 3-to-4-to-1 ratio, and the requirement through 1982 of somewhere in the 10-to-15-to-1 ratio.

Senator HEINZ. Do you anticipate you will be able to get credit under your present arrangements that would take you as high as 10 to 15 to 1?

Mr. BOLES. Not with the U.S. commercial banks, unless this legislation goes through.

Senator HEINZ. I think that is the point.

Mr. BOLES. That is the key point. I think one thing that is also key is that there are other banks and they reside offshore. We have had indications that these banks are very interested in becoming involved in what we will call U.S. export trading companies. Their use of credit in the financing of credit transactions has a long history and it is one that they have apparently found to be successful.

Senator HEINZ. You know, you said two absolutely fascinating things in your statement on page 2. First, that you felt U.S. export trading companies within a decade—10 years goes by rather quickly, unfortunately—could be doing a \$100 billion a year business. Is that pie in the sky? Or how do you justify that number? And is a lot of that additional business, or is it replacement?

Mr. BOLES. I think it will be a combination. The majority, however, I think would be additive to the current base. There are some good indicators in place now.

Senator HEINZ. I hope it is not all just inflation.

Mr. BOLES. Both of us do.

REVENUES OF JAPANESE ETC'S

There are some good examples here. Going back to the Japanese trading companies, of the largest of the 10 Japanese trading companies, I think Mitsubishi Trading Co. is probably the largest, with revenues of about \$60 billion a year.

Senator HEINZ. \$60 billion a year?

Mr. BOLES. Yes.

Senator HEINZ. That is what a really big trading company is all about.

Mr. BOLES. That is a big trading company.

Senator HEINZ. Before you go on, I was going to ask you this, in any event, but you brought it up. How big are the revenues of Mitsui?

Mr. BOLES. I don't have those numbers with me, but Mitsui, I would estimate, would be somewhere in the area of the \$35 billion to \$40 billion.

Senator HEINZ. What about Jardine Matheson?

Mr. BOLES. They are, I think, in about the \$6 billion.

Senator HEINZ. \$6 billion.

Mr. BOLES. That is Hong Kong. And Inchcape is approximately \$3 to \$4 billion.

Senator HEINZ. So we are talking about pretty heavy hitters.

Mr. BOLES. They are all heavy hitters.

Senator HEINZ. Is there a major Brazilian export trading company?

Mr. BOLES. Not that we are aware of. The Inchcape group is very active in the Brazilian marketplace.

Senator HEINZ. But those four companies you have mentioned, just those four, account for over \$100 billion.

Mr. BOLES. I think more importantly, of the top 10 Japanese trading companies, the smallest of the 10 is in the \$10 to \$18 billion range. Now, we are dealing with an economy which is approximately one-third the size of the U.S. economy. Now, going back to the Mitsubishi example, 10 years ago Mitsubishi was a \$18 billion, and today it is a \$60 billion.

Senator HEINZ. You know, you state that the intent is to develop a bit differently than Japanese trading companies. Why wouldn't you want to be a \$60 billion a year company?

Mr. BOLES. From the revenue point of view the objectives are that. But from an architecture point of view I think they are a little different. We don't think we would require the kinds of vertical and horizontal integration the Japanese trading company has. We don't think we necessarily have to go in and take equity positions in manufacturers.

Senator HEINZ. That is prohibited by the legislation.

Mr. BOLES. By the legislation it would be prohibited, right. But even with our offshore suppliers, where we import products into the United States and do third-country transactions, we still don't

think we have to be that integrated. We do think we are probably going to have to be pretty integrated in the distribution chain.

Senator HEINZ. I interrupted your response, but we may have covered it. Do you have anything you want to add?

Mr. BOLES. No; I don't think so.

Senator HEINZ. There is one thing that you said in your statement on page 6 I would like to clarify. You were talking about the \$10 million limitation in the legislation. The \$10 million limitation is not a maximum limitation on bank participation; it is the threshold beyond which you have to go to get approval.

Mr. BOLES. My problem is the threshold concept, whether it's \$10 million or \$20 million. The problem with that is, after reading the legislation, it appears to me to be awfully subjective and a moving target kind of problem. I, once again, as president of a company, would be quite reluctant to invest in any other company with the provision that I seek approval from some other body with very ambiguous criteria, and I do think the criteria are quite ambiguous and subjective.

Senator HEINZ. Well, given the fact that banks are regulated and their investments are regulated, we came to the point, particularly as some people view this as a penetration, if not a breach, of the separation between banking and commerce, we came to the conclusion that at some point of participation there would have to be appropriate oversight by the Federal bank regulatory agencies. Do you disagree with that principle?

Mr. BOLES. No; I don't disagree with the principle. I am quite happy with the 5 percent of capital-and-surplus test and could be happy with a 5-percent test which included both equity-and-debt participation of the bank instead of going to 10 percent. But what I am more bothered about is the percentage questions, because the issue is not one of percentage; it is one of dollars. So if a bank wants to acquire a 100 percent of a trading company for a \$1,000, I doubt that the Federal Reserve System is going to be concerned that the bank is going to fail.

Senator HEINZ. What you are really saying is you would prefer to see some kind of proportional amount related to the bank's capital and surplus rather than a 10-percent test, which for a small bank, a very small bank, might be a very large amount of money, which for a large bank might be very small.

Mr. BOLES. That is correct.

Senator HEINZ. I understand. Very well. Thank you very much, Mr. Boles.

WEBB-POMERENE ACT THREAT

Mr. Guttman, you are living testimony to the fact that Webb-Pomerene in its present form kills businesses, kills yours.

Mr. GUTTMANN. Yes.

Senator HEINZ. How successful was Amer-Asia Consultants until it was threatened with suit?

Mr. GUTTMANN. We worked for about 3 years in a territory which was new to every one of the 12 participating firms. We had a total of about 16 service contracts which generated something like \$450,000 worth of fees at the time we decided to discontinue. This is a fair start for a small service industry.

Senator HEINZ. I gather you feel that you could have grown substantially larger?

Mr. GUTTMANN. Oh, yes; very much so.

Senator HEINZ. So you might have had a multimillion-dollar-a-year business by now.

Mr. GUTTMANN. There is an interesting side effect, that two of the firms decided to establish themselves overseas afterwards. They emigrated, to which I made reference in my testimony, incorporated elsewhere. They joined forces with other firms. They have become very important firms in Southeast Asia.

Senator HEINZ. So based on the experience of those who emigrated to avoid Webb-Pomerene, they were able to realize the American dream. And you started with nothing, literally nothing, and got up to \$450,000 a year in fees.

And you could see the beginning of a genuine American success story that could have, you know—who knows? you might have become the Mitsui of America, starting with nothing. Horatio Alger would have been a footnote in history compared to Guttman Enterprises.

Mr. GUTTMANN. Not quite as highflying—

Senator HEINZ. I exaggerate slightly. But I think the point is—and it's a very well taken point that you make—that because of the kind of threat, which I want to ask you about in a minute, you were precluded from proving what you could do and that some of your associates literally started their businesses up overseas in order to continue their business. And they have been quite successful.

So all we did, all Webb-Pomerene did was force those people who were committed to the success of their businesses—not that you weren't—but wanted to continue it anywhere, went overseas, with great benefit, I'm sure, to whatever area they ended up domiciled in.

Mr. GUTTMANN. This is one of the advantages of a profession, that you are not anchored down. But it's one of the disadvantages for America.

Senator HEINZ. Could you elaborate on the antitrust action threat by your domestic competitors? What was the nature of it? Why was it a threat that was so severe that you felt you had to disband?

Mr. GUTTMANN. At the time we were working in Southeast Asia, one of the larger nations decided to invite us to make a proposal on the design of a major airport. This is a project which in our area of work generates a lot of work, a lot of money, a lot of prestige. We were shortlisted as the group of 12 firms, had all the expertise from the economics through the operation.

There were a number of domestic firms here in this country who had partial expertise and who felt left out of the opportunity to offer their services. They were the ones who told us that what we were doing was against antitrust, specifically, restriction of trade, and threatened to go to court.

Senator HEINZ. Well, I think that is pretty specific. Obviously, because—did you feel that you were going to be subject to retroactive penalties?

Mr. GUTTMANN. We could have been. Counsel advised us that we were eminently exposed.

Senator HEINZ. That would, of course, have meant permanent ruination, I imagine, if those penalties had been imposed. That is what Webb-Pomerene permits, retroactive penalties. Even though the Constitution says that ex post facto laws can't be passed, Federal regulatory agencies under the Sherman Act can do some things to you looking back in time.

Mr. GUTTMANN. The threat was so real, we desisted from making the joint offer to that particular country, and we lost the airport job subsequently.

Senator HEINZ. Mr. Guttman, that is eloquent testimony to the need a clear standard. As you well know, title II, which Senator Danforth has done so much work on, doesn't change the substantive nature of the law, as Mr. Cooper pointed out, but makes the procedures much more certain. It doesn't give you permanent anti-trust immunity.

Indeed, if the Justice Department decides that you are doing something that is wrong, that is proscribed, they can go after you, with one exception. They can't hit you with retroactive penalties.

On the other hand, when the Justice Department goes after you, as you found out, as you were thinking about the legal fees, that is almost enough to take care of you anyway.

Thank you very much.

Mr. GUTTMANN. May I just add one thing, Mr. Chairman?

Senator HEINZ. By all means.

Mr. GUTTMANN. We were exempt and protected by the Justice Department, as you will note from annex number 2 of my presentation, which I did not read (see p. 222). But we had no protection whatsoever from the private sector under the law. That was the great—

Senator HEINZ. That's right. They can go to court. You had a protection from Justice.

Mr. GUTTMANN. Yes.

Senator HEINZ. But no protection from private right of action under the same laws.

Mr. GUTTMANN. Right.

Senator HEINZ. Thank you for pointing that out. I did note that testimony.

Mr. Cooper, you have given really magnificent testimony and been very, very clear. There are two questions I would like to put to you.

First, could you elaborate briefly on what competitive advantages foreign banks have in exporting compared to U.S. banks?

Mr. COOPER. What competitive advantage foreign banks have? Well, I can only—

Senator HEINZ. Are they less restricted?

Mr. COOPER. I can only give my perspective from butting heads with heavy hitters like Mitsubishi Heavy Industries, and some of the cartels of Europe. Much of the facility they have is this ability to put together a full package: contract, contract language, financing, in a very short time, while we thrash around shopping for Exim financing then private-sector banking financing, going

through the licensing and export documentation, import documentation.

And even though my company has done quite a little exporting, we can only afford so big a staff and so much time, and are at an extreme disadvantage with many of our foreign competitors if for no other reason, the time and the celerity with which they move into the problem. The Deutschebank and the Dresden Bank, for example, support German industry. It's a formidable array of talent that they bring.

Senator HEINZ. And they are very successful in exporting and selling the machine tools that they make to other countries.

Mr. COOPER. Right.

Senator HEINZ. Both south of the border and east of the border.

MACHINE TOOL INDUSTRY FUTURE

Mr. COOPER. And so are the Japanese.

The United States, after many years of leading the world as machine-tool builders of the world, slipped into third place 2 years ago.

Senator HEINZ. And it's the considered judgment of you and your industry, which is one of the great industries of the world—the machine-tool industry uses much of the steel we make in Pittsburgh. We hope that your industry sees numerous export markets if you can obtain the proper kinds of marketing and financial services. And that is the principal reason that you feel that this approach is very important, the ETC legislation.

Mr. COOPER. Yes; I appreciate your kind words about our industry, but it's a very small industry in total.

Senator HEINZ. In terms of number of firms, but what you produce is of high value; is it not?

Mr. COOPER. Well, currently, we are running close to \$5 billion a year.

Senator HEINZ. \$5 billion.

Mr. COOPER. That puts us way down the list of the Fortune 500.

Senator HEINZ. Don't knock it. \$5 billion here, \$5 billion there; that's really inflation. That is a paraphrase of Senator Dirksen. When he said it, it was \$1 billion.

Mr. COOPER. But of the 400 member companies, the majority of them are family-owned companies with less than 200 employees.

Senator HEINZ. Oh, we are not talking about—I'm not saying we are talking about big companies. But I think we ought to recognize that the machine-tool industry, with which I do have some familiarity, is the basis of any country's industrialization.

You may not have to have millions of machine tools. If you do, you probably overinvested in capacity. But without machine tools, you can't produce any of the things that you need in order to drive an economy. That is why it is so important an industry and I single it out.

It includes basic things such as lathes, automatic screw machines, and things that can make the smallest little screw or bolt or nut, right on up to the giant armature of a huge generator. Without the machine-tool industry, we wouldn't have a modern, industrial civilization as we know it. That is why I referred to it as an important industry.

Mr. COOPER. And that is why my company and our association is so eager to get on a competitive basis in the world market, because we think we have an important contribution and role to play in the developing countries and in the reindustrialization of many of the countries, like Italy.

Senator HEINZ. I imagine your largest possible markets would be both the OPEC and non-OPEC LDC's, for great potential in the future.

Mr. COOPER. Well, the Iron Curtain countries were an important source of business.

Senator HEINZ. Yes; not only the Soviet Union but also the People's Republic of China, and the Eastern European countries.

How much do you think it would mean to your industry, which is a \$5 billion industry, if you were really successful, looking 5 years down the road, if we pass the legislation this year, your industry is able to take advantage of it, appropriate export trading companies are formed, they penetrate the east, the south, they go into South America, the Middle East, China, the Soviet Union, Czechoslovakia, maybe Poland?

What kind of an increase in exports do you see? \$1 billion? \$2 billion? Less than that? More than that?

Mr. COOPER. First, I should point out, we will have to earn our way with quality products.

Senator HEINZ. Absolutely.

Mr. COOPER. And competitive prices.

I would hope to see the day when 30 percent of the output of the machine-tool industry would be exported.

Senator HEINZ. And right now 30 percent would be roughly \$2 billion?

Mr. COOPER. \$1½ billion.

Mr. Guttman.

Senator HEINZ. That's right. That is a very big potential market we are talking about.

Gentlemen, thank you all very much. You have been excellent, and I appreciate it.

Would the next panel of witnesses please come forward?

STATEMENTS OF LONNIE HAEFNER, PROFESSOR OF CIVIL ENGINEERING, WASHINGTON UNIVERSITY, ST. LOUIS, MO.; ROBERT L. WAGGONER, PRESIDENT, AND RACHEL TRINDER, COUNSEL, INTERNATIONAL CUSTOMS SERVICE, INC.; AND WILLIAM R. CASEY, PRESIDENT, AND GERALD H. ULLMAN, GENERAL COUNSEL, NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC.

Dr. HAEFNER. Thank you.

Senator HEINZ. Let me ask our panel to please introduce themselves.

Dr. HAEFNER. Dr. Haefner, director of the Washington University transportation engineering program.

Mr. WAGGONER. Robert Waggoner, president of International Customs Service, and to my right is counsel, Rachel Trinder from the service.

Mr. CASEY. I'm William R. Casey, president of the International Customs Brokers & Freight Forwarders Association of America and

chairman of my own company, the Myers Group, which are freight forwarders and customs brokers. I'm accompanied by our association's general counsel, Mr. Gerald Ullman.

Senator HEINZ. Very well. Let me ask, Dr. Haefner, if you will please proceed.

Dr. HAEFNER. My written testimony is identical to my oral statement.

Mr. Chairman and members of the Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on International Finance and Monetary Policy, I am honored to be invited to present testimony on S. 144, a bill to encourage exports by facilitating the formation of export trading companies, export trade associations, and expansion of export trade.

As professor of transportation engineering at Washington University, I am heavily involved in research related to intermodal freight and the movement of export commodities. In addition, through an active consulting practice in port and industrial park planning, port financing, and intermodal freight terminal planning and engineering, I have a continual dialog with public agency and private clients with respect to the necessity to increase our export strength.

PRIVATE SECTOR INVOLVEMENT

As such, I would like to present testimony on this bill from a slightly different tack, that of the need to greatly improve private sector involvement in investment activities which are intertwined with optimum usage of our public works funds for efficient movement of export goods on an international scale. This bill can have a strong, positive effect on getting the private sector involved in port and intermodal goods planning, thus yielding improved export activity centers, particularly on the inland waterway port system. Let me now be specific about the mechanics that this bill offers.

Research by the U.S. Department of Commerce Maritime Administration indicates that the 1970 transportation and movement of each ton of waterborne cargo in U.S. foreign trade generated direct port industry revenues of \$34. The direct and indirect revenues combined amounted to \$55. Every 600 long tons in waterborne foreign trade created one job in the national economy in 1970. During the period of 1970-77 the above impacts have approximately doubled. Related studies verify the above strong basic-nonbasic industry effect, wherein manufacture of basic goods for export yield well known spinoff demands for service or nonbasic industries. Thus, regions with active export production generally yield a more balanced and viable multiskilled local or regional economy.

Good multimodal transportation systems making use of natural amenities, such as navigable waterways are considered to be stimuli for furthering the above export basic-nonbasic industrial activities of a region. During the last two decades on the inland waterway system, significant efforts have been made to develop port and intermodal transportation terminal plans which make full use of the public sector investment aids such as highway funds, channel improvements, EDA programs, in conjunction with massive private sector basic and export-related industrial real estate investments within and adjacent to the port and freight terminals. This results in an industrial agglomeration shopper effect and industrial real

estate economies of scale by virtue of simultaneously assembling large amounts of public works and private mortgage banking capital.

However, the above process has often been flawed with respect to aggressive private sector involvement. For some very good reasons, the process of simultaneous private sector-public sector involvement in such terminal plans has been slow due to the following.

One, private financial institutions are basically risk averters.

Two, the relatively large size of active income producing real estate holdings in a terminal complex requires that public sector provision of site amenities—sewers, roads, et cetera—and potential tax abatement incentives must be virtually guaranteed prior to private sector involvement.

Three, the private sector is highly sensitive to lack of continuity and timeliness of critical funding, and environmental, OSHA, regulatory and bureaucratic redtape.

Four, the private sector financial community, while being able to finance industrial real estate and land use related to export and goods movement, currently has little or no capability to impact the mechanics of growth, flow, marketing or distribution patterns of such export goods.

INCENTIVES TO ALLEVIATE PROBLEMS

However, the export trading company structures proposed in S. 144 would offer highly positive incentives to alleviate the above problems. Specifically:

One, by participation in export trading company formation, the banking community could, within reasonable limits, participate in international goods distribution activity directly related to their land use and financial interest in port and industrial park activities, thus yielding a more targeted perspective from which to develop their port and terminal-related financial investments.

Two, a major effort of port and freight terminal planning should, as so noted by the authors of the bill with respect to current operating strategies of foreign countries, be to stimulate zones, centers, and activities for marketing production output and influencing international distribution patterns. A structure for so doing has been lacking in the U.S. freight terminal and export community. This bill adequately develops such a structure.

Three, in relation to one above, direct involvement by the financial community in export trading in port dominant cities offers a direct incentive for them to foster private financed industrial real estate and port development programs, with an eye to effectively maximize their return and active control of port-related industrial activities.

Four, the potential of joint ventures of the private sector and key port authorities on the coast and in critical inland river port cities, such as St. Louis, is an optimum construct for insuring simultaneous effective public sector funding and private funding to exploit a region's locational or natural resources advantage.

Five, it is clear that certain critical U.S. goods which move from inland hinterlands abroad must be capable of being financed, produced, and transported in uniquely aggressive ways to maximize the effectiveness of U.S. export potential. Key commodities of coal,

grain, other agricultural products, containerized general cargo, and chemicals are highly viable international markets for us. The fusion of private sector banking capital with the firms associated with the extraction, production, wholesale, and transportation of the above commodities and use of their associated knowledge and expertise offers a forceful and financially stable capability to process our exports.

Six, a topic of concern in every transportation terminal land use plan is what to do with the medium-size industrial firm which has an exportable product, but exists without significant individual impact on the market, per se. This bill would allow conglomeration of several disparate small- to medium-size commodity and product exporters, thus developing a consistent and viable structure for optimizing return on production dollars from such heretofore underutilized sources of export.

Seven, a transportation or terminal-related industrial land use plan, when successfully implemented, has significant benefits to local, State, and Federal levels of government, including improved levels of payroll taxes, sales taxes, disposable incomes within the community, lowered unemployment, and increased property tax income, and increased regional economic value added. To the extent this bill promotes private financial sector involvement in trade, transportation, and terminal-related improved intensiveness of land use and interchange facilities, causing export activity to thrive, the public sector will benefit.

In closing, let me comment on the issue of antitrust immunity. While not an attorney, but rather a port planner with years of reviewing the appropriate conservatism of the private sector in transportation and trade matters, let me say that it appears, from my professional viewpoint, that antitrust immunity, with appropriate certification and legal safeguards, as developed in the bill, will be necessary. It is unlikely the private sector will participate if anything other than a limited environment of risk, economic or legal recourse exists with respect to antitrust matters.

It has been a distinct pleasure to offer this testimony. I strongly recommend passage of S. 144 in its present form.

Senator HEINZ. Dr. Haefner, thank you very much. We are delighted to have your testimony.

Let me ask Mr. Robert Waggoner to proceed.

Mr. WAGGONER. Thank you, Senator Heinz. It is a pleasure to have this opportunity to testify here today.

I have prepared a detailed statement which I would like to include in the record.

Senator HEINZ. Without objection the entire statement will appear in the record at this point.

Mr. WAGGONER. Thank you. In the interest of conserving time I would like to present a brief summary of my prepared testimony and leave the remainder of the time open for questions.

Senator HEINZ. Very well.

Mr. WAGGONER. My company is headquartered in Torrance, Calif., and maintains offices in Los Angeles, San Francisco, New York, Chicago, Boston, Hartford, and Houston.

Our only business is international trade, and it has been our only business for 22 years.

From the beginning it has been our objective to offer complete international trade service to our customers, furnish door-to-door transportation to exporters around the world.

In order to provide a full range of services we are authorized to act as ocean freight forwarders, as nonvessel operating common carrier, as an air freight consolidator, as air freight agent, as surface property brokers, and customs brokers as well as insurance agents.

Our staff of 200 experts also provide a variety of advice and assistance to our customers.

To give you some idea of our size, last year our gross billings for transportation services and other advances in foreign trade totaled some \$83 million.

I am here today with our ocean freight forwarding activities in mind and should like to limit my remarks to a particular technical problem which we see with the legislation as it presently exists.

As I understand it, S. 144 anticipates that an export trading company would provide a number of services including documentation, transportation, and freight forwarding. I would like to say at the outset that I am supportive of this concept. I am of the firm belief that unless trading companies are able to offer these services they will fail to be viable competitors to their foreign counterparts.

TECHNICAL BARRIER IN LEGISLATION

Unfortunately, there is a technical barrier which would prevent ocean forwarders from qualifying as export trading companies and which would, as a practical matter, prevent export trading companies from qualifying as ocean freight forwarders.

This comes from an act which prevents forwarders from having any kind of beneficial interest in shipments they dispatch, which includes any kind of financial or proprietary interest and prevents forwarders from taking title to goods they service. However, the legislation contemplates that in the course of providing export services to U.S. producers export trading companies may themselves become exporters by taking title to the goods. Hence the conflict.

Unless S. 144 is amended the effect of this prohibition would be to exclude from participation in export trading companies the very individuals and organizations which possess the international trade expertise essential to the success of a trading company.

I am convinced that this would be a disaster for export trading companies and that unless the issue is addressed the concept itself will fail.

A review of the successful foreign trading companies reveals that strength lies in the variety of services they can offer. Each of the 10 largest Japanese trading companies has the ability to obtain significant economies of scale in transportation, warehousing, and international marketing. This was the conclusion of the Hay report, a study prepared for the Department of Commerce and previously submitted to this committee, wherein I would also note that transportation constituted one-third or more of the value of the merchandise.

I believe this is a lesson we cannot ignore. We are, therefore, suggesting a simple amendment to S. 144, an amendment which is attached as appendix A to my written testimony.

Senator HEINZ. Without objection that will be part of the record (see p. 265).

Mr. WAGGONER. Thank you.

The amendment would remove the prohibitions of the shipping act to the extent necessary to permit ocean freight forwarders affiliated with an export trading company or an export trading company acting on its own behalf as a freight forwarder to acquire a beneficial interest in the goods and to continue to accept brokerage from ocean carriers on those shipments. It would not relieve forwarders or export trading companies from the FMC's licensing requirements. It would not permit the payment of brokerage to any one other than a licensed ocean freight forwarder.

These provisions would apply to forwarders and export trading companies alike. It would be highly undesirable to create two separate sets of rules, one for forwarders and one for export trading companies. What it would do is allow export trading companies to operate to the extent possible under the same set of rules as their foreign competitors.

The Hay report focuses on this problem, but its recommended solution was broader than we believe is necessary.

To my knowledge, the problem has not been focused upon again until today.

Thank you, Mr. Chairman, and I will be glad to answer any questions, if I may.

[Complete statement of Mr. Waggoner follows:]

STATEMENT
OF
ROBERT L. WAGGONER, PRESIDENT,
INTERNATIONAL CUSTOMS SERVICE, INC.
BEFORE THE INTERNATIONAL FINANCE AND
MONETARY POLICY SUBCOMMITTEE OF THE
SENATE COMMITTEE ON BANKING, HOUSING
AND URBAN AFFAIRS

Mr. Chairman and Members of the Committee:

My name is Robert Waggoner. I am President of International Customs Service, Inc. ("ICS"). ICS is headquartered in Torrance, California and maintains offices at eight locations nationwide. Additionally, ICS has official representatives at every major port throughout the world. ICS is engaged exclusively in international trade and in 1980 its gross billings for transportation services and advances provided to traders totalled \$83 million.

During the 22 years since its foundation, ICS has been involved in every aspect of export trading and provides a complete export service by furnishing door to door transportation throughout the world. ICS is licensed as an ocean freight forwarder and non-vessel operating common carrier by the Federal Maritime Commission, by the Civil Aeronautics Board as an air freight forwarder and consolidator, by the Interstate Commerce Commission as a property broker, and by the Treasury Department as a customs broker. ICS has been appointed by the International Air Transport Association as an airline cargo sales agent for all IATA carriers, and is licensed by the State of California as an insurance agent. ICS has a staff of 200 experts to advise its trading customers.

For the convenience of the Committee, I have attached as Appendix B to my testimony a summary of the services ICS offers its customers. And I would emphasize that while I am extremely proud of the quality and variety of services we offer, ICS is not necessarily atypical. We are part of a forwarder/agent/customs broker industry that I believe constitutes the single greatest source of this country's expertise in exporting.

I should say at the outset that ICS supports the Senate's attempts to focus on the problems of U.S. exporters. It has long been obvious to those of us in the export business that the failure of U.S. exporters to duplicate the immense success of foreign export trading companies has been in part attributable to the exclusion of U.S. banks from participation in trading companies and the difficulties and uncertainties occasioned by U.S. antitrust policy. I wish, however, to add a word of caution. The involvement of the banks will eliminate many of the financial constraints, but that in itself will not be a panacea for the ills of the U.S. export trade. If the export trading company concept is to succeed, it must be placed on an equal footing with foreign trading companies. This means that Congress must permit export trading companies to offer the full panoply of export services, not just financing but market intelligence, insurance, documentation and transportation. It is my opinion that unless the Congress focuses on the importance of services other than those offered by the banks, trading companies will never be able to compete effectively, and the objectives of

the bill will be frustrated.

S.144, by permitting the measured and closely monitored participation of banks and by extending the coverage of the Webb-Pomerene antitrust exemption would appear to remove some of these barriers. There is an additional barrier, however, that stands between the status quo and a truly competitive U.S. export industry, and that arises from the interaction of S.144 with certain technical provisions in the Shipping Act of 1916. As S.144 and the Shipping Act presently read, ocean freight forwarders would, as a practical matter, be excluded from participation in export trading companies; and although the history of the legislation anticipates that export trading companies might themselves qualify as ocean freight forwarders, again, as a practical matter, this would not be possible. The result, however unintended (and I do believe that this is the first time since the issuance of the Hay Report that this technical problem has been isolated) would be to exclude from participation in export trading companies the individuals and organizations that should be on the cutting edge of their operations -- and that presently serve this function with most of the foreign export trading companies.

I have attached as Appendix A to my testimony a proposed amendment to S.144 that would overcome this technical problem. It does require some explanation, and with your indulgence I would likely to briefly review some of the background. Let me emphasize that my primary concern is that if this bill is to give rise to export trading companies, those companies must possess, to the extent possible, the same flexi-

bility and capabilities as their foreign counterparts. It would be highly undesirable and contrary to the purposes of the legislation to create an entity that is not a viable competitor in foreign markets. Indeed, unless the Congress is prepared to create such an entity, it would do better to leave well enough alone. Second, I am very concerned that as a result of this legislation, two different sets of rules may develop, one applicable to forwarders and one to export trading companies. This would be disadvantageous to both forwarders and trading companies.

1. The Role of Ocean Freight Forwarders In Export Trade

(a) U.S. exporters

A large portion of ICS' business relates to ocean shipping. As an ocean freight forwarder licensed by the Federal Maritime Commission ("FMC") pursuant to the Shipping Act of 1916, ICS dispatches goods overseas from the United States. This activity involves much more than simply arranging for carriage of export shipments. An exporter wishing to ship merchandise abroad normally looks to us to make all the arrangements necessary to dispatch the goods to their foreign destination. ICS provides a complete, specialized export service. We not only secure cargo space with an ocean carrier, we also arrange for the transportation of goods to the port of embarkation from all over the

United States, we prepare and process documentation, furnish warehouse space, handle pick-up, routing and containerization, co-operate with banks in co-ordinating shipments, and provide expert advice to exporters regarding letters of credit, licenses and inspections. In addition we can arrange for insurance coverage and take care of problems which may arise in transit or with respect to unusual shipments. When a shipment arrives at a foreign port, our strong network of carefully selected agents handles all the details involved in dispatching the merchandise to its final destination. 1/

In other words, we provide a service which covers every detail from seller's door to buyer's door. Over the years we have built up a specialized knowledge of particular foreign markets and the complexities of export shipping and so we are able to free both the shipper and the buyer from many of the problems inherent in export trading. Our source of income from these transactions is two-fold. First, we pass certain service charges on to the shipper. Second, and most important, we receive compensation from the ocean carrier. This compensation, commonly called brokerage, is generally fixed by the carrier conference

1/ ICS also acts on occasion as a nonvessel operating common carrier, filing a tariff with the FMC which provides for consolidation services to Australia, Europe and the Far East and enables shippers to take advantage of fast, dependable ocean service with the attendant freight cost savings.

and ranges from 1-1/4% to 5% of the freight charge, depending on the conference.

The importance of the ocean freight forwarder in these export transactions cannot be understated. The vast majority of U.S. exports to Europe, Asia, South America, Africa and Australia are by ocean, even when bulk exports, e.g. grain, are excluded. 2/ To the extent that exports are by air, S.144 does not create a problem because of the virtual deregulation of air transportation and the related functions of air freight forwarders and agents. Although precise statistics on the amount of non-bulk exports by ocean that are processed by ocean freight forwarders are not publicly available, I would estimate, based on our experience, that it is certainly the majority and probably as high in some markets as 70% to 80%. Indeed, the only time a forwarder is not used is when a very large manufacturer has sufficient, repetitive volume to negotiate directly with the traffic conferences; and even then, many of these large shippers use the services of forwarders to supplement their export distribution systems.

2/ For example, in 1979 78% of the total value of U.S. exports to Japan moved by ocean vessel (U.S. Bureau of the Census, Report FT455).

(b) Foreign exporters

The evidence already in the record from this and prior hearings paints a vivid picture of the structure and operations of foreign trading companies. ^{3/} I do not want to repeat any of that here, but I do think that a point that is often overlooked is the extent to which the transportation function, and particularly ocean transportation, is at the cutting edge of these companies.

For example, look at the Sogo Shosha, the fifteen or so massive Japanese trading companies that dominate the Japan-U.S. import market. While banks and other large participants in the Sogo Shosha provide the capital and marketing expertise, it is their transportation arms that make it all work. Indeed, many of the Sogo Shosha developed around the traffic departments of the individual company participants.

The productivity of Japanese industry and the marketing skills of their U.S. proxies are often cited as the prime reasons for the dominance of these trading companies. An equally important reason is their complete control of the transportation function. Not surprisingly, more than half of the collected revenues for the ocean transportation of exports and imports to and from Japan goes to Japanese shipping

^{3/} See the Hay Report, a study prepared for the U.S. Dept. of Commerce regarding the feasibility of the export trading company concept as a viable vehicle for expanding U.S. exports, Hearings on Export Trading Companies and Trade Associations, Senate Committee on Banking, Housing and Urban Affairs, Int'l. Finance Subcommittee, 96th Cong., 1st Sess., at 413-616, September, 1979.

companies; and Japanese vessels account for 60% of imports into Japan. Japan has a 300% freight rate advantage over the United States on shipments to third countries. 4/

While the structure of trading companies may differ slightly in other countries, the pattern is the same. Probably the largest ocean forwarder in the world is Schenkers, a German company. Owned by the German National Railway which is in turn owned by the German Government, it is a sister company of Lufthansa, and the services it can provide to its German export clients would make even the largest U.S. exporter envious. Vertical integration of transportation functions and the ability to work closely with major exporters is common throughout Europe. Perhaps the most striking example of the competitive imbalance this causes is the fact that in the most recently reported year, freight rates averaged 32% more for U.S. exports than for U.S. imports. 5/ Since ocean freight rates can account for as much as 30% of the final price of an item to the consumer, this adds to the many disadvantages encountered by U.S. exporters. 6/

My point is that successful foreign trading companies and control of ocean transportation through a forwarder or its equivalent go hand in hand. And there is every reason to believe

4/ Hearings on the Multilateral Trade Negotiations, Senate Committee on Banking, Housing and Urban Affairs, Int'l Finance Subcommittee, 96th Cong., 1st Sess., at 28, March and April 1979.

5/ Id.

6/ The Hay Report, Hearings on Export Trading Companies and Trade Associations, note 3 supra at 448.

that if U.S. export trading companies are to succeed, that experience must be duplicated here -- or at least be given an environment that permits it to be duplicated.

2. Regulation Of Ocean Freight Forwarders

(a) U.S. forwarders

Ocean freight forwarders are regulated by the FMC pursuant to the Shipping Act of 1916, as amended by the Freight Forwarder Law of 1961. A forwarder is defined as a company which arranges for the dispatching abroad of shipments by oceangoing carriers on behalf of others in exchange for payment. Forwarders are required to be independent and may not be affiliated with shippers or buyers [46 U.S.C. §801]. This definition does not cover export divisions of manufacturing companies which export their own goods directly through an ocean carrier. In other words a forwarder is essentially a go-between for carriers and shippers, and its services are suited particularly well to small and medium size companies which do not possess the resources or expertise to undertake exporting activities on their own behalf. The FMC, which is responsible for regulating ocean freight forwarders, requires that anyone

performing this type of service must obtain an FMC license to do so. ^{7/}

The Act's requirement that forwarders not be affiliated with shippers was designed to prevent ocean carriers from making rebates to shippers, i.e., to prohibit carriers from kicking back to the shipper a portion of the published freight rate for a commodity in exchange for the shipper's agreement to deal exclusively with that particular carrier. Congress determined that if a freight forwarder is owned or controlled by a shipper, an otherwise appropriate brokerage fee to the forwarder would flow indirectly to the benefit of the shipper. Requiring a forwarder to be independent of a shipper was designed to prevent these indirect rebates.

In order to ensure the independence of forwarders, the Act and FMC regulations prohibit forwarders from having any kind of "beneficial interest" in the shipments which they service. The term "beneficial interest" has been construed very broadly. It is well established that this regulation prohibits a forwarder from receiving any kind of profit or benefit arising out of financing

^{7/} An independent ocean freight forwarder is defined as

"[A] person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest." 46 U.S.C. §801.

The statute further defines "person" to include a corporation. The FMC's licensing requirements are set forth in 46 U.S.C. §841(b) and 46 C.F.R. Part 510.

of the shipment. According to FMC regulations the term "beneficial interest" includes, but is not limited to:

"[a]ny lien interest in; right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising by financing of the shipment or by operation of law or by agreement, express or implied." 46 C.F.R. §510.21(1).

The only exception made is for advances of out-of-pocket expenses incurred in dispatching shipments.

(b) Foreign forwarders

It is hardly a surprise that there is very little regulation of foreign forwarders and that even where there is regulation it is designed to encourage rather than restrict export trade.

The most detailed system of forwarder regulation outside the U.S. is probably that found in Japan. Jurisdiction is split between the Ministry of Transportation, which has general jurisdiction over shipping matters that begins with an exemption from the Anti-Monopoly Law's prohibitions on cartels; and the Fair Trade Commission, which ostensibly oversees trade practices. The Fair Trade Commission, in actual fact, has authorized both exclusive patronage contracts and deferred rebates. ^{8/} Small wonder, then, that two commentators on Japanese practices have noted that "[t]he low key approach by the Fair Trade Commission,

^{8/} Brown and Uesugi, Japanese Regulation of Ocean Freight Shipments, 11 J. Maritime Law 293 (1980); See also Matsushita, Export Control and Export Cartels in Japan, 29 Harv. Intl.L.J. 103 (1979).

the agency assigned the tasks of combating anti-competitive behavior, suggests that shipping lines and shippers have been given a free hand in developing trade agreements on freight rates for international cargo shipments." 9/

3. The Conflict Between S.144 And U.S. Regulation Of Forwarders

There is little question that S.144 clearly contemplates that forwarders will be involved in export trading companies. Freight forwarding is included in the definition of export trading services (Section 103(a)(4)), and the legislative history of S.2718 in the last Congress even contemplated that export trading companies might themselves become freight forwarders:

"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. . . 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." S.Rep. 96-735, 96th Cong., 2d Sess., p. 7.

Although this makes clear that export trading companies should not be given an advantage over freight forwarders by being exempted from FMC licensing requirements, a proposition

9/ Brown, supra note 8 at 318.

which I support and which would be codified in the amendment suggested in Appendix A, it does not address the "beneficial interest" problem. In other words, the legislation clearly anticipates that in the course of providing export services to U.S. producers of goods, export trading companies may themselves become exporters by taking title to goods and exporting them. FMC licensed ocean freight forwarders, however, are prohibited from having any beneficial interest in goods they ship.

What it all comes down to is this. . . Under the Shipping Act and FMC regulations as presently constituted, and under S.144 as proposed, an export trading company: (1) could not qualify for an ocean freight forwarder license in its own name; and (2) could not use the services of any forwarder which had any sort of beneficial interest in the export trading company. Further, these restrictions would apply even if the export trading company were engaged in exporting goods in which it did not have a beneficial interest. In other words, the very act of establishing export trading companies would exclude from participation those with the trading expertise essential to achieving the objectives of the legislation.

4. A Proposed Solution To The Problem

The Hay Report, a study prepared for the Department of Commerce in 1977 on the feasibility of U.S. export trading companies and submitted to this Committee two years later, contained five recommendations, including the following:

"Every attempt should be made to enhance the profitability of the trading business to draw the highest caliber of talent and additional investment into it. This ability to participate in freight brokerage should be given to all [export management companies] and [Webb-Pomerene Associations] today regardless of the feasibility of the [export trading company] concept." 10/

The legislative solution set forth in Appendix A represents a much less drastic step than simply permitting all export trading companies and Webb Associations to receive brokerage, as recommended in the Hay Report. Under our proposed amendment, brokerage still could be paid only to a licensed ocean freight forwarder. What it would do is remove the legal barrier to payment of brokerage if that forwarder were affiliated with an export trading company or if an export trading company were itself a licensed forwarder, and to permit the forwarder or export trading company to acquire a beneficial interest in goods shipped in accordance with the objectives of the Act. A simple amendment, but one which could have a profound impact on the success of the export trading company concept.

The payment of brokerage under such controlled circumstances would be a "rebate" only in the highly contrived sense of the word. None of the traditional evils toward which anti-rebating concerns are directed would be present. Exclusive dealing, or commercial bribery as it is often referred to under the antitrust laws, is not a relevant concern since: (1) the amount of the

10/ Hearings on Export Trading Companies and Trade Associations, note 3 supra at 570.

5. Conclusion

The testimony submitted with respect to this bill and its predecessors has, quite understandably, focused upon the banking aspects of the legislation. The amendments made to the banking and antitrust laws will play an important part in enabling export trading companies to compete effectively with their foreign counterparts. But that in itself will not lead to the creation of a successful trading company. The banks will be invaluable in removing many of the financial constraints which presently inhibit the growth of U.S. exports. But an export trading company can only be successful if it can offer a full range of export services. I hope I have succeeded in convincing you that transportation services are a vital part of this package. Of all types of transportation used in exporting goods from the U.S., ocean shipping is a major factor. In 1979, 78% of the total value of U.S. exports to Japan moved by ocean vessel. As the legislation presently stands, export trading companies will be severely handicapped unless the Shipping Act restrictions are removed. Indeed it is my belief that it would be preferable not to enact the legislation unless these changes are made. To do otherwise would be to create an entity which is an export trading company in name only.

These assumptions are not merely conjectural. The fact is that the strength of the world's most successful trading companies lies in their ability to provide whatever services

are needed to meet the requirements of particular industries and buyers. Basing its conclusions on the success of Japanese and European trading companies, the Hay Report listed the requirements for success of a U.S. trading company. These included the ability to develop export strategies for manufacturers; an intimate knowledge of foreign markets, including buying practices, potential size and growth, market structure and trends; the ability to meet unique financial requirements, e.g. the need for additional working capital; and an evaluation of costs associated with exporting which exceed those for domestic markets. The Hay Report further concluded that "[t]he exporter must have access to or develop the capability to carry out the specialized functions necessary to support export activity: transportation, insurance, documentation." 12/ This is especially important given that transportation costs can account for as much as one-third of the export value of an item. I am firmly convinced that the purposes of this bill will not be accomplished unless export trading companies have this capability and I urge the Committee to create an entity which is truly a viable competitor in foreign markets.

Finally, I wish to emphasize that it is not my intention to create two separate sets of rules, one governing forwarders and one governing export trading companies. I believe that

12/ The Hay Report, note 3 supra, pp. 437-450.

would be prejudicial to the industry and not in the best interests of either forwarders or export trading companies. I believe that my proposed amendment can accomplish its purpose while maintaining an equilibrium between forwarders and export trading companies and that it is essential that this be done.

The following language would be added to Title 1 of

S.144:

"Notwithstanding Sections 1, 16 and 41(b) of the Shipping Act of 1916, as amended, any export trading company engaged in the business of ocean freight forwarding, or any ocean freight forwarder affiliated with an export trading company, may be compensated by a common carrier by water for its services in connection with any shipment dispatched on behalf of the export trading company; provided that if the export trading company has acquired a beneficial interest in such shipment it has done so solely for the purposes permitted by this Act; and provided further, that an export trading company may not engage in the business of ocean freight forwarding unless it has been duly licensed pursuant to Section 41(b) of the Shipping Act of 1916, as amended."

HISTORY OF ICS

The Los Angeles International Airport and the Air Freight Industry were in their fledgling stage when Robert L. "Bob" Waggoner, fresh out of 2½ years of the U. S. Army Air Force, took a part time job with a nationwide International Freight Forwarder and Customs Broker in 1947, while returning to school under the G. I. Bill. In 1953, having passed the United States Treasury, Bureau of Customs exam, he was issued his U. S. Customs Brokers License. After 12 years in operations, sales and management capacities with two Broker/Freight Forwarder companies, he decided to test his own ideas, and with this decision International Customs Service, Inc. was born on May 1, 1959. From the beginning, the objective was the creation of a progressive organization able to supply a complete service for the international trade. This meant qualifying the Corporation for a Customs Brokers License for servicing importers and exporters; a Federal Maritime Commission License to provide ocean freight forwarding services, certification by the Civil Aeronautics Board as an airfreight forwarder and consolidator; appointment by the International Air Transport Association as an airline cargo sales agent for all IATA carriers; and as a State licensed Insurance Agent in California. A personal philosophy of "You are only as good as your overseas agents" became the reason for extensive travel abroad to find the type of agents who could meet the stringent requirements established by ICS.

A policy of controlled growth resulted in the opening of additional ICS locations in the major traffic centers of the United States. ICS San Francisco opened in June 1962, New York in June 1963, Chicago in June 1966, Boston in November 1970, Hartford (Sales) in January 1973 and Houston in July 1977. As new product lines and market growth patterns are constantly evaluated, ICS continues to expand its full service system bringing over twenty years of *professionalism* to our clients and their multinational markets.

The ICS staff has grown to meet the needs of a rapidly increasing worldwide client base. Their service requirements are met by over 180 experts in all phases of import/export trade. ICS is proud of the fact that 15 licensed Customs Brokers are an integral part of our system. As part of our Corporate philosophy, management and key system personnel combine proven industry track records with that extra spark of total customer service awareness unique to the ICS team spirit.



As one of the leaders in its field, ICS is an active member of the National Customs Brokers and Freight Forwarders Association, American Importers Association, National Committee of International Trade Documentation, local Customs Brokers and Forwarders Associations in cities of location in the United States, Foreign Trade Associations, Foreign and Local Chambers of Commerce, Traffic Management Associations, National and Civic Associations and National Advisory Boards. ICS has also been the Customs Broker/Freight Forwarder of record for numerous International Trade Fairs held in the United States and abroad. Bob Waggoner, President and founder of ICS, is well known and highly respected for his tireless activities in the promotion of foreign trade. He has served as Board Director, Officer and Committeeman in various local, national and international industry associations.

The management and staff of ICS constantly strive to excel in client service and the application of new and innovative service systems for positive maintenance of our industry leadership position.

INTERNATIONAL CUSTOMS SERVICE INC.

SERVICES FOR IMPORTERS & EXPORTERS

Why spend hours on the telephone when ICS can "do it all with one call"? We are ready to handle all your overseas shipping, inbound or outbound, through our wide variety of services. All are performed by teams of experts available in each of our offices. You get a Licensed Customs Broker, Ocean Freight Forwarder and Consolidator, Airline Cargo Sales Agent, Air Freight Consolidator, Insurance Agent, Trucking Broker and Traffic Consultant. Backing up this expertise is one of the most modern and sophisticated computer operations in the industry, all at your service.

LICENSED CUSTOMS BROKER

Licensed Customs Brokers in all our offices can lead you safely through the maze of tariffs, regulations and paperwork because we know all the rules and always play by them. Delays and penalties are virtually eliminated when an ICS team handles your import shipment.



LICENSED OCEAN FREIGHT FORWARDER

The "first available vessel" will carry your cargo to destination when you call ICS. We can handle the booking, pick-up, routing, containerization, insurance, documentation, licensing, customs and delivery. We can also arrange any intermodal service you require.



INTERNATIONAL CUSTOMS SERVICE INC.

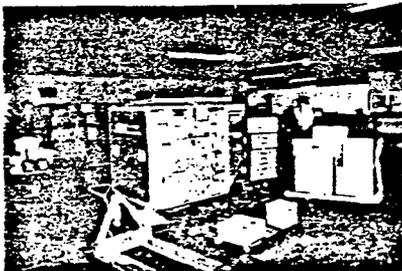
FREIGHT CONSOLIDATION SERVICE

★ AIR AND SEA

It doesn't matter whether you are an air or ocean shipper or both, we have a consolidation service for you. ICS's own ocean tariff, filed with the Federal Maritime Commission, covers consolidations to Australia, Europe and the Far East providing fast, dependable ocean service with freight cost savings for all LCL shippers.

Our air consolidation tariff provides a full range of General and Specific Commodity rates to most of the major airports of the world, again at a savings you will appreciate.

By air or sea, the inherent savings of consolidated service are passed on to you. Your shipments are containerized by ICS specialists and break bulk at destination is completed by agents who have met the stringent requirements established by ICS. When you consolidate with ICS you can rest easy knowing their umbrella of services is protecting you at both ends.



AUTHORIZED AIRLINE CARGO SALES AGENTS

We don't operate our own airline, but that's about all we don't do. Our many years of experience at airports enables us to be at the right place at the right time to keep your cargo moving. We arrange for origin pick-up, full documentation, air carrier booking and delivery, in-transit monitoring and destination services.



ICC LICENSED PROPERTY BROKERS

We can arrange and negotiate trucking of your shipment within the U.S.A. for a full truckload or less than truckload. Our service is designed to fit our clients' distribution needs. Another rung in the complete service ladder.

INTERNATIONAL CUSTOMS SERVICE INC. SERVICES FOR IMPORTERS & EXPORTERS



INSURANCE AGENTS

Nobody plans an accident — but they do sometimes happen in spite of the most diligent efforts to prevent them. Our ICS specialists can provide all of the insurance information you need and the required coverage to protect your interests. In the event of accident or loss, you will be adequately covered and we will be at your side until settlement is completed. Another part of the ICS complete service on which we were founded.

SERVICES TO BANKING

Money isn't everything but it sure helps when it is available when and where you need it. Isn't it nice to know that you can get the credit while we do all the work? Our experts can arrange for any currency, in any country, when you need it.



DOCUMENTATION EXPERTS

How many times have your shipments been delayed because you couldn't finish the paperwork in time — or you didn't know what documents were required? Do you have peak seasons when paperwork gets completely out of control?

Our teams are experts in all phases of documentation. Try us! You'll soon wonder how you ever got along without our help — and it's cheaper than adding to your staff.

INTERNATIONAL CUSTOMS SERVICE INC. SERVICES FOR IMPORTERS & EXPORTERS



CONSULTATION SERVICE

If you want to know anything about overseas shipping, you can do one of two things. You can spend months of travel and countless telephone calls to find out for yourself or you can call ICS. Our over twenty years of experience, our dedicated teams and network of overseas agents can become your invaluable aides — at no cost to you. It's like having a new man on your staff, but not on your payroll!

OVERSEAS SERVICES

It is essential that the ICS concept be as readily discernible in our overseas agents as it is in our home teams. Key ICS management personnel are constantly visiting and evaluating performances of our agents. Frequent consolidations to and from major overseas points enable us to guarantee the best possible service at the lowest possible cost.



AUTOMATED DATA PROCESSING

Our "in-house" computer represents over 10 years of unending effort to produce one of the finest systems in the industry. With fully tested and operational systems in all ICS locations you have the entire team working as a unit. More extra benefits for our clients at no extra cost.

Senator HEINZ. Thank you very much. I will have some questions for you, but we will proceed to Mr. Casey.

Mr. CASEY. Fine.

Senator HEINZ. Who is our cleanup witness.

Mr. CASEY. Thank you, Mr. Chairman.

My name is William R. Casey and I serve currently as the president of the National Customs Brokers & Forwarders Association of America, Inc. Our membership consists of approximately 400 licensed ocean freight forwarders and customs brokers and we have affiliated with us 21 local, affiliated forwarder/broker associations.

Our combined membership is responsible for handling the vast majority of general cargo exports. I am also president of my own firm, the Myers Group, with offices throughout the country. I am accompanied by the association's general counsel, Gerald H. Ullman.

EXPORT TRADE SERVICES

Our particular concern is sec. 103(a)(4) of S. 144, which defines the term "export trade services" to include "trade documentation and freight forwarding." This phrase, if unexplained, may possibly be construed to mean that an export trading company may prepare shipping documents and engage in ocean freight forwarding without qualifying for and receiving a license to render forwarding services from the Federal Maritime Commission as the Shipping Act of 1916 requires.

In our view it is most important that the committee make it absolutely clear that the definition of "export trade services" does not permit an export trading company to carry on the business of forwarding, as that term is defined in section 1 of the Shipping Act, 1916, without an FMC license.

A contrary interpretation would open the door to the dummy forwarder problem that Congress resolved in 1961 after several years of study. Prior to that date some exporters, looking to receive an unfair competitive advantage, registered with the FMC as forwarders and received brokerage commissions from steamship lines. Such commissions gave these exporters a lower net freight rate and thus a competitive advantage over other exporters not resorting to this subterfuge.

Congress banned the dummy forwarder practice in 1961 by requiring the licensing of an ocean forwarder provided that he was independent, that is, not a shipper or consignee or seller or purchaser of shipments to foreign countries, nor did he have any beneficial interest in such shipments, nor was he directly or indirectly controlled by shippers or other person having a beneficial interest in the shipment.

To prevent the return of unlawful rebates our association believes that an export trading company should not engage in forwarding without an FMC license. Only in this manner may the shipping public be assured that the dummy forwarder problem will not resurface and permit export trading companies to receive a freight rate advantage over exporters shipping similar commodities who are not export trading companies.

In our view, if an export trading company is an exporter or has a beneficial interest in the goods, he cannot be an ocean forwarder.

Similarly, if a licensed ocean forwarder wishes to become an export trading company, he should surrender his forwarder license. There can be no inbetween position without running the risk of illegal rebates.

We presented this problem to your committee last year when S. 2379 was under consideration. The committee recognized the necessity of making it clear that the bill was not intended to allow export trading companies to engage in forwarding without complying with the licensing requirements of the law by stating:

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 which governs 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. (H. Rept. No. 96-735, p. 7, 96th Cong., 2nd Sess.)

Our association strongly supports the bill and its objective of increasing our export trade. However, it would be appreciated if the committee indicated, as it did last year in its report, that there is no intention in the bill to override by implication or otherwise the licensing provisions of the Shipping Act of 1916.

Thank you.

Senator HEINZ. Very well. Thank you all very much for excellent testimony.

EMPLOYMENT

Dr. Haefner, I found your testimony quite intriguing and interesting. Clearly, what you're suggesting is that there are a lot of jobs to be created in ports, whether they be inland ports such as St. Louis, or seacoast ports such as Philadelphia or Erie on the Great Lakes.

And I think it's significant to make that statement because it means that this bill is not just good for the east or the west coast or the gulf coast. It's good for the heartland of America quite directly.

Dr. HAEFNER. Very much so.

Senator HEINZ. Quite directly. I find your job creation statistics for every ton and every 600 tons very valuable. Have you got any specifics that you based your study on?

Dr. HAEFNER. Well, the job specifics were taken from a nationwide study from the Maritime Administration, which you note in footnote 1, which I'll read. It's *The Economic Impact on the U.S. Port Industry*, Volumes 1 and 2, published August 1978.

Just two small words of background about that study. That was a national use of an input-output economic analysis model run by the Port of New York Authority for the entire Nation under the sponsorship of the Maritime Commission.

I would point out that there is a great deal of active research and professional activity at the moment to take this type of nationalized statistics and regionalize them.

PUSH-PULL MECHANISM

Another thing I might elaborate on that I think is the central theme of my testimony is that port planning is possibly the most public-relations related of any and all hard-core transportation

engineering. It has a great deal of business community interaction and one of the unique problems we continually run into is what I like to call the push-pull mechanism.

The private sector would like to see the public facilities there, but they will not go in until they are guaranteed. The presence of public facilities rest largely on a strong commitment of private sector support in the region, by virtue of the financial and banking entities making strong efforts to get involved in the real estate activity, to finance and draw private industry to the site. The unique fact is they have very little control over what happens to the success of the industries they draw to the site, other than typical mortgage banking considerations.

Senator HEINZ. So what you're saying is you see trading companies as a means of unifying the disparate elements that invariably get involved in port questions. And let me tell you, they are almost too numerous to count.

In Philadelphia we not only have Philadelphia Port Corporation, Port Authority, Chamber of Commerce, the freight forwarders, the tugboat captains, the longshoremen, you know, but we are blessed with having the New Jersey Port Authority, and the Delaware Port Authority, not to mention the Port of Wilmington, which means coordinating with several jurisdictions.

So you add that all up and anything you can do to bring, I've forgotten even the Coast Guard, Customs Service, and a few other ancillary people like that—you add all those up together and anything you can do, anything at all to unify people in a common cause is more than welcome.

I think your point is extremely well taken. You were about to say?

Dr. HAEFNER. I was just going to point out that this particular bill allows the bank or any other financial entity direct control in their destiny in the sense that the bill will set in motion the capability to allow them to have a start to finish operation in controlling the export activity at a site and execute direct financial interest and direct capability of management and control.

I think that is the most important thing, as we port engineers go to the private sector with some development requests, and some capability of rewards for their response to us.

Senator HEINZ. It wasn't the specific intent of the legislation to make your job easier, but I'm glad it does if we pass it, and I hope we will and I expect we will.

Mr. Waggoner, Mr. Casey, both of you really have addressed an issue that properly should be addressed having to do with the special circumstances of the freight forwarders. And you've both made a special point of noting that were we not to take special cognizance of the problem, there could be an inequity created by the passage of this bill between the trading companies and the freight forwarders, given the fact that licensed freight forwarders are not allowed to have beneficial interest in the freight they forward.

What I would propose to do is to incorporate the same language in the report as we had last year, both of you incorporated that language in your statements.

Mr. Casey, you read that. It would be difficult for this committee, not being the committee of jurisdiction, to actually get into the Shipping Act itself. That would be up to the Commerce Committee.

I do think that you've raised some important questions, and some of which would require more than the insertion of report language. We would be happy to work with you to try and get the resolution of those larger questions.

As a practical matter, we would have kind of a jurisdictional problem if we started amending the Shipping Act at this time, I think. Your comments, please.

Mr. CASEY. Yes. I appreciate that. Would that mean that you would accept some language as an amendment?

Senator HEINZ. Yes, I think we should handle this by report language and we will work with you to draft language to meet the intent of not putting the freight forwarders or anybody else at a disadvantage.

It was clearly not the desire of the drafters of the legislation, Senator Stevenson, myself, Senator Danforth, or anyone, to create an inequity and we will do everything we can to avoid that.

Mr. CASEY. We felt so and thank you for that.

Senator HEINZ. Mr. Waggoner, any comment?

ETC'S TO COMPETE AROUND THE WORLD

Mr. WAGGONER. My comments are that I'm concerned that in this creation of an Export Trading Companies Act, that we have a viable entity that can compete effectively around the globe. This was the original concept that we used, to have an export trading company concept in this country to meet the competition from the United Kingdom, from Japan, and so on, without equipping the export trading companies with that ingredient which, as I referred to and was referred to in the Hay report, transportation constitutes a good third of the total value of goods. Then you are clipping the wings of the export trading company to go out and meet the competition from overseas on the battlefield.

My contention is that the export trading company concept in this country should be equipped to wrestle with transportation.

My concern was that to promote transportation as was mentioned, or have it be an identical part of the export trading company, and then have it operational, and have a freight forwarder department, and that freight forwarder department starts doing other business to add to its income, to cover its overhead, and is doing so without licensing requirements that we already in the business are subjected to, then we end up with two sets of rules. And this is my concern.

So, one, I think we must be as safe to insure that the export trading company is a viable competitive organization, and, on the other hand, let it not have two sets of rules to muck up the regulations that we're subjected to.

Senator HEINZ. It is my understanding that as a matter of law, correct me if you have contrary counsel, that because we don't specifically repeal any provision of the Shipping Act, it is a fact that anybody engaging in freight forwarding would have to be licensed, because the Shipping Act exists it is untouched by this legislation.

In order to make sure that there was no misunderstanding on that point, the committee last year in the report specifically said, export trading companies wishing to render forwarding services may do so upon qualifying for and receiving a license under the Shipping Act.

Now, it would seem to me that while that doesn't fully resolve the larger issues you raise as to whether freight forwarders are too regulated and therefore that anybody in the trading company who gets a license to be a freight forwarder is also going to be heavily regulated, that that at least would appear to deal with any questions for now of inequity. It would also be useful to take the question up with the committee of jurisdiction. And we will look at the question and try to see if we can't get some interest in that.

Do you have a comment, Mr. Casey?

Mr. CASEY. Yes. No more on that, but somewhat off the specific point.

I was interested, in listening to some of the banking testimony, and no one mentioned one of the obvious advantages to banks in this thing, is the confirming house, which is not normally used in North America.

Senator HEINZ. I am sorry. I didn't hear you. The what?

Mr. CASEY. The confirming house approach which is used by many of our trading partners and gets around a lot of the onerous requirements of the letters of credit and thus facilities exporting. And certainly a bank would be in a far greater position to become a confirming house than anyone else in the trading community.

Senator HEINZ. Mr. Waggoner?

Mr. WAGGONER. Counsel would like to make a comment.

Senator HEINZ. Absolutely.

Counsel, please proceed.

Ms. TRINDER. Thank you, Senator.

I think our point, if I could just clarify it, is that while we are very supportive of the idea that ETC's should be licensed before they could undertake forwarding activities, if in fact they go ahead and get a license they will not, in fact be able to undertake those activities because of the Shipping Act. In other words, simply including that language in the report in and of itself does nothing.

Senator HEINZ. Well, it prevents you freight forwarders from being put at a competitive disadvantage.

Ms. TRINDER. That is true, but it also prevents export trading companies from undertaking forwarding activities.

Senator HEINZ. It might well have that effect, but we are, unless we want to get into a jurisdictional fight with the Commerce Committee, are going to have to work with them to resolve that problem.

I think you have provided a very important service to the committee in pointing that out. Clearly we would like to see the trading companies offer as integrated and full a package of services as possible.

Mr. ULLMAN. May I take a mild exception to statement of counsel?

Senator HEINZ. Absolutely.

LICENSES FOR FORWARDING SERVICES

Mr. ULLMAN. Ms. Trinder said if the export trading company should be licensed nevertheless she feels they could not undertake forwarding services. If I understood her statement, that is what I said. As counsel for the association, in this business for many years, I don't quite understand that, Senator, because if the export trading company does get a license from the Federal Maritime Commission, that means it is allowed to engage in forwarding activities. If that is so—

Senator HEINZ. As I understand the nature of counsel's question, both of you are probably much more knowledgeable in this area which I have never studied for more than 2 or 3 minutes—however long we have been here—plus a little time on the testimony last night, I think what counsel is saying is that they probably won't be granted.

Mr. ULLMAN. Well, that is true. I think her basic hypothesis is wrong, because if an export trading company applies for a license it would be precluded by the Federal Maritime Commission because under the definition it would be a seller of goods.

Senator HEINZ. That is right.

Mr. ULLMAN. Or would have a beneficial interest in the goods or control such a person. So an export trading company cannot get a license under present law nor do we think they should.

Senator HEINZ. Both of you entirely agree. Now, if there is a difference between you, it would be the question of whether it is a good idea for the licensees, and everybody agrees that freight forwarding should be licensed to have no beneficial interest in the goods, that in some sense there should be a liberalization.

Mr. ULLMAN. Well, that is where I—

Senator HEINZ. Now, what Mr. Waggoner is saying is he feels it is in the interest of the—is in the national interest for export trading companies to be as full service as possible. The means to do that is to provide a liberalization of the freight forwarder's ability to in effect or in some degree or in some way have more of a beneficial interest in what it is they are forwarding. And if you have a disagreement, I suspect it would be with that.

Mr. ULLMAN. Well, I think I ought to mention, too, that current law provides for an exporter to do forwarding without a license so long as he is forwarding his own goods. So there really is no necessity of an export trading house, which is another form of exporter, under our law, of having the need to get a license as an ocean freight forwarder so long as he is forwarding his own goods.

It seems to me that would comply with Mr. Waggoner's idea that they should be able to offer full services. It is only when they engage in outside forwarding that a license is required.

Senator HEINZ. What is the test for what is your own goods? You don't have to manufacture them, you just have to have taken title to them?

Mr. ULLMAN. The statute talks about being the seller of the merchandise. Now that doesn't mean it has to manufacture it. It could buy the goods from a manufacturer. But so long as the exporter is selling to a third person he is therefore forwarding his own goods. He's bought it and is reselling it. He can forward those goods.

Senator HEINZ. Under that construction, which would seem to be reasonable, Mr. Waggoner, it would appear that export trading companies indeed could forward their own goods.

Mr. ULLMAN. Without a license.

Senator HEINZ. Without a license.

Mr. CASEY. Yes, sir.

Senator HEINZ. If they took title. And indeed, in order to sell they would have to take title. If they were simply forwarding somebody else's goods, something they weren't selling, something they didn't take title to, they would have to get a license to do that.

Mr. ULLMAN. That is correct. We don't really think that it is terribly important to have that kind of exception in the law.

Senator HEINZ. It seems to me the only problem you get into is where a trading company might decide to operate on consignment. That would appear to be the area that would be really difficult to resolve.

Ms. TRINDER. May I have just 1 minute. I think, and Mr. Waggoner will correct me if I am wrong, but I think it is our understanding of the export trading company concept that export trading companies will also undertake to export goods to which they do not necessarily own title. They will not always own title. In fact, the definition of export trading company indicates that an ETC has to be organized and operated principally for the purpose of exporting goods but also for the purpose of facilitating export of goods from unaffiliated persons.

Senator HEINZ. You know, the people who want to form export trading companies, some of whom you have heard today, I think, and I say this in case they aren't, but I think, having seen the report language from last year, ought to be aware of the requirements of the Shipping Act. So far they haven't told us as prospective export trading company operators and participants, equity investors, that they see it as a problem. You may very well be right. There may be a potential problem for successful export trading companies there. But as yet the people who seem at this point most interested in it haven't so identified it.

Mr. WAGGONER. Permit me to say that actually, in the trading company concept, it is entirely possible that a trading company, having a forwarding department forwarding goods that they had negotiated and sold but are really not theirs could run afoul of operating a forwarding company without a license.

Senator HEINZ. If they were forwarding goods that weren't theirs they would be in violation of the Shipping Act, as I understand it. But we make clear in our report language that if they are going to engage in forwarding somebody else's goods—being the seller but not taking title to it—they are subject to the same licensing requirements that you are. That is what the report language is all about.

But I think we understand the broader nature of the problem. While we may not be the committee of jurisdiction, we are not necessarily going to ignore it either.

We appreciate all of you bringing it to our attention.

Mr. ULLMAN. Thank you, Senator.

Senator HEINZ. Thank you very much.

[Whereupon, at 12:20 p.m. the hearing was adjourned.]

[Additional material received for the record follows:]

NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS,
New York, N. Y., February 19, 1981.

Hon. H. JOHN HEINZ,
Chairman, Subcommittee on International Finance and Monetary Policy, Committee on Banking, Housing and Urban Affairs, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The National Association of Mutual Savings Banks, on behalf of its member institutions, would like to express its support of S. 144, legislation to promote the formation of export trading companies. Strengthening the export position of U.S. manufacturers and service providers is a national goal on which there can be no basic disagreement. Prior congressional hearings and numerous independent studies have likewise amply documented the important role which export trading companies can play in fostering overseas sales.

Our review of the record leads us to conclude that the favorable experience which Japan and other foreign countries have had with respect to export trading companies is indeed transferable to the U.S. Certainly there exists sufficient evidence to justify the initiatives embodied in S. 144, which are, after all, mainly aimed at removing existing legislative and regulatory disincentives to the establishment of trading companies.

On the more difficult question of whether banks should be permitted to invest in and sponsor export trading companies, our association is strongly of the view that this can be accomplished with sufficient safeguards to protect the public interest in a sound banking system. While there has been a longstanding tradition of separating banking from commerce in the U.S., it is equally true that a number of exceptions have been permitted in recent years without any adverse impact on the banking system. One example which comes to mind is the authority granted banks to sponsor small business investment companies (15 U.S.C. § 682). By way of promoting other important public policy goals, banks have also been authorized to invest in and lend to state housing corporations (12 U.S.C. § 1464(c)). We see no reason why the logic of permitting banks to take properly supervised equity positions in small business or housing development ventures cannot be applied to the national objective of promoting exports.

Turning to the specific interest of the savings bank industry, we are very pleased that Section 105(a)(1) of S. 144 classifies a federal savings bank as an eligible "banking organization" for purposes of investing in export trading companies. State chartered savings banks already qualify by reason of their inclusion within the definition of "state bank" set forth in Section 105(a)(2). Although mutual savings banks are primarily real estate lenders and are likely to remain so in the foreseeable future, S. 144 clearly recognizes that in the deregulated banking environment of the 1980's, there exists no valid reason for conferring powers on one particular type of financial institution to the exclusion of competing depository institutions. We whole-heartedly support this particular feature of the pending legislation.

In conclusion, the mutual savings bank industry views S. 144 as a measure well designed to assist the nation's export position while providing banks with additional management flexibility. The supervisory safeguards now in the bill are more than adequate, and thus we see no reason to adopt the approach recommended by the Federal Reserve Board that would essentially limit banking organizations noncontrolling investments in trading companies.

We appreciate this opportunity to comment and respectfully request that this letter be incorporated into the hearing record.

Sincerely yours,

LOUIS H. NEVINS,
Senior Vice President and Director.

EXPORT TRADING COMPANY ACT OF 1981

THURSDAY, MARCH 5, 1981

U.S. SENATE,
COMMITTEE ON BANKING,
HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON INTERNATIONAL
FINANCE AND MONETARY POLICY
Washington, D.C.

The subcommittee met at 9:40 a.m. in room 5302, Dirksen Senate Office Building; Senator John Heinz, chairman of the subcommittee, presiding.

Present: Senators Heinz, Garn, Proxmire, and Dixon.

Also present: Senator John C. Danforth.

OPENING STATEMENT OF SENATOR HEINZ

Senator HEINZ. Ladies and gentlemen, today's hearing represents the third and last to be held by this committee on S. 144, the Export Trading Company Act of 1981.

Extensive hearings were held in previous years by the committee, and I think overall we have a more complete record laid out on this bill than any other bill this committee has considered for quite a number of years.

It is my hope that after this hearing we will move quickly to mark up the bill.

I understand that the chairman of the full committee, Senator Garn, has scheduled the markup for March 12.

In my judgment committee action on this bill could not be more timely. Only last weekend the Commerce Department announced that our Nation's trade deficit for January was the second highest on record, \$5.44 billion, second only to the record of February 1980.

While there is some indication that the size of this deficit is temporary, and that in future months it will shrink somewhat, it is nevertheless a fact that the deficits continue month after month with temporary progress alternating with sharp setbacks.

Over the longer term the rising dollar will mean even more difficulty in increasing exports and that makes even more compelling the case for prompt Government action to promote exports.

S. 144 represents such action, and I am pleased that all members of the committee have been so cooperative thus far in helping the bill move forward.

Today's hearing will focus primarily, though not exclusively, on the antitrust issues in title II of the bill.

Our panel of witnesses on this subject includes attorneys now in private practice with considerable expertise in the Webb-Pomerene Act, which S. 144 proposes to amend; and an attorney intimately

familiar with the development of this bill from the perspective of the Justice Department last year.

The Reagan administration was also invited to send another witness to this hearing to testify on title II of the bill, even though they have already appeared previously and have endorsed the legislation. We have, however, received a letter from the administration declining the invitation and elaborating at some length on their position on title II of the bill.

Without objection we will place the entire letter in the record at this point.

[The document follows:]

DEPARTMENT OF COMMERCE,
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.

Senator HEINZ. I do want to read a number of the pertinent parts of the letter for the benefit of those present.

The letter is addressed to the subcommittee, signed by Malcolm Baldrige, the Secretary of Commerce, and it says starting in the third paragraph:

My testimony specifically dealt with the questions raised in your letter regarding participation in trading companies, bank control of an export trading company and the financial provisions of S. 144.

With respect to the antitrust immunity, you asked whether such 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 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 export trading companies and increase exports, and the other to ensure 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 is issued 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.

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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.

The 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.

Before I yield to my colleagues for any opening statements, let me just announce that the first witness will be Milton Schulman, the president of Millen Industries, who then will be followed by our panel, which is announced.

We are doing that partly because Mr. Schulman is one individual and we will be able to move him along much more quickly than the entire panel, and we want to leave a good deal of time for discussion with the panel.

Senator Proxmire.

OPENING STATEMENT OF SENATOR PROXMIRE

Senator PROXMIRE. Thank you, Mr. Chairman.

I think before we panic on the notion that our balance of trade is in terrible shape we should recognize that it is really very helpful to look at it overall.

We recognize that the balance of current accounts includes everything, including income and investments abroad. We are the only non-OPEC country of any substance that did have.

I notice Mr. Ewing in his statement this morning documents how healthy our balance of trade is becoming and how it is improving.

I have a great deal of sympathy with what I understand to be the essential feature of the existing Webb-Pomerene law. That law makes clear that joint venture in export trade to enable U.S. firms to achieve economies of scale which do not adversely affect competition at home are permissible.

The laudable purposes of the Webb-Pomerene Act were perhaps best expressed by Justice White's words, and I quote:

Congress concluded that American firms should be allowed to combine to achieve lower costs, lower prices and more comprehensive and effective service in order to be able to compete on an equal footing in foreign shipments.

S. 144 amends the Webb-Pomerene Act. I agree with the thrust of the amendment. Certainly services should be covered as well as goods. Certainty should be accorded business which operates under the law.

But I am troubled very much by some of the larger policy questions.

In the Wall Street Journal last year an editorial pointed out, and I quote:

The export trading company bill does pose some dangers. By endorsing it and expanding the principle of export cartels it undermines the U.S. commitment to an open international trading system. How can we complain about OPEC and third world cartels if we encourage our sulfur or carbon black producers to form their own export cartels?

And that wasn't the "Village Voice" speaking. As I say, the editorial was part of the Wall Street Journal.

When Secretary of Commerce Baldrige appeared this week to testify on S. 144 he disappointed me very much in his response when I brought to his attention this editorial. His response was that he did not believe in unilateral disarmament. The United States needs to have an affirmative policy in favor of free, open competition in world markets. That is the policy that will serve us best in the 1980's.

Protectionist sentiment or fighting fire with fire will be a losing proposition, if it is the case, as the Journal suggested that S. 144 encourages the cartelization of our foreign trade.

In short, I think we need a better record than we now have on title II of S. 144.

I hope we shall take advantage of the presence of the antitrust experts here this morning to testify on the certification provision of title II.

And I must say again, Mr. Chairman, that I am disappointed that the Reagan administration is not testifying on this bill. The Justice Department is not testifying on this bill. It is obvious from

Mr. Baldrige's testimony he is no antitrust expert, but he appeared here speaking for the Justice Department.

In that letter there is an astonishing first paragraph. Of course, he is responding to a request. He said:

Thank you for your letter of February 25 requesting that I as administration spokesman on export trading companies designate a representative of the Justice Department to testify at the March 5 hearing on S. 144.

So the Secretary of Commerce would say move and the Justice Department would testify on this legislation. We need the Justice Department to come in itself and give us their own views—they are the experts on antitrust—and tell us what effect this will have.

I hope this doesn't mean that we should batten down our hatches and prepare for another Andrew Mellon type administration with an assault on antitrust laws and a disregard for the great service that free competition here at home and abroad has provided for this country throughout the years.

Senator HEINZ. Senator, I apologize for not having made it clear, when I read the letter into the record, that the Department of Justice has signed off on this letter. It does represent their position, and they did review the entire letter, and to the extent that any changes were made, they helped to make them.

So this does represent the position of the Reagan administration Justice Department.

They have asked, apparently, Secretary Baldrige to be their spokesman in this instance, because there is no substantive difference between what their position is and what Secretary Baldrige's is.

Senator PROXMIRE. I just thought it was unfortunate that they didn't send a representative up here to be cross-examined and questioned on this as a representative of the Antitrust Department. But I understand the positions.

Senator HEINZ. Senator Dixon?

Senator DIXON. I have no statement, Mr. Chairman.

Senator HEINZ. I would like to welcome Senator Jack Danforth to this committee.

Senator Danforth is not a regular member of this committee, but he is very welcome to attend, particularly because he has put so much work into title II of this bill. He literally is the author of it. He has contributed to the understanding of it, both here on the Hill, and I might add downtown.

Jack, if you have any comments you would like to make we would be happy to hear them.

OPENING STATEMENT OF SENATOR DANFORTH

Senator DANFORTH. Mr. Chairman, thank you very much. I appreciate very much being invited to join with you.

As you know, this bill has now been in the legislative process for some 3 years. Multiple hearings have been held on it. After extended floor debate in the last year, the bill was passed by a vote of 77 to zero on a rollcall vote.

The antitrust aspects of the bill have been scrutinized most carefully over this 3-year period of time, scrutinized in the various hearings that have been held in the Congress. Justice Department officials, along with other departments of Government, have come

before the congressional committees, testified, have been examined on this.

The initial bill, as it was introduced, raised some questions with various people in the Justice Department.

Extensive negotiations were held with the Justice Department personnel and staff in my office. Again, negotiations were held within the Justice Department itself, between the Justice Department and the Commerce Department and the Carter administration, eventually discussions involving Stuart Eizenstat of the Domestic Council under the Carter administration.

The result of this extended, elaborate process of negotiation, discussion and compromise was fashioned in the bill which was passed by the Senate by unanimous vote last fall, and the bill which is now before us.

So you have scheduled hearings again, giving us yet another chance to sift through the bill. I think that that is commendable.

I understand that a number of lawyers will be here giving various views on the bill before us. As is true with almost any kind of extended negotiation and working out of details, I am sure that probably everybody would rather have the bill be in somewhat different form. Some people would even rather accomplish the objectives of the bill, I am sure, in a somewhat different manner. But I am confident that the Webb-Pomerene Act, which has been on the books now for 60 years or so, is an important concept in furthering America's ability to keep her international markets. And I am confident also that it is not now working very well, and that the changes in the Webb-Pomerene Act, which are part of title II of this bill, are very important if we are going to have a better position in the United States to deal in international markets.

As you have pointed out, Mr. Chairman, in the past, and as your predecessor, Senator Stevenson, pointed out very frequently, the first title of the bill is really dependent on the second title. Without the antitrust provisions the first title would not really be very effective at all.

So I think what we are about today, while it goes over ground that has been gone over and sifted through many, many times, I think that we are dealing with an important subject, and I appreciate your including me in your deliberations.

Senator HEINZ. Senator Danforth, we thank you for taking your time to really go beyond your usual committee responsibility to be here. It is appreciated, I am sure, by all of us.

Let me ask Mr. Schulman to please come forward.

I understand he is accompanied by his counsel, Douglas E. Rosenthal.

STATEMENT OF MILTON SCHULMAN, PRESIDENT, MILLEN INDUSTRIES, INC., APPEARING ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, ACCOMPANIED BY DOUGLAS E. ROSENTHAL, PARTNER, SUTHERLAND, ASBILL & BRENNAN; AND HOWARD WEISBERG, DIRECTOR OF INTERNATIONAL TRADE POLICY, CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. SCHULMAN. My name is Milton Schulman, chief executive officer of Millen Industries of New York City, testifying on behalf

of the Chamber of Commerce of the United States. Accompanying me are Douglas Rosenthal, a partner in the law firm of Sutherland, Asbill & Brennan and chairman of the antitrust working group of the Chamber's export policy task force; and Howard Weisberg, the Chamber's director of international trade policy.

The U.S. Chamber's membership is committed to fostering a strong domestic economy and a vigorous competitive position in world markets.

For this reason we are here to express the Chamber's support for S. 144, a bill to facilitate the formation of export trading companies.

Millen Industries manufactures and converts paper into paper products. We make many products, including folding cardboard boxes for the shoe industry.

We are a family business, the successor of a family business, which has been in operation in the United States since 1888.

My company employs 400 workers with small local manufacturing facilities in nine States.

I was asked by the U.S. Chamber of Commerce if I would speak to you today on their behalf from the distinctive point of view of an American small businessman who wants to export but has had difficulty in doing so in the past.

I accepted somewhat reluctantly because I am not accustomed to public attention and I know very little about either the technicalities of U.S. banking or antitrust law.

For the past 6 years I have tried, with only limited success, to expand internationally the sales of our paper products. That experience has made me very receptive to the ideas expressed in S. 144. What impresses me about this bill is that it would seem to encourage the formation of trading companies of a type that could help my company and of a type I have not encountered.

When our company decided 6 years ago to seek new markets abroad, especially in Europe, I began traveling in foreign countries to try to sell our products. I found the expenses of these visits grossly out of proportion to the business generated. I was hampered by problems of language and found that interpreters were cumbersome and uneconomical.

I became aware that each nation not only has intricate and distinctive legal requirements relating to imports but political and economic situations, especially relating to receptivity to imports, which are difficult to learn about, and which require an expert understanding, which I had neither the time, patience nor expertise to gain.

It's not that I found it was wrong traveling to these potential markets, for I found it impossible to learn about them on this side of the ocean. Only by sitting down and talking to customers could I find out that they often desired us to make types of products—boxes are one of them—which we did not manufacture, or that we could receive orders if we were willing to furnish a complete range of products which we did not then make.

PARTNERSHIPS IN VIOLATION OF ANTITRUST ACT

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 products 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 the U.S. antitrust laws.

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, therefore, is inclined to stay away as far as possible from exposure—even if it means giving up business opportunities and possible profits.

I have been told by lawyers that there may be problems with section 2 of the Export Trading Company Act, the section which provides for certification of export trading companies so that they may be free from antitrust prosecution. There may be problems with it, 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 the selling opportunities by putting together a full line of products among two or three firms.

After 6 years, Millen is finally selling its products, to a limited extent, in Europe. But the effort which has been put into reaching the point where we now stand is disproportionately great to the returns realized. And as a practical matter, it discourages any new and significant investment in further export promotion.

It would be reasonable for you to wonder whether our problems did not result more from our products just not being competitive in foreign markets than from special difficulties of getting access to those markets, even with a competitive product. I am quite satisfied that we have a product of superior quality to sell, which could be profitably exported to many foreign markets, even after taking into account the costs of shipments and import duties. For example, U.S. production of shoes declined relative to foreign manufacturers, and there are increasing opportunities for our firm and our competitors to sell boxes to the countries where shoe production is increasing.

In sum, a small company like ours, manufacturing low-cost, limited demand products, cannot afford to start its own export operation, even though it could increase sales abroad if it were helped to do so by those with special knowledge and experience in overseas sales. I have been told that there are U.S. subsidiaries of large, successful foreign parent trading companies which operate very effectively in the United States. I question whether I can have absolute confidence that a foreign trading company will further an American company's interests. I would wonder whether such a company would not want itself to set up a competitive operation, probably abroad, once it had thought it had identified the elements

that made our company successful and felt it could reproduce these elements without having to deal with us.

Moreover, our company is just too small for even those trading companies to be willing to give our products the kind of attention we need for successful marketing abroad.

I also understand that section 1 of the Export Trading Company Act, which would encourage banks to participate in the formation and operation of export trading companies, is controversial. I have a good relationship with my banker, and he has been helpful to me in many aspects of the operation of our business. I do not see why the international commercial experience of our banks should not be shared with us and used to benefit small exporters.

I do not believe this bill is going to solve all U.S. trade problems; however, if you want to encourage exports by small firms, and reorient us into thinking more in world market terms, then this legislation is desirable, and perceived by businessmen like me to be a very good idea, long overdue.

[The complete statement follows:]

STATEMENT BY MILTON M. SCHULMAN, FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES

I am Milton M. Schulman, Chief Executive Officer of Millen Industries, Inc. of New York City and am testifying on behalf of the Chamber of Commerce of the United States. Accompanying me are Douglas Rosenthal, a partner in the law firm of Sutherland, Asbill and Brennan and Chairman of the Antitrust Working Group of the Chamber's Export Policy Task Force, and Howard Weisberg, the Chamber's Director of International Trade Policy.

The U.S. Chamber's membership is committed to fostering a strong domestic economy and a vigorous competitive position in world markets. For this reason, we are here to express the Chamber's support for S. 144, a bill to facilitate the formation of export trading companies.

Millen Industries manufactures and converts paper and paper products, especially folded cardboard boxes such as for shoes. We are a family business, the successor of a family business which has been in operation in the United States since 1888. My company employs approximately 400 workers with small local manufacturing facilities in 9 states. I was asked by the U.S. Chamber of Commerce if I would speak to you today, on their behalf, from the distinctive point of view of an American small businessman who wants to export but has had difficulties doing so in the past. I accepted, somewhat reluctantly, because I am not used to public attention, and I know very little about either the technicalities of U.S. banking or antitrust law.

For the past six years I have tried, with only limited success, to expand internationally the sales of our paper products. That experience has made me very receptive to the ideas expressed in S. 144. What impresses me about this bill is that it would seem to encourage the formation of trading companies of a type that could help my company and of a type I have not encountered.

When our company decided six years ago to seek new markets abroad, especially in Europe, I began traveling in foreign countries to try to sell our products. I found the expenses of these visits grossly out of proportion to the business generated. I was hampered by problems of language and found that interpreters were cumbersome and uneconomical. I became aware that each nation not only has intricate and distinctive legal requirements related to imports but political and economic situations—especially relating to receptivity to imports—which are difficult to learn about and which require an expert understanding which I had neither the time, patience, nor expertise to gain.

It is not that I was wrong in traveling to these potential markets, for I found it impossible to learn about them on this side of the ocean. Only by sitting down and talking with customers could I find out that they often desired us to make types of boxes which we did not manufacture or that we could receive some orders if we were willing to furnish a complete range of boxes which we did not then make. 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 discussion or a joint venture setting mutu-

ally 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. There were people in the paper industry who were sent to jail as a result of a criminal antitrust prosecution. One of the big paper companies has made a movie about the way a criminal antitrust prosecution can be based on circumstantial evidence which may not reflect what it appears to reflect. The main lesson, and I suspect others like me have learned it, is don't get involved; it is not worth the aggravation.

I have been told by lawyers that there may be problems with Section 2 of the Export Trading Company Act, the section which provides for certification of export trading companies so that they are free from risk of antitrust prosecution. There may be problems with it, 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.

After six years, Millen is finally selling its products, to a limited extent, in Europe, but the effort which has been put into reaching the point where we now stand is disproportionately great to the returns realized and, as a practical matter, discourages any significant new investment in further export promotion.

It would be reasonable for you to wonder whether our problems did not result more from our products just not being competitive in foreign markets than from special difficulties of getting access to those markets even with a competitive product. I am quite satisfied that we have a product of superior quality to sell which could be profitably exported to many foreign markets even after taking into account the costs of shipment and import duties. As U.S. production of shoes declines relative to foreign manufacturers, there are increasing opportunities for our firm (and our competitors) to sell special cardboard setups for shoe boxes in those countries where shoe production is increasing.

In sum, a small company like ours, manufacturing low-cost, limited demand products, cannot afford to start its own export operation even though it could increase sales abroad if it were helped to do so by those with special knowledge and experience in overseas sales. I have been told that there are U.S. subsidiaries of large successful foreign parent trading companies which operate very effectively in the United States. I question whether I can have absolute confidence that a foreign trading company will always be trying to further my company's interests. I would wonder whether such a company would not want itself to set up a competing operation, probably abroad, once it had thought it had identified the elements that made our company successful and felt it could reproduce those elements without having to divide the profits with us. Moreover, our company is just too small for even those trading companies to be willing to give our products the kind of attention we would need for successful marketing abroad.

I also understand that Section 1 of the Export Trading Company Act, which would encourage banks to participate in the formation and operation of export trading companies, is controversial. I have a good relationship with my banker and he has been helpful to me in many aspects of the operation of our business. I do not see why the international commercial experience of our banks should not be shared with and used to benefit small exporters like us. Even though I am a relatively small business account for my bank, I still get good service. That gives me some confidence that I might get good service even though a relatively small account in a trading company in which my bank participates.

I do not believe this bill is going to solve all U.S. trade problems. I understand that long-term U.S. export success will depend far more on the efforts of our large multinational corporations than on the successes of small businesses like Millen Industries. It may also be true that for the big enterprises with constant access to sophisticated advice, this legislation is unnecessary. If, however, this legislation is largely designed for small businesses like ours and if you want to encourage exports by smaller firms and reorientate us to thinking in world market terms, then this legislation is desirable and is perceived by businessmen like me as a good idea long overdue.

Senator HEINZ. Mr. Schulman, I think that is some of the best testimony I have ever heard, not just before this committee, but before any committee, because it simply lays the facts out on the way a small- or medium-size businessman confronts the real world.

In this particular case, as you confront the international world, you are not an insignificant company. You've got 400 employees. There are many firms much smaller than yours that have substantial sales volumes. There are firms larger.

And I suspect that you are in many respects very, very typical insofar as the kinds of problems that you yourself have encountered in trying to successfully penetrate the complex web of international markets. Your example about how you were told by counsel in the first instance that you might run afoul of the antitrust laws if you formed a joint venture, I'm sure, is very similar to the advice that many small businessmen receive.

And the second set of advice you received somewhat later, which is that you as a small manufacturer in a very competitive industry might not be subject, or probably wouldn't be subject, to any anti-trust enforcement, probably wasn't too comforting to you.

As I understand your testimony, I think I got a touch of concern that simply being told that you probably or might not be subject to the Justice Department or the Federal Trade Commission coming down on your association with their full weight was not exactly what you would call a tremendously reassuring situation.

Is that a fair statement?

Mr. SCHULMAN. Very fair.

Senator HEINZ. Tell me, roughly what is the sales volume of your company?

Mr. SCHULMAN. Several million.

Senator HEINZ. Well, that is a fair sized company, by anybody's reckoning, and yet we all recognize with the kind of return on sales that any company now has, you can't take the chance of incurring \$100,000, \$200,000, or \$300,000 worth of legal bills.

I would imagine that would put a pretty serious dent in your company's cash flow and the ability to modernize or replace your equipment. Would that kind of a legal bill be a substantial impediment to you?

Mr. SCHULMAN. It's so bad that I can't even afford to think of it.

Senator HEINZ. I'm sure that many lawyers here would like to take your case. [Laughter.]

In fact, with the kinds of relationship you appear to have with your bank—but I understand that you're not anxious to increase the debt on the balance sheet.

Mr. SCHULMAN. Not at these rates. Right. It's impossible. I'd give it up before I'd take the chance.

Senator HEINZ. I think that is a statement that should be emphasized, that you, as you just said, just now, would really not take the chance of running afoul in any way of the Justice Department or the FTC.

Because of the uncertainties, even though they may be described to you as 1 chance in 10, 1 chance in 100, you can't take that kind of a chance with your employees, with the people who depend upon them, their families, or with your family, and the other shareholders of the company that you represent.

Mr. SCHULMAN. That's absolutely correct. It's been told to me in various ways, but it frightens me.

Senator HEINZ. Mr. Schulman, the reason I asked you to testify first is that I wanted, frankly, our other witnesses who are coming to testify to hear for themselves exactly the kind of problem that a medium- or small-sized businessman has, the kind of real-life uncertainties that are faced, and why those uncertainties are so critical in your business judgments.

I thank you for being here, and I want to yield now to my colleague, Senator Proxmire, for any questions.

Senator PROXMIRE. I don't have any questions, Mr. Chairman.

Senator HEINZ. Senator Danforth?

Senator DANFORTH. Thank you, Mr. Chairman.

CERTIFICATION OF IMMUNITY

Mr. Schulman, as I understand from your testimony, you see the certification of immunity as the important part of this bill. Now, that immunity is, in your mind, the certain knowledge that as long as that certification is maintained, you would have absolute immunity from prosecution under the antitrust laws.

Mr. SCHULMAN. I'd like to answer that question just a little differently.

I don't want to break any laws, and if it's up in the air—that I may have to hire expensive attorneys to defend me—I just don't think it's worth it. It's a simple as all that.

There are other aspects of the Export Trading Act that I like very much. But what's most important to me is that I am not breaking the U.S. antitrust laws and certification assures me that my conduct does not violate the law.

Senator DANFORTH. If we were to, say, change the substance of the antitrust laws without providing the certification procedure, you would still have to hire a lawyer to tell you what the substance was. The lawyer would have to give you odds on whether or not you were violating the substance of the antitrust laws. You would still have to make a judgment as to whether you would be protected or not protected.

That would not, I take it, give you the same assurance that a certification of immunity would give you.

Mr. SCHULMAN. Of course. You're absolutely right. I need to know from the attorneys that what I'm doing doesn't violate any known law of the United States.

Senator DANFORTH. When I was practicing law, I was not an antitrust lawyer but I was associated with law firms that did practice antitrust law.

What happens is that they are very complicated cases, very lengthy and extended cases. The discovery process goes on and on. The Justice Department has tremendous resources. I don't know how many attorneys are employed by the Antitrust Division of the Justice Department. Maybe some of the people who are following later will be able to tell us what the budget of the Justice Department is.

But they are able to come in and take as many depositions as they can. They're able to comb through all of the documents, all of the correspondence, of a business. They're able to drag it out for

prolonged periods of time. The typical antitrust opinion of the court is quite lengthy.

And I take it that what you're saying is even if you were to prevail in the end in the litigation, the process of going through the litigation, the process of hiring sufficient legal power, legal personnel, in order to keep up with the Justice Department, would in itself be an extremely heavy burden for a small business to go through, and that even if you were to win, it would be a Pyrrhic victory: You would have lost, because your company would have been ravaged by the legal expenses, not to mention the inner turmoil of having your records combed through and Justice Department officials virtually setting up shop in your offices.

Is that a fair statement?

Mr. SCHULMAN. Very clear and very exact. That's the way I feel. That's the way most of us feel. A paper company made a film on how circumstantial evidence can affect your whole life in this area. When you talk to someone, you have to prove that you weren't talking about anything illegal.

HIGH COST OF ANTITRUST INVESTIGATION

I would imagine that most businessmen are frightened over the cost—not over anything but the cost and the ravages that take place in their company when faced with an antitrust investigation. Innocent or not innocent, it's a frightening thing.

Senator DANFORTH. You indicated in your answer that this view was shared by others. Is that your experience?

Mr. SCHULMAN. Absolutely.

Senator DANFORTH. Is there a general concern among small business people in particular that perhaps the presence of the Federal Government is all too obvious as it is right now, and therefore that the notion of sticking your head up, and inviting yet more attention, would be something that would be unattractive to you?

Mr. SCHULMAN. I don't even belong to my industry's trade association, where there are many discussions regarding interesting things about our business, interesting matters that are not in violation of any law that we know of. But I am afraid even to attend a meeting. I think that concern is shared by a very large number of people in the United States.

I imagine not everybody is frightened of it. I don't know why I should be. They must be getting the same advice I'm getting. That is: "Don't talk to anybody. Be afraid. Be afraid of the costs." It costs hundreds of dollars per hour to have one attorney talk to you. It's terrible. So, you understand the situation very clearly, and I agree with what you say.

Senator DANFORTH. Thank you very much.

Senator HEINZ. Mr. Schulman, when you were reading your testimony and indicated that some of your product was available for use by shoe manufacturers, I was thinking to myself about the fact that on Tuesday next, March 10, I'll be testifying down at the International Trade Commission on behalf of the nonrubber footwear industry in the United States, which is experiencing record decimation at the hands of potential customers of yours as well as probably the people abroad who are making more and more millions of pairs of nonrubber footwear, that is to say, shoes.

Judging by the fact that the increase in imports has gone, as recently as 1979, to 51 percent of the domestic market, I can think of two good reasons for you to want to export:

No. 1, our industry's been decimated, and it's a much smaller industry to sell to; No. 2, the vast quantities of imports that are coming in, where, when you have 51 percent of the market it even makes the problems that Senator Danforth and I have with Datsuns at 20 percent of the market—at least in terms of market share—clearly, the action is to a very large extent overseas.

About 51 percent of our nonrubber footwear presumably is coming in in cardboard boxes from Taiwan, Korea, Italy, and other countries. That is where the market is.

Mr. SCHULMAN. That is what we go for. The market.

Senator HEINZ. So I can appreciate. And I hope the record is clear on the point that there really are major volume opportunities out there for you and other businessmen that are being precluded by the uncertainties that now exist in the present law and which title II of this bill seeks to clarify and thereby to create a much more certain climate.

We thank you very much for your testimony. It was excellent.

Mr. SCHULMAN. Thank you very much, Senator.

Senator HEINZ. Our next group of witnesses is a panel. Howard Fogt, Norman Seidler, A. Paul Victor, and Ky P. Ewing. Gentlemen, would you please come forward.

STATEMENT OF HOWARD FOGT, PARTNER, FOLEY, LARDNER, HOLLABAUGH & JACOBS, WASHINGTON, D.C.; NORMAN SEIDLER, PARTNER, LORD, DAY & LORD, NEW YORK, A. PAUL VICTOR, PARTNER, WEIL, GOTSHAL & MANGES, NEW YORK; AND KY P. EWING, PARTNER, VINSON & ELKINS, WASHINGTON, D.C.

Senator HEINZ. Gentlemen, let me say at the outset that your entire statements will be placed in the record. To the extent that you are prepared, you can summarize your statements so that we can limit the initial presentation of each witness to 10 minutes or less. We'd appreciate it. Let me ask Mr. Fogt to be our first witness.

Mr. FOGT. Thank you, Senator Heinz. Good morning. My name is Howard Fogt. I am a member of the Washington, D.C., law firm of Foley, Lardner, Hollabaugh & Jacobs. I am secretary of the Phosphate Rock Export Association.

I welcome this opportunity to testify on Phosrock's behalf regarding S. 144, which modifies the Webb-Pomerene Act.

Phosrock strongly supports the objectives of this legislation, the promotion and expansion of export trade. The achievement of these objectives, however, is complex, and requires a careful and deliberate approach to assure that the proposed changes to existing law preserve currently successful export operations as well as provide new opportunities to expand and promote U.S. export trade.

THREE PRINCIPAL ISSUES OF CONCERN

Three principal issues should concern this committee as it considers title II of S. 144. First, the legislation must provide clear-cut standards for permissible joint action by U.S. exporters. As all who

have studied this issue recognize, uncertainty as to the legality of cooperative activity in the export market, coupled with the hostility to the Webb-Pomerene Act by the Antitrust Division of the Department of Justice, has deterred greater utilization of the Webb-Pomerene Act.

Second, if a certification procedure is to be adopted, the Department of Commerce must apply clear and definitive standards in processing applications, according automatic certification under appropriate circumstances.

Finally, the legislation should permit existing Webb-Pomerene associations to continue their operations without having to undergo an unsettling certification process. These associations presumably have conducted their operations in compliance with the substantive provisions of the Webb-Pomerene Act, which are intended to remain unchanged in the new legislation.

To require them, nevertheless, to justify their continued existence through a certification process would disrupt their operations and jeopardize important customer relations, thus hindering their efforts to compete against foreign rivals.

Simply stated, legislation designed to foster export trade ought not to threaten the operation of organizations that have been promoting trade expansion for years.

Phosrock was formed in 1971, when it registered with the Federal Trade Commission, pursuant to section 5 of the Webb-Pomerene Act. Membership in Phosrock is open to any person, firm, or corporation engaged in the United States in mining phosphate rock.

After an initial interim period of establishment of operational policies, location of offices, and procurement of staff, Phosrock became a full functioning association in 1972. Phosrock is engaged in all aspects of export sales in phosphate rock as a nonexclusive agent of its members.

Its responsibilities include market research and analysis, technical assistance, solicitation, negotiation, and conclusion of export sales contracts, traffic coordination, invoicing, order processing, and collection and distribution of the proceeds of sale.

Phosrock is headquartered in Tampa, Fla., and has representative offices in Paris, France; Sao Paulo, Brazil; and Toyko, Japan; and deals with a large number of commercial agents that it has developed throughout the world.

Virtually all phosphate rock miners in the world, apart from those operating in the United States, are government-owned or controlled. Countries in which phosphate rock miners are so controlled include Morocco, Algeria, Egypt, Senegal, Tunisia, Jordan, Israel, Syria, China, Vietnam, Austria, Ocean Island, U.S.S.R., Brazil, and Mexico.

Naturally, phosphate rock miners in these countries all have the strong political, economic, and financial support of their governments. Morocco, for example, derives over one-third of its gross national product from the export sale of phosphate rock.

Further, many actual and potential customers of Phosrock are foreign governments or companies who are totally or substantially owned or controlled by their governments.

The statutory exemption for certain joint export trade activities, which ultimately became the Webb-Pomerene Act, was recom-

mended by the Federal Trade Commission to permit U.S. companies to effectively compete with foreign cartels and foreign government-owned competitors, and to deal effectively with foreign customers, owned, controlled, or supported by the foreign governments.

Phosrock believes that its record of performance is fully consistent with the purposes and goals of the Webb-Pomerene Act.

Based on its view that properly organized and efficiently operated associations have made and can continue to make a positive contribution to expand export trade, Phosrock strongly supports efforts like S. 144, which are intended to promote export trade.

On the other hand, we urge that Congress must reject legislative proposals which, however well intentioned, may have the practical effect of diminishing the utility of the act under the guise of trade expansion.

During consideration of similar legislation in the 96th Congress, concern was repeatedly expressed that any export trade legislation must contain a provision to assure that all existing Webb-Pomerene associations may continue their operations unimpeded. Existing associations have at stake millions of dollars in capital investment and longstanding proved methods of dealing.

Additionally, existing associations frequently are parties to long-term contractual obligations that may be jeopardized if care is not taken to insure not only that there is no temporal discontinuity with regard to the antitrust immunity enjoyed by such associations. But also any modified system of antitrust immunity must be, at a minimum, coextensive with the immunity currently available to Webb-Pomerene associations.

An effective approach to these concerns involves a number of elements:

First, a protection of the substantial investment by existing Webb-Pomerene associations in export trade, their longstanding commercial relationships, and their long-term contractual obligations necessitates a provision in any revision of the Webb-Pomerene Act which permits Webb-Pomerene associations now in existence to continue functioning under the current provisions of the act.

Phosrock believes most strongly that however well intentioned, S. 144 may have the potential to unfairly restrict joint export trade and, as such, prove to be counterproductive.

The entire system of immunity not only is to be administered through new processes and procedures, but also may produce legal standards and protection of a potentially different and more restrictive scope.

To impose such potentially sweeping modifications upon existing organizations which have operated successfully and lawfully under the provisions of the existing Webb-Pomerene Act is to subject the export trade activities of the these associations to unnecessary uncertainty and possible disruption. Such a result would be most unfortunate and contrary to the legislative intent.

PROPOSED AMENDMENT

A second critical element which should be included in S. 144 is a provision which would authorize such currently existing Webb-

Pomerene associations to apply anytime for certification under the revised act and to have the election of operating under the former provisions of the act, or to operate under the certificate as granted.

Phosrock attaches a proposed amendment to S. 144 that provides for such a necessary and meaningful grandfather clause protection and urges its adoption.

Senator HEINZ. Without objection, the amendment also will be incorporated in the record.

Mr. FOGT. Thank you, Senator.

That concludes my statement. I would be happy to answer any questions.

[The complete statement follows:]

STATEMENT OF THE PHOSPHATE ROCK EXPORT ASSOCIATION ON
S.144, "EXPORT TRADING COMPANY ACT OF 1981"

BY

HOWARD W. FOGT, JR.
FOLEY, LARDNER, HOLLABAUGH & JACOBS
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I. INTRODUCTION

My name is Howard W. Focht, Jr. I am a member of the Washington, D.C. law firm of Foley, Lardner, Hollabaugh & Jacobs and am Secretary to the Phosphate Rock Export Association ("Phosrock"). I have been actively involved in Webb-Pomerene association practice for over ten years. I welcome this opportunity to testify on Phosrock's behalf regarding S.144, which modifies the Webb-Pomerene Act.

Phosrock strongly supports the objectives of this legislation--the promotion and expansion of export trade. The achievement of these objectives, however, is complex and requires a careful and deliberate approach to insure that the proposed changes to existing law preserve currently successful export operations as well as provide new opportunities to expand and promote United States export trade. Moreover, Congress should

recognize the continued validity of the purpose of the Webb-Pomerene Act. Indeed, Webb-Pomerene associations can be an invaluable aid to American companies that compete in foreign markets.

Three principal issues should concern this Committee as it considers S.144. First, the legislation must provide clearcut standards for permissible joint action by U.S. exporters. As all who have studied this issue have recognized, uncertainty as to the legality of cooperative activity in the export market, coupled with hostility to the Webb-Pomerene Act by the Antitrust Division of the Department of Justice, has deterred greater utilization of the Webb-Pomerene Act. Nevertheless, uncertainties over the scope of the Act's exemption and concerns relating to legal complications in connection with an association's activities should not overshadow the important cost savings and valuable marketing information that can be gained through a properly organized and operated Webb-Pomerene association.

Second, if a certification procedure is to be adopted, the Department of Commerce must employ clear and definitive standards in processing applications, according automatic certification under appropriate circumstances. In passing the Webb-Pomerene Act in 1918, Congress was responding to the prevailing view that American firms required an antitrust exemption to permit them to compete effectively with foreign cartels and to sell to buying-entities that were owned, sponsored

or supported by foreign sovereigns. The same condition exists today for many associations that compete against and deal with foreign governments. Once the Department makes its decision, it should not be second-guessed by other parts of the Executive branch.

Finally, the legislation should permit existing Webb-Pomerene associations to continue their operations without having to undergo an unsettling certification process. These associations presumably have conducted their operations in compliance with the substantive provisions of the Webb-Pomerene Act which are intended to remain unchanged in the new legislation. To require them nevertheless to justify their continued existence through a certification process would disrupt their operations and jeopardize important customer relations thus hindering their efforts to compete against foreign rivals. Legislation designed to foster export trade ought not threaten the operations of organizations that have been promoting trade expansion for years.

II. PHOSPHATE ROCK EXPORT ASSOCIATION

Phosrock (or the "Association") was formed in 1970 when it registered with the FTC pursuant to Section 5 of the Webb-Pomerene Act. ^{1/} Phosrock is a Delaware nonstock corporation, and its Articles of Incorporation, By-laws and Form of Membership

^{1/} 15 U.S.C. 65.

Agreement are on file at the Federal Trade Commission. The members of Phosrock are:

Agrico Chemical Company
 AMAX Chemical Corporation
 American Cyanamid Company
 Freeport Phosphate Rock Company
 International Minerals &
 Chemical Corporation
 Oxychem International, Inc.
 W. R. Grace & Co.

Membership in Phosrock is open to any person, firm or corporation engaged in the United States in mining phosphate rock. ^{2/}

After an initial interim period of establishment of policies, location of offices and procurement of staff, Phosrock became a full-functioning association in 1972. Since its inception, Phosrock has endeavored to expand export trade and commerce in phosphate rock by assisting the phosphate rock export activities of its members. The utilization of Webb-Pomerene associations by United States sellers of mined products was one

^{2/} Major phosphate rock miners in the United States include: Agrico Chemical Co.; AMAX Chemical Corporation; American Cyanamid Co.; Beker Industries; Estech (formerly Swift); Farmland Industries; Gardinier, USBP; W. R. Grace & Co.; Freeport Minerals Co.; International Minerals & Chemical Corp.; Kerr-McGee Chemical Corporation; Mobil Chemical Corporation; Monsanto Chemical Corporation; Occidental Chemical Co.; J.R. Simplot Co.; Stauffer Chemical Corp.; Texasgulf and U.S.S. Agrichemicals. Many other companies have substantial reserves. In addition, many smaller concerns have always been a factor in the market, particularly during periods of increased demand when entry seems attractive.

of the specific objectives in the enactment of the Webb-Pomerene Act. 3/ The FTC report which formed the basis of the Webb-Pomerene legislation summarized the Act's purposes and rationale when it stated that cooperation among domestic producers is imperative:

To avoid needless expense in distribution, to meet formidable foreign buying organizations, to insure reasonable export prices and to prevent the profitless exhaustion of our national resources. . . . 4/

Phosrock is engaged in all aspects of export sales activity in phosphate rock as a non-exclusive agent of its members. Its responsibilities include market research and analysis, technical assistance, solicitation, negotiation and conclusion of export sales contracts, traffic coordination, invoicing, order processing and collection and distribution of the proceeds of sale. Phosrock has its headquarters in Tampa, Florida, and has representative offices in Paris, France; Sao Paulo, Brazil and Tokyo, Japan.

The Association is engaged solely in "export trade." The Certificate of Incorporation of the Association states that Phosrock:

3/ Virtually every major industrial nation, and European Economic Community itself, encourages or permits the establishment and operation of export associations under exemptions from their respective antitrust laws similar to the Webb-Pomerene Act. The Treaty of Rome, which establishes Common Market competition policy, contains no explicit "foreign commerce" element like the Sherman Act but rather regulates only trade between member states. It has been specifically held not to apply to concerted action directed outside the Common Market. See Export Cartels (OECD 1974). Moreover, the Philippines and Brazil have each discussed the establishment, respectively, of coconut oil and coffee export sales cartels.

4/ 55 Cong. Rec. 3577 (Underscoring added.)

shall engage solely in export trade, as the term "export trade" is defined in the Act of Congress entitled "an Act to promote export trade, and for other purposes," approved April 10, 1918, commonly known as the "Webb-Pomerene Act," and any Acts amendatory thereof or supplementary thereto, and such export trade shall be solely trade and commerce in phosphate rock which is for export or is to be exported or is in the course of being exported from the United States to any foreign nation.

The Association makes no sales for United States domestic use or consumption and has no involvement in and takes no other action in United States domestic commerce. As such, Phosrock has nothing to do with the determination of the price of phosphate rock sold for consumption or use in the United States.

Moreover, Phosrock does not control the amount of phosphate rock available for export, for sale in this country, or even the amount to be exported by its Members. Under the Association's Membership Agreement, each Member, acting individually, determines the amount of phosphate rock which it wishes to sell each year through the Association (the Association serving as that member's agent). Each Member, in addition, retains the unfettered right to sell phosphate rock on terms and conditions which the Member individually determines, to any domestic person for whatever purpose, including exportation. 5/ Finally,

5/ In addition, subject to availability and mutual agreement on terms and conditions, Phosrock will sell and has sold phosphate rock to domestic persons for exportation.

Phosrock has no involvement in export sales by a Member company to any affiliated company abroad. 6/

Phosphate rock is a mined raw material used in various phosphorous derivative industries, particularly in the manufacture of complex phosphatic fertilizers. Generally speaking, it is a fungible commodity, the principal variant being the content or extent of the fertilizing element (P2O5). Various grades of phosphate rock contain differing concentrations of this element and, in the industry, have been differentiated by reference to the percentage of the content of P2O5 or the units of bone phosphate of lime or tricalcium phosphate (BPL). 7/ Known phosphate rock deposits are scattered throughout the world, but are principally located in Morocco, Algeria, Tunisia, Spanish Sahara, Jordan, Israel, Togo, Senegal, South Africa, certain South Pacific islands, the Soviet Union and the United States. World phosphate resources (from all locations) total approximately 67,000 million metric tons. 8/

6/ The term "affiliated company" is defined in Phosrock's Membership Agreement to be a corporation in which a member has a 20 percent ownership interest.

7/ See, generally, Fertilizer Technology and Use (2d ed. 1971).

8/ "Phosphate" Mineral Commodity Profiles 3 (1979 ed. U.S. Dept. of Interior); see, generally, Phosphate Rock and Fertilizers In the World (OECD 1972).

Major resource areas (million metric tons) are as follows:

<u>Location</u>	<u>Reserves</u>	<u>Total Resources</u>
Morocco	18,000	40,000
United States	2,200	8,000
South Africa	3,000	7,000
U.S.S.R.	1,400	3,400
Western Sahara	400	1,600
Australia		2,000

Of course, Morocco claims access to certain Spanish Sahara resources which only serve to increase its dominant position in the world market.

Virtually, all phosphate rock miners in the world, apart from those operating in the United States, are government owned or controlled. Countries in which phosphate rock miners are so controlled include Morocco, Algeria, Egypt, Senegal, Tunisia, Jordan, Israel, Syria, China, Vietnam, Australia, Ocean Islands, U.S.S.R., Brazil and Mexico. Naturally, phosphate rock miners in these countries all have the strong political and financial support of these governments. ^{9/} Morocco, for example, derives over one-third of its gross national product from the export sale of phosphate rock.

Further, many actual and potential customers of Phos-rock are foreign governments or companies that are totally or substantially owned or controlled by their governments. Included in this category are customers in the following countries:

^{9/} See, Walters & Monseu, "State-owned Business Abroad: New Competitive Threat," Harvard Business Review, March-April 1979, p. 160.

Australia	Bangladesh
Indonesia	Philippines
China	Taiwan
Portugal	Mexico
Romania	Austria
Czechoslovakia	Poland
Bulgaria	France (certain customers)
Venezuela	Italy
Pakistan	Brazil (certain customers)
India	Colombia
Sri Lanka	Costa Rica
Korea	Ecuador
El Salvador	Finland

The potential problems of dealing with these foreign sovereigns are many. For example, several years ago a South Asian government advised its American suppliers, who did not belong to a Webb-Pomerene association for that product, that it would not honor any of the contracts the Country had executed with the American firms and would not accept any shipments of product until the suppliers released this customer from its contracts and lowered their price to a figure stipulated by the customer. The foreign government made it clear that failure to heed its request would result in a ban on further business. Because American firms thought they could not take collective action to prevent such pressure tactics, the foreign government was able to pit one supplier against the other until it managed to get one supplier to go along. Once the resistance of the American suppliers was broken, all the remaining American firms acted likewise in order to avoid losing substantial tonnage. However, millions of dollars of export revenue were lost as well.

Finally, even when an export customer is privately owned, it may, like in Japan, have a long-standing relationship

of support and cooperation with its government. Moreover, the government may use its often considerable leverage to influence selection of a phosphate rock supplier in order to foster some other national interest. France, for example, has repeatedly urged the few remaining privately-owned French fertilizer companies to favor Morocco as a supplier in order to attempt to satisfy certain bilateral commitments between those two countries.

The statutory exemption for certain joint export trade activities which ultimately became the Webb-Pomerene Act was recommended by the Federal Trade Commission (the "FTC") to permit United States companies to effectively compete with foreign cartels and to deal effectively with foreign customers owned, controlled or supported by foreign governments. A report by the FTC, based on an extensive two-year study, concluded that:

In seeking business abroad, American producers must meet aggressive competition from powerful foreign combinations. . . . In various markets American manufacturers and producers must deal with highly effective combinations of foreign buyers. . . . These combinations naturally make individual American producers bid against each other. . . . If Americans are to enter markets of the world on more equal terms with their organized competitors and their organized customers, and if small American producers and manufacturers are to engage in export trade on profitable terms, they must be free to unite their efforts. 10/

10/ Federal Trade Commission, Report on Cooperation in American Export Trade (1916).

The keystone of the Webb-Pomerene Act lay in its permitting a cooperative effort by American competitors in the pursuit of their common goal of winning foreign customers from foreign rivals. Congress recognized the advantages of united activity that could reduce the costs of exportation, increase the export market shares of American firms, and -- if the joint activity should result in higher returns from foreign sales -- foster the health of the American economy. Phosrock believes that its record of performance is fully consistent with the purposes and goals of the Webb-Pomerene Act.

III. LEGISLATIVE ISSUES

Based on its view that properly organized and efficiently-operated associations have made and can continue to make a positive contribution to expansion of American export trade, Phosrock strongly supports efforts like S.144 which are intended to promote export trade. On the other hand, we urge that Congress reject legislative proposals which, however well-intentioned, may have the practical effect of diminishing the utility of the Act under the guise of trade expansion.

Several issues relating to the Webb-Pomerene Act merit prompt legislative attention in connection with efforts to expand and promote export trade. Prominent among these issues are uncertainties relating to the statutory construction of the Act, the nature of enforcement activities under the Act, and the potential disruption of activities of existing Webb-Pomerene associations as the result of any modifications of the Act.

A. Uncertain Statutory Construction

Since passage of the Act, there have been few decisions or proceedings construing its rather general provisions. 11/ These cases have treated a variety of issues including international cartel agreements, domestic price fixing, restraints on members' exports and use of foreign factories, effects on import trade, limitations on barter and exchanges and exclusion of services from the Act's immunity. Although these decisions help to define the scope of the limited immunity provided by the Act,

11/ Judicial and administrative decisions considering application of the Act include: United States v. Concentrated Phosphate Export Association, 393 U.S. 199 (1968), rev'g 273 F. Supp. 263 (S.D.N.Y. 1967), on remand, 1979 Trade Cas. ¶ 72,719 (S.D.N.Y. 1969); United States v. United States Alkali Export Association, 325 U.S. 196 (1945), aff'g 58 F. Supp. 785 (S.D.N.Y. 1944), on remand, 86 F. Supp. 59 (S.D.N.Y. 1979); United States v. Anthracite Export Association, 1970 Trade Cas. ¶ 73,348 (N.D. Pa. 1970); United States v. California Rice Exporters, Cr. 32879 (N.D. Cal. 1952); United States v. Minnesota Mining & Manufacturing Corp., 92 F. Supp. 947 (D. Mass. 1950); United States v. Electrical Apparatus Export Association, 1946-47 Trade Cas. ¶ 57,546 (S.D.N.Y. 1947); Carbon Black Export, Inc., 46 F.T.C. 1245 (1949); General Milk Co., 44 F.T.C. 1355 (1947); Sulfur Export Corp., 43 F.T.C. 820 (1947); Export Screw Ass'n, 43 F.T.C. 950 (1947); Phosphate Export Ass'n, 42 F.T.C. 555 (1946); Florida Hard Rock Phosphate Export Ass'n, 42 F.T.C. 843 (1945); Pacific Forest Industries, 40 F.T.C. 843 (1940). See Larson, "An Economic Analysis of the Webb-Pomerene Act," 13 J.L. & Econ. 461 (1970); Simmons, "Webb-Pomerene Act and Antitrust Policy," 1963 Wis. L. Rev. 426 (1963); Note, "The Webb-Pomerene Act: Some New Developments in a Quiescent History," 37 Geo. Wash. L. Rev. 341 (1968); see also Brewster, "Antitrust and American Business Abroad (1958); Fugate, Foreign Commerce and the Antitrust Laws (2d ed. 1973); Diamond, "The Webb-Pomerene Act and Export Trade Associations," 44 Colum. L. Rev. 805 (1944); Comment, "Export Combinations and the Antitrust Laws: The Dilemma of the Webb-Pomerene Act," 17 U. Chi. L. Rev. 654 (1950).

the absence of clear and definitive statements of permissible joint conduct coupled with the continued hostility of the Department of Justice have had a negative effect on utilization of the Act by American firms. ^{12/} The reluctance to risk legal problems has been recognized repeatedly as a major cause for the relatively small number of Webb-Pomerene associations. Former Assistant Secretary of Commerce Frank A. Weil recently testified:

We think that the fundamental problem, one of the fundamental problems faced today in world trade relates to the fact that many American businesses -- rightly or wrongly -- perceive a threat from the U.S. government in the form of the Justice Department for their activities overseas in getting together to compete with the consortia that they find in competition abroad.

And perhaps the simplest way to put it is that we in the Department of Commerce are not suggesting for one instant a relaxation of our commitment to firm principles of competition and antitrust law. On the other hand, we think that it is possible for the U.S. government to send a more positive signal in terms of those things which are permissible to the business community so as to encourage them to take permissible actions as they compete in the world. ^{13/}

^{12/} The Department of Justice has repeatedly urged repeal of the Act. See, e.g., Shenefield, Antitrust and Trade Regulations Report (BNA) No. 875, AA-3 (August 3, 1978); Turner, International Aspects of Antitrust, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 90th Cong., 1st Sess. 124 (1967).

^{13/} Weil, Hearing before the President's Commission on Reform of the Antitrust Laws and Procedures, July 27, 1978 at pp. 89-90.

Former Secretary of Commerce John Connors said more than ten years earlier that "uncertainty about the exemption provided is a deterrent and companies are fearful that joining an association may give rise to legal problems." 14/ The General Accounting Office and the Federal Trade Commission have reached the same conclusion. 15/ As the GAO said in 1973:

it seems desirable to create a more favorable climate for increased exports while recognizing that care must be exercised to minimize their possible adverse impact in the domestic marketplace. . . . [W]e believe the critical U.S. export situation demands a positive approach -- encouraging the formation and operation of Webb-Pomerene associations -- so that the full potential of the Webb-Pomerene Act in promoting exports can be realized. . . . Because of uncertainty over possible antitrust implications, clarifying the provisions of the Webb-Pomerene Act would help create an environment in which U.S. firms might more readily join together. . . . 16/

14/ See McQuade, International Aspects of Antitrust, Hearings Before the Subcommittee on Antitrust & Monopoly of the Senate Judiciary Committee, 90th Cong., 1st Sess. 179 (1967).

15/ General Accounting Office, "Clarifying Webb-Pomerene Act Needed to Help Increase U.S. Exports," Report to the Congress (1973); Kirkpatrick, Export Expansion Act of 1971 Hearing before the Subcommittee on Antitrust & Monopoly of the Senate Judiciary Committee, 92nd Cong., 2d Sess. 244 (1972).

16/ General Accounting Office Report, n.20 supra at 16-18. The continued existence of this uncertainty is demonstrated by comparison of the testimony given by the Antitrust Division and the Federal Trade Commission at the hearings on export trade legislation before this Subcommittee in 1979. A representative from the Antitrust Division said:

(Footnote continued on following page.)

These uncertainties must be resolved if export associations are going to realize the potential Congress intended when it passed the Webb-Pomerene Act in 1918. S.144 may prove a positive step in that direction.

(Footnote continued from previous page.)

The significance of the Webb Act obviously is closely related to the issue of the antitrust legality of joint exporting activities. Our position is one which we have held and disseminated for many years, and I want to emphasize it strongly. In general, American businesses do not require antitrust exemption or clearance to engage in joint exporting ventures or any other joint activity the sole purpose of which is to sell goods or services for consumption abroad.

A myriad of normal joint export activities can be and are constantly being carried on by groups of American companies without fear of antitrust prosecution. To be actionable, joint activity must have a substantial and foreseeable effect on United States domestic or foreign commerce. Joint activity intended to impact outside the territory of the U.S. and carried on so as not to affect competition between the parties in the United States is unlikely to raise any question under American antitrust law. Accordingly, it has been the consistent position of the Department of Justice that the antitrust exemption found in the Webb-Pomerene Act of 1918 is unnecessary to provide protection for export trade associations since the normal activities undertaken by such associations have as their exclusive focus markets abroad. (underscoring added)

On the other hand, a representative of the FTC testified:

The Export Trade Act, also known as the Webb-Pomerene Act, was adopted in 1918 during a period of resurgent interest in foreign trade. The basic purpose of the Act is to increase exports by granting antitrust immunity to domestic competitors for joint

(Footnote continued on following page.)

B. Enforcement Patterns

In our view, a significant reason for under utilization of the Act is the absence of a clear enforcement structure. Section 5 of the Webb-Pomerene Act provides a useful framework for such administration, but it has not operated for many years. Regulation should be centralized in the place that possesses the interest and expertise to ensure that the purposes of the Act are fulfilled. Provisions in S.144 which transfer administrative responsibility under the Act from the FTC to the Department of Commerce is responsive to this concern.

Second, uncertainty regarding permissible conduct will continue as long as the immunity conferred is stated in general terms. It is not enough to say that the Webb-Pomerene Act should be amended to eliminate exposure to treble damages and criminal litigation. Existing associations have that protection today -- but only for conduct in "export trade." An important and useful purpose would be served by stating with great specificity the

(Footnote continued from previous page.)

activities in export trade that might otherwise be illegal. For example, the Webb-Pomerene Act allows firms that are competitors in domestic markets to jointly fix export prices and allocate foreign markets -- activities that could in some circumstances violate the antitrust laws in the absence of an exemption.

This conflict supports the continued need for an unambiguous exemption for joint exportation.

kind of conduct that is beyond legal challenge. 17/ S.144 fails to provide substantial assistance in this respect and instead provides for the promulgation of guidelines. To the extent that such standards are established in administrative guidelines rather than in the legislation itself, considerable uncertainty may be generated. This uncertainty is heightened, moreover, by the provision in the bill that antitrust enforcement agencies traditionally hostile to the Webb-Pomerene Act may participate in the formulation of the guidelines and that the Department of Justice may second-guess any certificate that is granted. Accordingly, the Committee should focus on the specific conduct permitted to be undertaken jointly and the role of the Department of Justice in the certification process. Indeed, this Subcommittee recognized in its Report on United States Export Trade Policy:

Export activities are subject to uncoordinated and sometimes conflicting demands from different government agencies. In the face of competition from countries like Japan and Germany which achieve considerable coordination in these matters, the inability of the U.S. to promote cooperative export expansion efforts and synchronize export policies is a serious disadvantage.

17/ See, e.g., United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). Senator Danforth discussed this case in his January 19, 1981 floor statement on S.144 and said:

The court held that an export association could not establish or operate jointly owned facilities abroad and then went on to give illustrations of conduct that a Webb association may lawfully carry out: First, an association could be created by a majority of firms in an industry; second, the

(Footnote continued on following page.)

Legislative efforts to enable U.S. exporters to compete with foreign banks and cartels in overseas markets date back over sixty years. The Webb-Pomerene Act (1918) exempts the formation and operation of Export Trade Associations from some prohibitions of the Sherman and Clayton Acts, but its provisions have been singularly underutilized. Only 28 such Associations exist today, account for less than 3% of U.S. exports.

The principal reason for the Act's failure is its vagueness. Because no definitive standards are prescribed for permissible activities. Webb associations have repeatedly been challenged by the Justice Department. Facing the likelihood of an antitrust investigation and with no clear idea of permissible activities and possible benefits under the Act, firms have been reluctant to form Export Trade Associations. 18/

C. Potential Disruption of Existing Activities of Webb-Pomerene Associations

During consideration of similar legislation in the 96th Congress by committees in both the House of Representatives and the Senate, concern was expressed repeatedly that any export trade legislation must contain a provision to assure that all

(Footnote continued from previous page.)

association could be used as the members' exclusive foreign outlet; third, members of the association could agree that goods would be purchased only from member producers; fourth, resale prices could be fixed for the association's foreign distributors; fifth, prices could be fixed and quotas established for members; and sixth, foreign distributors could be required to handle only the members' products.

18/ U.S. Export Trade Policy, A Report of the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs, 96th Cong., 1st Sess. 18 (1979).

existing Webb-Pomerene associations may continue their operations unimpeded. Existing associations have at stake many millions of dollars of capital investment and long-standing, proved methods of dealing. Additionally, existing associations frequently are parties to long-term contractual obligations that may be jeopardized if care is not taken to insure not only that there is no temporal discontinuity with regard to the antitrust immunity enjoyed by such associations but also that any modified system of antitrust immunity be, at a minimum, co-extensive with the immunity currently available to Webb-Pomerene associations. Nevertheless, none of the proposals to date, including S.144, have dealt effectively with this critical issue. Statements of Administration officials, moreover, have been equivocal. This issue must be resolved if the contribution made by Webb-Pomerene associations to United States export trade is to continue or increase.

An effective approach to these concerns necessarily involves a number of elements. First, the protection of the substantial investment by existing Webb-Pomerene associations in export trade, their long-standing commercial relationships and long-term contractual obligations necessitates a provision in any revision of the Webb-Pomerene Act which permits Webb-Pomerene associations in existence as of the date of revision to continue to function under the current provisions of the Act. Phosrock believes most strongly that however well-intentioned, S.144 may have the potential to unfairly restrict joint export trade

and, as such, be counter-productive. The entire system of immunity not only is to be administered through new processes and procedures but also may produce legal standards and protection of a potentially different and more restrictive scope. To impose such potentially sweeping modifications upon existing organizations which have operated successfully under the provisions of the existing Webb-Pomerene Act is to subject the export trade activities of such associations to unnecessary uncertainty and possible disruption. Such a result would be most unfortunate and contrary to the legislative intent. Simply stated, legislation directed toward the expansion of export trade should not threaten the continued successful export activities whose unchallenged record of achievement should be accorded considerable weight. A second critical element which should be included in S.144 is a provision which would authorize Webb-Pomerene associations in existence on the date of the Act's revision to apply at any time for certification under the revised Act and to have the election of operating under the former provisions of the Act or pursuant to certification. Phosrock attaches a proposed amendment to S.144 that provides for such necessary and meaningful grandfather clause protection and urges its adoption.

ELECTION OF EXISTING ASSOCIATIONS TO CONTINUE
UNDER PRIOR LAW TO ACCEPT CERTIFICATION

SEC. 207. EFFECTIVE DATE WITH REGARD TO EXISTING ASSOCIATIONS. The amendments to the Webb-Pomerene Act set forth in Sections 203, 204, 205 and 206 of this Act shall become effective with regard to existing associations described in subsection (a) hereof only at such time as said associations may elect to be certified pursuant to subsection (b) hereof.

(a) Election to Continue Under Prior Law. Application of the antitrust laws to any association which as of January 1, 1981 had filed with the Commission the information specified under Section 5 of the Webb-Pomerene Act as in effect immediately prior to the date of enactment of this Act shall continue to be governed by the standards set forth in that Act, unless such association elects to seek certification under subsection (b) hereof.

(b) Election to Apply for Certification. Any association to which subsection (a) applies may, at any time after the effective date of this Act, file an application for certification with the Secretary containing the information set forth in Section 4(a) of the certification procedures set forth in Section 206 of this Act. The Secretary shall consider and act upon such application in the manner provided in Section 4(b) of the certification procedures set forth in Section 206 of this Act. The Association filing an application pursuant to this subsection shall continue to be subject to subsection (a) hereof until the Secretary issues a certificate and such certificate has been accepted by the association; the association must decide whether or not to accept such certificate no later than 30 days after the Secretary's determination with respect thereto has become final.

Related Technical Amendments to S.144

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"SEC. 206. Effective immediately, except as provided in Section 207 of this Act, Sections 4 and 5 of the Webb-Pomerene Act (15 U.S.C. 61-66) are amended and new sections added as follows":

(5) Page 40: strike out lines 3 through 25; Page 41: strike out lines 1 through 9 (and redesignate subsequent paragraphs accordingly).

(6) Page 43: An additional Section 207 is added after line 24.

Senator HEINZ. Thank you very much.

We will proceed to take all four witnesses, then we'll return to questions.

Let me ask Mr. Norman Seidler to please proceed.

Mr. SEIDLER. Thank you, Senator.

I am a member of the law firm of Lord, Day, & Lord, located in New York City. I speak today as counsel for the Phosphate Chemicals Export Association, commonly known as Phoschem.

Phoschem is the marketing arm of eight U.S. producers of phosphate fertilizers. It is a Webb-Pomerene association and has operated as such since 1976.

There are two points I wish to make, very briefly, Mr. Chairman.

First, I would like to point to the success of Phoschem and its ongoing contribution to the export trade of the United States a Webb-Pomerene association.

Second, I would like to join Mr. Fogt in submitting to this committee a proposed amendment which would permit us to continue to operate as a Webb-Pomerene association or make an election to apply for and receive certification. I'd like to explain why we make this request.

ADVANTAGES OF WEBB-POMERENE ASSOCIATION

First, as to Phoschem, the members of Phoschem found that the export trade in phosphatic fertilizers was a particularly appropriate trade in which to have a Webb-Pomerene association. Many of the customers of Phoschem in a country are federated with the government of that country itself. Many of the competitors of Phoschem are government-sponsored, government-subsidized, government-supported.

In many areas of the world we find that we are at a disadvantage with those competitors because of the quotas, tariffs, and other preferential treatment that they receive.

The sale of phosphatic fertilizers is a very complicated one. A sale to a single government can exceed \$100 million. Routinely, individual sales exceed \$1 million. The financial arrangements are highly complex. The shipping arrangements are highly complex. It was in this circumstance in this market that the members of Phoschem determined that the most effective, the most economical, the most efficient way that they could approach this market was through a joint, combined Webb-Pomerene association. That association acts as their marketing arm, it negotiates the contract, it enters the contract, and it administers performance passing the proceeds back to the members.

Over the 5 years that we've been in existence, since 1976, our association has developed in its staff an expertise in shipping, in financing, in statistics, in market analysis, and in the market itself.

Our association has maintained contacts throughout the world, built customer relationships and established agents throughout the world. We believe it has been successful, as evidenced by the fact that our sales in the export trade have increased, in the 5 years we've been in existence, from \$100 million to approximately \$650 million last year.

In sum, it is the judgment of our members that they can make the best, most effective ongoing contribution to the export trade to

maintain a presence in the export trade through a Webb-Pomerene association that can offer services to the customers and ongoing reliability of supply to the customer, and represent the most effective way for our members to move their product into the export market.

And I might say, every one of our members has determined that it is most economical to proceed this way, that the cost of moving a ton of material in the export trade is that much less than maintaining their own staffs. Some have, in fact, curtailed or cut back their export staffs in favor of relying on Phoschem. And it is entirely possible that with regard to some of our members who are small in this particular area, this particular product, that there is no way they can provide the same services and be as competitive in the market as they can through the Webb-Pomerene association.

That brings me to my second point. Up till now, we have existed for 5 years as an unregulated business. We have made our annual report to the Federal Trade Commission. We have answered the questions of the Federal Trade Commission. We've been subject to the ongoing scrutiny of the Department of Justice Antitrust Division for the full 5 years.

Now, with S. 144, we enter a new ballgame and a new ballpark. We enter into a regulated, administrated program. And this creates uncertainties for us. We certainly hope that the administration of the new bill would be one that would not jeopardize our ongoing existence. But there are questions which we'd like the opportunity to step back and examine.

For example, there are guidelines to be promulgated. What form will they take?

There are rules and regulations to be promulgated by the Secretary of Commerce. What form will they take?

As an ongoing certified association, we have to be concerned about the requirement that if there is a material change in our method of operation, we must seek certification anew. I'm not sure what that means. Over the years producers have joined our association and resigned from our association, based upon their independent judgment of what their particular needs were at that time. Does the subtraction of a member represent a material change? If we change distributors abroad, is that a material change? We don't know.

There is also the fact that with certification the Secretary of Commerce may impose certain terms and conditions upon our method of operation. We don't know what form that will take.

The requirements under the S. 144 differ somewhat from those under which we've been operating. What is a specified need? We're not sure.

What we're saying, Mr. Chairman, is "Let us operate as we have, successfully. Let us continue to be an ongoing presence in the export market, with the same risks we've faced up till now as a Webb-Pomerene association. And let us look at the certification process and determine whether it is one that we can participate in and continue our existence."

We certainly hope that it would be true. We're just asking for the time. And basically, it represents no change.

Again, we're an ongoing successful Webb-Pomerene association, and simply wish to continue our existence. We just ask for that opportunity, let us have that option.

Thank you.

[The complete statement follows:]

PREPARED STATEMENT OF

NORMAN H. SEIDLER, ESQ.

Partner, LORD, DAY & LORD

Counsel to

PHOSPHATE CHEMICALS EXPORT
ASSOCIATION, INC.

Mr. Chairman and Members of the Subcommittee:

I appear as counsel for Phosphate Chemicals Export Association, Inc., headquartered in New York City, and commonly referred to as "Phoschem." It is an Association of eight United States producers of phosphatic fertilizer products,^{1/} which was organized solely to promote exports and which has successfully operated in the export trade of the United States under the existing Webb-Pomerene Act^{2/} for the past five years. I appreciate this opportunity to testify on the provisions of Title II of S.144 and, particularly, to focus on the experience and concerns of Phoschem as an ongoing export association serving to improve and strengthen the competitive position of U.S.-produced goods in overseas markets. Specifically, I wish to bring to the attention of the Subcommittee the need to insure that existing Webb-Pomerene associations will be able to continue their positive contributions to the United States export trade.

There are approximately 30 Webb-Pomerene Associations in existence today, assisting in the export of products as diverse as motion pictures, textiles, agricultural produce, wood products and fertilizer.^{3/}

Each marketplace has its own unique challenges, and to meet these challenges the various Associations have undertaken performance of a variety of functions. I believe it can safely be said that no two are completely alike, as can readily be seen from the most recent FTC staff analysis on the subject,^{4/} but their continued existence does demonstrate that the present Webb-Pomerene exemption has served "its intended purpose in some industries"^{5/} and that new legislation should not inadvertently curtail or totally jeopardize substantial investments and the significant place which these Associations have in our export trade and their contribution to improving the balance of payments of the United States. The particular experience of Phoschem, which makes export sales of phosphatic fertilizer products manufactured in a variety of locations throughout the country by eight U. S. producers, strongly emphasizes this point.

Phoschem, which began active operations in 1976, operates in a highly volatile world market in which many of its customers are government purchasing agencies and many of its competitors are government-controlled or receive preferential treatment. A single purchase by a foreign government may exceed \$100 million. Single transactions with buyers routinely exceed \$1 million and

involve complex financing and shipping arrangements, frequently presenting substantial risks.

Phoschem represents the individual determination of each member to make a commitment to a sustained program of export sales development and continued participation in this market—commitments made in reliance on the statutory protection afforded by the present Webb-Pomerene Act. Its By-Laws provide that any U. S. producer of phosphate products may join, and over the years U. S. producers have joined or resigned based on their evaluation of their economic needs in particular situations. Phoschem's continued existence gives evidence to the independent decisions of its eight current Members that it is the best way for them to compete and maintain an effective presence in the export marketplace.

Phoschem is devoted exclusively to the marketing of phosphate products and its Management is directly responsive to the needs and interests of its Members alone. It has gradually developed a highly-specialized U. S.-based sales staff with a proficiency in marketing, transportation, statistics and finance which all but the largest of its Member companies would find hard to duplicate. This staff has increased in numbers and expertise to provide

effective in-depth service and an ongoing reliable relationship with its customers.

The members of Phoschem have committed to a budget of several million dollars per year for the creation, development and maintenance of this common export sales entity which negotiates, concludes and administers their export sales. In further aid of this effort, two overseas administrative subsidiaries have been established and staffed, and a network of commercial agents in the Far East, Asia, South America and Europe has been developed. As a result, sales contacts and goodwill have painstakingly been built over time as Phoschem has successfully competed throughout the world.

Phoschem's existence reflects the independent determination of its various Members that this is the most effective and economic way for them to compete on the world marketplace. The fundamental soundness of their judgment has been reflected in a steady increase in its Member export sales from \$100 million during its first year to an estimated \$650 million during calendar 1980. Through a joint organization offering an ongoing substantial market presence and supply reliability, Phoschem's Members have been able to offer worldwide customers an attractive alternative to overseas competitors

who enjoy advantages afforded by foreign statute, import quotas, preferential tariffs and host-government subsidization. Phoschem's successful operation and its benefits have passed directly back to Phoschem's Members and, through them, to the U. S. economy.

Mr. Chairman, Phoschem quite obviously supports the intent behind S.144 to encourage and widen the benefits of joint export efforts. Indeed, because of the scale and volatile nature of the market in which Phoschem competes, the experience and judgment of its Members has been that an export association represents their best opportunity to have a direct and ongoing presence in the world marketplace. Phoschem also supports the expansion of the exemption to cover services and the vesting of administrative responsibility in the Department of Commerce where the formation of new export trade associations and export trading companies can better be promoted.

At the same time, however, we respectfully submit that existing Webb-Pomerene Associations have already recognized the benefits of the current Act and organized themselves in the manner best suited to take advantage of them. They have invested substantial resources and developed longstanding courses of dealing

and customer obligations that have withstood the test of time and legal scrutiny. We submit that fairness and common sense suggest that their successful operation ought not to be disrupted or unnecessarily subjected to uncertainty as a by-product of laudable efforts to promote the exemption and extend its benefits to others.

The problem we face and the concern which we wish to express is that S.144 provides for new complex procedures, standards which differ in some respects from those of the Webb-Pomerene Act, and the promulgation of guidelines, rules and regulations. At this time, we are not in a position to evaluate what impact these will have on our present operation. For example, S.144 provides in outline form for a certification process, but the actual form that process ultimately will take and operational criteria which will be applied must await the development and promulgation of guidelines and other related rules and regulations specifying precisely how determinations of eligibility will be made.^{6/} These guidelines—and, indeed, the entire certification process, will be administered by a Commerce Department which, although dedicated to promotion of export trade, will nevertheless have to develop a new expertise to deal with the objectives and criteria of the new Act. Complicating

this uncertainty will be the presence and participation of the Department of Justice and Federal Trade Commission, agencies not historically known for wholehearted support of the present Act and unaccustomed to granting unconditional preclearance and absolute exemption for activities of the nature contemplated by the new Act. Moreover, granting of certification does not end this procedure, because a certificate is subject to re-evaluation by the Secretary, by the enforcement agencies, and an Association may have to file for an amended certificate in the event of "material change."^{7/}

In short, Mr. Chairman, while we believe the goal of expanded certainty through certification is a laudable one, the path by which it is to be reached is as yet uncharted and not wholly clear. A new applicant has little to lose by going down that path, but existing Associations have a great deal at stake and in fairness and recognition of their current positive contributions, ought to be afforded a right to make that decision after assessing the development of the Act in actual practice.

We believe that the efforts of the future ought to build on the achievements of the present, and for this reason respectfully request that S.144 be

modified to contain a meaningful grandfather clause which meets the concern of existing associations, such as Phoschem, by guaranteeing that their present export businesses may continue without interruption in their present form and with their present flexibility. To this end, we ask that the attached proposed amendment to S.144 be adopted by this Committee. It would address our concerns by encouraging application for the intended benefits of S.144's new certification, while at the same time making clear that there is no desire to impose that process or to jeopardize or dislocate those who have lawful investments and operations presently in place—activities which last year contributed in excess of \$2 billion annually to our nation's export trade account.

We submit that the successful contribution to the export trade of the United States of existing associations has earned us the opportunity to continue under the Webb-Pomerene exemption while studying the potential impact upon our ongoing operations by the actual application of the new procedures and standards of S.144. We support the objectives of S.144 while at the same time simply requesting the same export trade encouragement as it would, in essence, offer to all: freedom to choose the benefits of the new law or to remain under the status quo.

FOOTNOTES

- 1/ Agrico Chemical Company, American Cyanamid Company, Beker Industries Corp., First Mississippi Corporation, Freeport Chemical Company, W. R. Grace & Co., International Minerals & Chemical Corporation, and Texasgulf Inc.
- 2/ Export Trade Act of 1918, 15 U.S.C. §§ 61-65.
- 3/ Webb-Pomerene Associations: Ten Years Later, a staff Analysis submitted to the Federal Trade Commission (November, 1978, unpublished).
- 4/ Id., at p. 12.
- 5/ Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures (1/22/79), Vol. II, "Report of the Business Advisory Panel on Antitrust Export Issues," p. 291 at 293-294.
- 6/ S.144, TITLE II, Section 206, inserting a new Section 5.
- 7/ Id., inserting new Sections 4(c), 4(d), and 4(e).

Proposed Amendment to S.144ELECTION OF EXISTING ASSOCIATIONS TO CONTINUE
UNDER PRIOR LAW TO ACCEPT CERTIFICATION

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Related Technical Amendments to S.144

(1) Page 23: strike out lines 10 through 12 and insert in lieu thereof the following:

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(6) Page 43: An additional Section 207 is added after line 24.

Senator HEINZ. Mr. Seidler, thank you very much.

Let me ask Mr. Victor to proceed.

Mr. VICTOR. Thank you, Mr. Chairman.

My name is A. Paul Victor. I'm a partner in the New York law firm of Weil, Gotshal & Manges.

I've been in the antitrust and international trade area for about 18 years, including a stint at one time in the Justice Department.

I am currently chairman of the International Trade Committee of the American Bar Association Section of Antitrust Law. It's in that capacity that I began to get interested in this piece of legislation, although I must make it very clear to you that I am here today on my own behalf and not at all on behalf of the American Bar Association, because the Association Committee has not had enough time to study the current piece of legislation. We are looking at it. We do hope that we'll be in a position to make some comments when the legislation is considered over in the House.

In my individual capacity, I'd like to make some personal observations. I sort of feel a little bit like I am a salmon swimming upstream here, because everybody who has had anything to say has had nothing but favorable things to say about the bill this morning. And that may well be quite appropriate.

I am not opposed to this legislation. I think its purpose is quite laudable. No one can deny the benefits of promoting exports of small- and medium-sized companies and even of trying to provide greater certainty regarding the potential antitrust consequences in joint conduct in the export trade.

CAUTION URGED IN CONSIDERING S. 144

And I don't quarrel that there's a perception, at least a perception that uncertainty with respect to the application of U.S. antitrust laws inhibits the formation of export trading companies or overseas joint venturing or the marketing of U.S. exports.

On the other hand, I do think that some legitimate questions can be raised whether S. 144 will accomplish the purpose that it so laudably seeks to achieve.

Certainly the Webb-Pomerene Act itself hasn't proven, I don't think, to be the essential core of expanding U.S. exports, although it's helped to a certain extent, despite the fact that there has been an antitrust exemption for legitimate joint export activity thereunder for many, many years.

Also, there is little real proof that can be pointed to which would demonstrate the restraining effect of the antitrust laws on joint conduct with respect to the U.S. export trade.

Hence, I guess my basic suggestion would be to urge considerable caution in considering this bill.

I recognize we have sort of a balance-of-trade problem. On the other hand, U.S. exports have continued to rise, and I'm not sure that there's an absolute urgency to pass this bill today, especially in light of the fact that S. 432 is pending. S. 432 would establish a commission to study international application of the U.S. antitrust laws. It is contemplated, I believe, that the issues that are involved in this piece of legislation, from an antitrust standpoint, will be studied under that bill. I think it would be prudent to defer passage of this legislation until that commission has an opportunity to

engage in an in-depth study with respect to these issues and to develop a cohesive approach to recommend.

Assuming nevertheless that you decide to go forward with this piece of legislation, I would like to make the following observations.

In the first place, I don't think that it contains any fundamental substantive changes to the U.S. antitrust laws. It is simply an extension of Webb-Pomerene thinking, and an attempt at clarification of the confusion and uncertainty which is at least perceived to exist. It is more procedural in nature in that context.

Nor do I have any quarrel with the expansion of the coverage to services. If this kind of legislation is going to induce greater U.S. exports with respect to goods, and if an antitrust exemption is acceptable with respect to goods, then I see no reason why services shouldn't be included as well.

I am somewhat concerned, however, about the mechanism that has been selected to develop this antitrust immunity, which is the regulatory certification approach. It will itself involve a period of uncertainty for some 3 to 6 months concerning whether or not there will in fact be certification issued. Even that period of time might have an impact in some situations of inhibiting exports. It could be complicated, it could be burdensome, it could be expensive, and with all due respect to one of the earlier witnesses this morning, I can't see how those people who apply are not going to have to make use of attorneys to assist them in their application and to deal with the Commerce Department, Justice Department, or both, or the FTC, in connection with those activities as well as to have continuing counselling thereafter.

Senator HEINZ. Mr. Victor, let me just interrupt to say that nobody in the Congress, particularly composed as it is of eminent attorneys, has yet even tried to find a way to make it unnecessary for people in other parts of the private sector to find an attorney. You need have no fear on that account. [Laughter.]

MR. VICTOR. While this may be an admission against interest, perhaps that is a worthwhile objective. [Laughter.]

In any event, I am concerned that since the purpose of the legislation is to try to facilitate the opportunities for small and medium sized companies, the regulatory process itself should not become so complicated and fettered, and may not be the best way of doing it.

In addition to that, it really doesn't attack the fundamental problem, which is to clarify the antitrust jurisdiction in the Sherman Act and the other antitrust statutes. I would assume that the commission contemplated by S. 432 would consider a possible alternative such as to clarify the underlying antitrust laws themselves, and amend those laws to indicate that they don't apply except where the conduct involved has a direct and substantial effect, adverse effect, on the U.S. domestic commerce or on export competition.

It seems to me it is worthwhile to consider that as an alternative. That would eliminate the expenses of complying with the regulatory procedures. It, of course, would not guarantee that there would not ultimately be a lawsuit, but neither is that really guaranteed under the currently contemplated bill.

It provides greater certainty than exists under the perception today that the antitrust laws inhibit exports or activity involving foreign trade, and it would be consistent with the Justice Department's existing view of the law and antitrust enforcement policy.

If, nevertheless, the Congress in its wisdom does decide to pursue a regulatory approach, I urge that it be kept as simple as possible. It might well make some sense to define the types of export trading companies or export trading associations for whom certification would be almost virtually automatic.

For example, if there is no significant evidence of direct and substantial adverse effect on domestic commerce, or on export competition, that might prima facie indicate a go.

Also, prima facie acceptable conduct from a legal standpoint might be indicated, such as the four or five criteria that were indicated in Judge Weizansky's opinion in *Minnesota Mining*, which I believe Senator Danforth alluded to when the bill was introduced this year.

URGE JUSTICE DEPARTMENT INVOLVEMENT

Finally, I would also urge that if there is going to be a regulatory procedure it be the Justice Department and not the Commerce Department, a non-antitrust agency, that be involved.

The purpose of this legislation is clear: to promote exports. Even the Justice Department will understand that purpose. The real problems that you have are problems of whether or not to grant antitrust immunity. The Commerce Department, I suggest, does not have a tremendous amount of sophistication in that area. There will be a lot of consultation with Justice.

Justice, on the other hand, or the FTC, understands, I think, the antitrust laws a little bit better. It could be more responsive. It could be more direct. It might be more prompt in the way of dealing with the problems that would exist under the certification procedure.

I commend the sponsoring Senators for proposing this legislation, which is designed to improve our export trade, and in the end this legislation may be right. But I do believe it is more prudent to defer its passage until the S. 432 commission study is undertaken so that the most cohesive, comprehensive and efficacious policy of assuring U.S. international competitiveness will result.

Thank you.

[The complete statement follows:]

STATEMENT OF A. PAUL VICTOR, PARTNER, WEIL, GOTSHAL & MANGES

My name is A. Paul Victor and I am a partner in the New York law firm Weil, Gotshal & Manges. Since 1963, I have been engaged in the practice of antitrust and international trade law, first, with the Antitrust Division of the Department of Justice, then, in private practice in Washington, and, for the past 12½ years, with my law firm in New York.

Since August of last year, I have been Chairman of the International Trade Committee of the American Bar Association's Section of Antitrust Law. It is in that capacity that I became particularly interested in S. 144, as my Committee has begun to study the proposal and, hopefully, will be in a position to provide comments when the bill is considered in the House. For now, however, I must make it clear that I am not appearing before the Subcommittee as a representative of the American Bar Association. Instead, it is my privilege to appear before you on my own behalf to share just a few personal observations concerning S. 144, with specific emphasis on Title II thereof.

At the outset, let me assure the Subcommittee that I believe the purpose of the proposed legislation—that of promoting export activity among small to medium size U.S. organizations, and of providing greater certainty to those companies concerning the potential antitrust consequences of joint export activity—is laudable. Any legislation that can meaningfully improve the prospects of facilitating our ability to export should be seriously considered. Moreover, I readily acknowledge that there is an often referred to and widely held perception that uncertainties under the U.S. antitrust laws inhibit the formation of trading companies, overseas joint venturing and the aggressive and efficient marketing of U.S. exports.

Whether or not this perception is true, it is apparent that the Webb-Pomerene Act has done little over the years to alleviate this concern. One could legitimately question, therefore, whether expansion of that Act, and the increased antitrust immunity which accompanies that expansion, as contemplated by S. 144, will really help achieve the desired purpose—an increase of exports by small to medium size companies. I raise this question especially because, despite the long history of the U.S. antitrust laws, there is very little precedent to point to that would support the view that there is reason for undue concern when two or more competitors wish to get together to target their conduct on a foreign market rather than on competition within the United States.

It is for this reason that I urge caution—not opposition—in considering the proposed legislation. As you know, last year's S. 1010, a bill to establish a commission to study the international application of the U.S. antitrust laws, was reintroduced on February 5 as S. 432. That bill contemplates, *inter alia*, that the study shall specifically address the effect of those laws and their interpretations upon the exemptions under the antitrust laws with respect to associations under the Webb-Pomerene Act. In view of the broad antitrust immunity that would be granted to organizations receiving certifications under S. 144 as currently contemplated, and the ordinary reluctance of Congress to provide such immunity, one wonders whether it might not be more prudent to defer this legislation for just a little longer so that its need and wisdom can be considered in light of the results that the study contemplated by S. 432 would provide. U.S. exports remain generally healthy and are growing despite the ostensibly restraining effects of the U.S. antitrust laws. The urgency for S. 144 is not, therefore, immediately apparent.

Assuming, nevertheless, that it is deemed both necessary and appropriate to pass S. 144 as a piecemeal solution at this time, I would like to make the following observations.

In the first place, let me say that I do not discern any major substantive changes to existing antitrust law that would be wrought 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. I should add that if an antitrust exemption for U.S. export activity under the circumstances provided for in S. 144 will help promote U.S. exports. I think it is appropriate for Congress to expand the exemption to services as well as goods. There seems to be no compelling reason—either from an economic or legal standpoint—to restrict the exemption to the export of goods alone.

The basic question that I would like to raise, however, is what is the best way to provide for the antitrust immunity that Title II seeks to provide? I recognize, and, as I said before, praise, the commendable objective of providing greater antitrust certainty to those who seek to act in concert concerning their export activities. However, is the Subcommittee satisfied that the regulatory approach contemplated by S. 144 is really the best way to go about this? Has there been any cost/benefit study undertaken to determine the efficacy of the contemplated certification procedure? One must recognize that the certification procedure itself will involve an inherent period of uncertainty which could extend from 3 to 6 months and even inhibit certain export opportunities that require prompt action. It, in effect, puts control of the uncertainty into the hands of the regulator rather than the courts, albeit for a shorter period of time. Moreover, the certification procedure could be complicated, expensive and burdensome and, I must note, seems to run counter to the new Administration's basic theme of deregulation. There are those who might even claim that S. 144 reflects another example of needless government regulation.

For this reason, the Subcommittee may wish to consider a possible alternative—one that involves clarifying the underlying antitrust laws themselves. That is, it might be more helpful if the antitrust laws were simply amended to make clear that they do not apply to persons or activities in U.S. export trade unless the conduct

involved has a direct and substantial adverse effect on U.S. domestic commerce or export competition. Utilizing such an approach would not only obviate the need for and expenses involved in complying with complicated regulatory procedures, but might well ensure sufficient certainty concerning the scope of our antitrust law so as to still foster the encouragement of export trade intended by S. 144. Moreover, such an approach would be consistent with the Justice Department's current enforcement policy and view of the law in the area of international trade.

I recognize that this suggestion is not perfect, and that, if adopted, it would make a fundamental change in at least the language of the pertinent U.S. antitrust statutes. Accordingly, I again urge caution in considering this subject and suggest that Congressional action concerning the entire question of antitrust jurisdiction and exemption involving U.S. export trade be deferred until it can be carefully reviewed by the Commission, as contemplated in S. 432.

At all events, if Congress does deem it appropriate to pursue a regulatory approach to this subject, I urge that it be kept as simple as possible. The more complicated and expensive it is, the more likely it is going to deter the small and medium size firms the legislation is designed to assist from taking advantage of the law's provisions. Thus, I would suggest that consideration be given to defining certain categories or types of export trading companies or associations for whom certification would be virtually automatic, including those organizations whose applications demonstrate that there is no significant evidence of a direct and substantial adverse impact on U.S. domestic commerce or foreclosure of U.S. export competition. Similarly, it would seem helpful to identify the type of conduct which Congress deems, *prima facie*, to be beyond legal challenge. In this connection, the type of activity identified by Judge Wyzanski in *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 965 (D. Mass. 1950), would seem to be a good starting point. At the same time, it might be useful if Congress were to identify certain types of activity that would clearly not be countenanced by the Act.

Moreover, since the Act's purpose—to foster joint export activity by eliminating antitrust concern where appropriate—is plain and clear, but since the Justice Department and Federal Trade Commission are more sensitive to and familiar with the most important questions under Title II—the antitrust issues that will be raised by applications for an antitrust exemption under the Act—I urge that those antitrust agencies, not the Commerce Department, be made responsible for conducting whatever regulatory process is ultimately provided for by Congress. This would, at least to me, provide an opportunity to simplify the regulatory process, provide more responsive agencies to the real problems that are likely to arise under S. 144, eliminate the need for consultations between Commerce and the antitrust agencies, and allow for more direct and prompt decisions with respect to pending applications.

As you can see, while I do not personally oppose S. 144, I also do not think it is a perfect piece of legislation as it currently stands and, at all events, believe it could profitably be deferred until the more detailed study contemplated by S. 432 sheds more specific light on the important issues the bill attempts to resolve. I certainly commend the sponsoring Senators for proposing legislation designed to improve the export trade of the United States. S. 144 may, in the end, indeed be a significant piece of legislation to achieve that objective. I would hope, however, that the questions raised in good faith by my comments and those of others will be carefully considered so that Congress can ensure that the United States develops a cohesive, comprehensive and efficacious policy for guaranteeing its international competitiveness in the remaining decades of this century.

Thank you for your attention to my remarks.

Senator HEINZ. Mr. Victor, thank you.

Mr. Ewing.

Mr. EWING. Thank you, Mr. Chairman.

With the chairman's permission, I would appreciate it if I could submit my full statement for the record and summarize it briefly this morning. I believe the chairman has already indicated that our full statements will be in the record.

Senator HEINZ. That is correct.

HUGE TRADE DEFICIT

Mr. EWING. This consideration by the subcommittee of S. 144 is in the context of the U.S. merchandise trade deficit of \$26.7 billion

in 1980. That clearly points to the need for us to do something in addition to what we are doing now.

This consideration of S. 144 also is underway in the context of a remarkable export performance; 1980 was the second consecutive year in which our merchandise trade deficit declined and 1980 exports increased \$39.9 billion, or some 22 percent.

Furthermore, looking at our nonagricultural export increases, we find they were in a number of different areas. Machinery, consumer goods, civilian aircraft, chemicals, coal, to name just a few.

Those significant increases occurred without the creation of a "U.S.A. Chemicals, Inc.," or a "U.S.A. Coal, Inc." or a "U.S.A. All-Exports-Produced, Inc."

When we speak of what is needed to increase still further our export performance, we must be careful not to damage or undermine the strengths we are presently showing in our export performance.

I think it is important also that we not oversell what this particular approach of export trading companies can do. I think the experience of the Webb-Pomerene associations, which still account for less than 1.5 percent of our exports, should caution against that.

Having said all of that, I nevertheless believe that if this bill results in even a few new entities that effectively market abroad goods and services that now are either not being exported or are not being exported in sufficient quantities, and they do so without harming the existing strengths of our export effort, then this bill will have been worth a very long, hard battle.

I would like to comment briefly on two aspects. First, the banking and banking organizations provisions.

I believe that Secretary of Commerce Baldrige is accurate when he states that banks are already involved in international transactions, particularly those with foreign affiliates, that are, and I quote, "logical candidates to form and participate in effective export trading companies."

Permitting our banking organizations to have an equity ownership in export trading companies, but subject to carefully structured provisions designed to safeguard the integrity of our financial system, seem to me a useful step. It is, in short, reducing a barrier to the free market's functioning in the export area, and I support it.

The antitrust exemption is, to me at least, a much more complicated issue. I would like to offer four thoughts which I will briefly summarize. They are developed at length in my prepared statement. And then I would like to offer for your consideration a possible alternative to the fairly elaborate certification process now contained in the bill.

COMPLICATED CERTIFICATION PROCESS

My first comment is that the certification process contained in the bill is in fact quite complicated.

In my prepared testimony—I won't repeat it here—I take one example; namely, the appeals process in a hard case, the hard question being where the applicant wants a bundle of activities which we can call *x*. The Commerce Department sends that application over to the antitrust division. The antitrust division, with

conscientious lawyers looking at the provisions of section 2, to be amended by section 204 of your bill, proceed to say, well, on this one, let's only give an exemption to the bundle of x minus 10 of these activities.

Well, the applicant doesn't like that. So the applicant goes to the Assistant Secretary of Commerce, or whatever official has been delegated the Commerce Department's authority to act, and argues for the full bundle.

Let's say that conscientious official, agrees that Justice was right on part of these activities and the applicant was right on a part. So we end up with a bundle of exempt activities, x minus 5 under this bill.

This, in turn, could be appealed, with hearing rights, to the Secretary of Commerce.

Let's assume for a moment here, just to simplify things, that the Commerce Secretary agrees with his Assistant Secretary and exempts the bundle of x minus 5 activities. That is final agency action within the meaning of the Administrative Procedure Act.

At that point you have two people mad at you. You have the antitrust division that doesn't like the result and you have the applicant who doesn't like the result.

I guess it gets its way to the courthouse with both aggrieved parties. The applicant can sue the Secretary of Commerce under the Administrative Procedures Act in a suit styled the applicant versus the United States. I trust initially the Attorney General has the right as an aggrieved party to sue also, that might be the United States of America versus the applicant.

Presumably the Solicitor General would get involved at about that point to determine what the position of the United States of America would really be.

He has the right to confess error on everybody. He might agree with the applicant that the whole bundle of rights should be exempted.

My point in going through this scenario is to suggest that we have in fact created a certification mechanism that tosses responsibility among the various executive branch officials in a fairly convoluted manner.

Senator Danforth's explanation in the Congressional Record was a very lucid one, but I believe it points out the complexity of the process involved.

My second major point for you to consider is that historically the Justice Department has argued that no exemption, no Webb-Pomerene type exemption is needed because appropriate joint export efforts are already not illegal under the antitrust laws.

The Justice Department has backed this up by not bringing cases, and more particularly, by setting forth its views in its Antitrust Guide for International Operations.

Let me quote just a bit from that guide:

It says:

Normally the Department would not challenge a joint venture whose only effect was to reduce competition among the parties in foreign markets, even where goods or services were being exported from the United States.

Having said that, as a private attorney and private citizen, and that is solely the way I am testifying here, I also have to realize

that there are at least two, possibly more, lower court decisions in which courts have disagreed that adverse effects solely on foreign markets take activity out of the proscriptions of the Sherman Act.

To put the matter simply, even if the Justice Department does not sue, there is still some antitrust uncertainty and risk stemming from the substantive provisions of the act itself.

In my prepared testimony I cite the cases. I am referring here to private triple-damage actions.

My third major point is to suggest to you that the creation of an elaborate certification process to confirm the legality of what is already legal may itself be a disincentive to exports.

I would hate to see a situation where Mr. Schulman, who testified earlier, or other men in his situation, would feel that they had to come to Washington and go through a fairly elaborate certification procedure, meeting all the requirements of section 204 of this act, to do what they can already do with perfect legality under the antitrust law.

I also appreciate the fact that however we structure the mechanism at the margin, whether it is the margin of the law itself or the margin of the certification process, questions of interpretation will arise and the need for attorneys will arise.

My point, though, goes beyond that. It is that people will believe that they have to come to the Federal Government and go through the certification process to do what is already legal.

Fourth and finally, I don't think there is any consensus today that export trading companies should monopolize industries or be allowed unreasonably to restrain the export competition of the United States. To the contrary, I think that the consensus is that we should create a mechanism by which companies such as banks and bank holding companies would have the incentive to create effective marketing organizations abroad. But those should not be allowed to monopolize the trade of the United States.

I believe, in fact, that the careful provisions of section 204 and 206 of your bill are designed to avoid having export trading companies be in a position to abuse the legislative grant of authority and cut down on our exports; that is, limit output for their own private advantage or raise prices for their own private advantage to the detriment of our export effort as a nation.

Now, if this subcommittee of the Congress were to agree with my premises, namely, that this is a very complicated procedure, that much of what we want to do is already legal, that we don't want to create mechanisms that would be a disincentive to exports, then it seems to me useful to consider an alternative. It seems to me that at least the subcommittee might consider the possibility of the following package approach.

ALTERNATIVE APPROACH

First, amend the substantive provisions of sections 1 and 2 of the Sherman Act and the Federal Trade Commission Act to make clear that they do not apply to activities in the U.S. export trade unless such activities have a direct, substantial, and foreseeable adverse impact on the domestic commerce of the United States or foreclose U.S. export competitiveness.

Second, provide for simple registration of an export trading company with either the Commerce Department or the Justice Department, simply giving its name, address, and registered agent for the receipt of service of process.

Third, provide that the activities of a registered export trading company entered into for the sole purpose of engaging in export trade would be immune from challenge in our courts by anyone other than the Department of Justice, until such time as the Department of Justice has successfully challenged in court the registered export trading company's activities as being in violation of the amended Sherman Act, at which time a private right of action for redress of injury from the violation of the amended act could be maintained.

And fourth, repeal the existing Webb-Pomerene exemption provisions, thus requiring the existing Webb-Pomerene associations to register anew and comply with the new statutory scheme.

I believe that an approach along these lines would go to the heart of the issue. We need to make clear what the substantive antitrust rules applicable to our export trade really are; we need to center in one responsible Government agency the enforcement of those antitrust rules, through the mechanism of our courts; and we need to leave open the right of private parties to obtain redress for injuries their companies may suffer by virtue of a violation of these rules by a registered export trading company.

I would like to close by saying that I truly understand the desires of the sponsors of this legislation, and there are many in this Congress, to move this quickly through the legislative process. But I nevertheless would urge that this subcommittee pause for a moment to consider the possibility of a simpler, less bureaucratic system than the certification requirements, which are now contained in S. 144.

I appreciate the opportunity the subcommittee has given me to offer these views as a truly private citizen.

Thank you.

[The complete statement follows:]

STATEMENT OF KY P. EWING, JR.

My name is Ky P. Ewing, Jr. I am a lawyer practicing in Washington, D.C., as a partner in the firm of Vinson & Elkins. I appear here today as an individual, at the request of the Chairman of the Subcommittee on International Finance and Monetary Policy, Senator John Heinz. Because some members of the Subcommittee are aware that I was a Deputy Assistant Attorney General in the Antitrust Division of the Justice Department until the end of last October, I particularly want to emphasize that I appear here today strictly as a private citizen.

This Subcommittee is considering S. 144 in the context of the United States' merchandise trade deficit of \$26.7 billion in 1980. While that figure has been prominent in the presentations concerning this bill, I believe it important that the Subcommittee also focus on some other facts about our export situation, namely:

That 1980 was the second consecutive year in which our merchandise trade deficit declined;

That in 1980 exports increased \$39.9 billion or some 22 percent;

That in 1980 our merchandise trade balance with non-OPEC developing countries moved to a surplus of \$3.3 billion from a deficit of \$3.0 billion, while the surplus with Western Europe increased to \$20.3 billion from \$12.3 billion; and

That looking solely at nonagricultural exports, 1980 showed an increase of \$33.4 billion or some 7 percent by volume.¹

¹Source: United States Department of Commerce, Bureau of Economic Analysis Release BE81-05, February 5, 1981.

That is an impressive export performance. And it clearly points to the realization that much of what we are doing is right and should be continued.

Let me stress that the nonagricultural export increases were in a number of different areas: there were major increases in machinery, up \$11.1 billion; consumer goods, up \$3.8 billion; civilian aircraft, up \$3.6 billion; chemicals, up \$3.3 billion; and coal, up \$1.2 billion, with the latter representing a doubling in volume of steam coal exports and a 25 percent volume increase in metallurgical-grade coal exports.

This export performance is being produced by a system that relies on the free market mechanism for its success. Put another way, we did not have to create a "U.S.A. Chemicals, Inc." or a "U.S.A. Coal, Inc." or a "U.S.A. Aircraft, Inc.," and certainly not a "U.S.A. All-Exports-Produced, Inc." to accomplish significant increases in our exports.

Having said that, I think it's apparent that we must always be alert to the need to export successfully and at ever larger volumes if we are to indulge our appetite for imported goods. Thus, we need to make those adjustments in our laws that will enable our institutions to perform even better. I believe that S. 144 is an attempt to do just that, by easing the formation and operation of companies that would be devoted to export trade.

I think it important that we not oversell what this bill can do; our experience with Webb-Pomerene associations, which account for less than 1.5 percent of our exports, should caution against that. In fact, the vast bulk of our exported goods and services will continue to be exported, in my judgment, through the types of companies and via the means available today. Yet if this bill results in even a few new entities that effectively market abroad goods and services that now are either not being exported or not being exported in sufficient quantities, and they do so without harming the existing strengths of our export effort, then the bill will have been worth the battle.

Permit me to comment briefly on two of the bills' more controversial features: first, the bills' lifting of existing barriers against bank participation in equity ownership of trading companies, and, second, the antitrust exemption and certification mechanism.

I. BANK OWNERSHIP IN EXPORT TRADING COMPANIES

I believe that the bills' removal of the current barriers to bank ownership participation in export trading companies—but subject to some continuing provisions safeguarding the integrity of our financial system—will help achieve the creation of viable new marketing entities. As Secretary of Commerce Malcolm Baldrige has pointed out, banks that are already involved in international transactions, and particularly those with foreign affiliates, are "logical candidates to form and participate in effective export trading companies." This provision, it seems to me, reduces a barrier to the free market's functioning in the export area. I therefore support it.

II. ANTITRUST EXEMPTION

The antitrust exemption is, to me, a much more complicated issue. At the risk of somewhat oversimplifying the problems, let me organize the points I would like to make to you around four major thoughts. After that, I would like to suggest, respectfully, that your Subcommittee consider a different and considerably simpler approach to the vexing question of antitrust uncertainty.

1. *The bill creates an exceedingly complex certification procedure*

First, the bill not only transfers the registrar's function under the Webb-Pomerene Act from the Federal Trade Commission over to the Commerce Department, but creates a certification procedure in Commerce that can only be described as highly complex. I know and respect the good intentions of all of those who spent long hours and much thought drafting the elaborate certification requirements, and making provision for the challenge by Justice and the counterchallenge by Commerce, and for two different versions of judicial review of the outcome. I know the purpose was to guard against a trading company's abuse of this law by acting in ways that adversely affect our domestic commerce or actually cut down on this country's ability to export successfully. But because I believe that government officials in the Justice Department and in the Commerce Department will conscientiously do their duty in trying to interpret these complex provisions and apply them to factual applications, I think what we may have created is a bureaucratic nightmare.

One has only to read the five pages of the Congressional Record of January 19, 1981 (pages S. 263 through S. 269), where Senator Danforth explained the operation of the certification procedure, to appreciate its complexity. All the complicated provisions are really designed for what I call the hard case, so for just a moment

let's take a hard case—one where there are different perceptions of what should be permitted under the statute—and examine it just in terms of appeal rights, as an example of the complexity.

One can start with the applicant's paper, carefully drafted by a battery of lawyers to comply with the provisions, asking that antitrust immunity be certified for a bundle of activities that we can call X. The application is sent over to the Antitrust Division which promptly responds that only a bundle of "X minus 10" activities should be exempted. Let's suppose that the Assistant Secretary of Commerce, to which the Secretary of Commerce has delegated the authority to act, rules that a bundle of "X minus 5" activities should be exempted. Let's suppose that the Assistant Secretary of Commerce, to which the Secretary of Commerce has delegated the authority to act, rules that a bundle of "X minus 5" activities should be exempted. Both the applicant and the Antitrust Division make use of the hearing procedure to appeal their differing views to the Secretary. Let's assume the Secretary upholds the Assistant Secretary, so that the "final agency action" of the Commerce Department is to approve an antitrust exemption certification for the bundle "X minus 5" activities.

As I understand the appeal provisions of this Statute, read in conjunction with the Administrative Procedure Act, what we might find is that the applicant has appealed to the United States Court of Appeals for the District of Columbia Circuit in an action entitled *The Applicant vs. the United States*; meanwhile, the Antitrust Division, as an aggrieved party, has also appealed to the Court of Appeals in the name of the United States. Presumably, the Solicitor General would determine what the position of the United States was to be—whether he was going to follow the Secretary of Commerce and support a bundle of "X minus 5" activities or the Antitrust Division with a bundle of "X minus 10," but of course he also has the right in the appellate courts to compromise claims against the government and to confess error, so the Solicitor General might agree that it ought to be the full bundle of X.

Moreover, while I hope that the doctrine of *res judicata* might avoid the situation, I do note that the Justice Department has the right to challenge in the District Court, in an action *de novo*, those activities of a trading company that it believes go beyond the statutory authorization. Thus, whatever the outcome of that first judicial review, there is at least the possibility of a second round in the courts.

Why are we creating such a complicated, indeed convoluted, certification mechanism that seems to toss responsibility back and forth among various government officials? What is the purpose? I believe Senator Danforth gave the answer to the second question in his presentation on January 19, 1981, to the Senate, where he indicates that the certification procedure "is necessary in order to provide certainty to the business community in their international trading activities assuring them that their activities do not run afoul of the domestic antitrust laws."

That brings me to my second major thought.

2. *The Justice Department has historically argued that no exemption is needed because appropriate joint export efforts are not illegal*

Second, the Antitrust Division has historically insisted that American businesses do not require antitrust exemption or clearance to engage in joint exporting ventures or any other joint activity, the sole purpose of which is to sell goods or services for consumption abroad.

A myriad of normal joint export activities can be and are constantly being carried on by groups of American companies without fear of antitrust prosecution. To be actionable, according to the Justice Department, joint activity must have a substantial and foreseeable effect on the United States domestic or foreign commerce, and joint activity intended to impact outside the territory of the United States and carried on so as not to affect competition between the parties in the United States is unlikely to raise any serious question under American antitrust law. Thus, it has been the consistent position of the Department of Justice over the years that the antitrust exemption found in the Webb-Pomerene Act of 1918 is unnecessary to provide protection for export trade associations since the normal activities undertaken by them have as their exclusive focus markets abroad.

The Department of Justice's "Antitrust Guide for International Operations" specifically provides:

"The 'joint venture' is a particularly common form of business organization in the international field, for a variety of entirely legitimate reasons. Some joint ventures are . . . essentially 'one shot' consortia engaged in a single venture limited in time

and scope. Others may involve what are essentially permanent combinations for the production or distribution of products and services.

* * * * *

"Normally, the Department would not challenge a joint venture whose only effect was to reduce competition among the parties in foreign markets, even where goods or services were being exported from the United States. The rules are even less stringent where a limited "one shot" type of venture is involved . . . Such short-term consortia are useful where large risks or dollar amounts are involved (as with a multiple bank loan or securities underwriting) or where complementary skills are required (as with the typical construction joint venture)." (Emphasis added.)

Against these declarations of the Justice Department over the decades, we have at least two lower court decisions in which the argument was rejected that the Sherman Act is inapplicable when the primary adverse effect is on a foreigner abroad. See *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610, modified in part, 383 F. Supp. 586 (E.D. Pa. 1974); *Industria Siciliana Asfalti Bitumi v. Exxon Research and Engineering Co.*, 1977-1 Trade Cas. ¶ 61,256 (S.D.N.Y. 1977). See also *United States v. Learner Co.*, 215 F. Supp. 603 (D. Hawaii 1963). To put the matter simply, even if the Justice Department does not sue, there is still some antitrust uncertainty and risk, stemming from the reach of the substantive Sherman Act itself.

3. Creation of an elaborate certification process to confirm the legality of what is already legal may itself be a disincentive to exports

Third, to the extent that joint activities looking to increased exports are already legal, or could definitively be made legal, under the substantive standards of the antitrust laws, the creation of an administrative machinery in the Commerce Department, with elaborate provisions for Department of Justice challenge in the case of disagreement, could themselves be a barrier to companies doing what is already lawful. By this I mean that the very existence of the certification procedure may be perceived by many medium and small businessmen as a requirement that, unless they go through that procedure, they cannot join with others in selling or marketing abroad. That would be an unfortunate consequence.

4. There is no consensus that export trading companies should monopolize industries or unreasonably restrain trade

Fourth, in the debates over the past few years, there has been a growing consensus that we ought to make clear that there is no antitrust risk for the kind of export activities that the Justice Department has historically said would not be prosecuted anyway, but there is no consensus at all that we should create entities which would, absent an antitrust exemption, be in gross violation of our ordinary antitrust rules. In short, there is no consensus—indeed I know of no one advocating—that these new export trading companies should be allowed to monopolize industries or unreasonably restrain export trade by limiting output or raising prices. Quite the contrary: as a nation we do not want to create entities with market power sufficient to enable them to reduce output and thus extract supra-competitive profits for their private advantage, at the expense of our national export performance. I believe the aim of Sections 204 and 206 of S. 144 is to prevent this.

III. SUGGESTIONS FOR AN ALTERNATIVE APPROACH TO THE ANTITRUST ISSUES

If you share my view that the exemption-and-certification procedures are exceedingly complex and thus may themselves be a disincentive to appropriate joint export activity, and if you share my view that what the new export trading companies should really be doing is what the Justice Department's formal guide says is legal anyway, and if you further share my view that the risk to be eliminated stems from the philosophy demonstrated in the private treble damage cases I cited earlier, then there can be a much simpler solution to the vexing antitrust issues.

It seems to me worth while for the Subcommittee at least to consider the possibility of the following package approach:

(1) Amend the substantive provisions of Sections 1 and 2 of the Sherman Act (and the Federal Trade Commission Act) to make clear that they do not apply to activities in the United States export trade unless such activities have a direct, substantial, and foreseeable adverse impact on the domestic commerce of the United States or foreclose United States export competitors.

(2) Provide for simple registration of an export trading company with either the Commerce Department or the Justice Department (giving its name, address and registered agent for the receipt of service of process).

(3) Provide that the activities of a registered export trading company "entered into for the sole purpose of engaging in export trade" would be immune from

challenge in our courts by anyone other than the Department of Justice, until such time as the Department of Justice has successfully challenged in court the registered export trading company's activities as being in violation of the amended Sherman Act, at which time a private right of action for redress of injury from the violation of the amended act could be maintained.

(4) Repeat the existing Webb-Pomerene Act exemption provisions, thus requiring existing Webb-Pomerene associations to register anew and comply with the new statutory scheme.

I believe that an approach along these lines would go to the heart of the issue. We need to make clear what the substantive antitrust rules applicable to our export trade really are; we need to center in one responsible government agency the enforcement of those antitrust rules, through the mechanism of our courts; and we need to leave open the right of private parties to obtain redress for injuries their Companies may suffer by virtue of a violation of these rules by a registered export trading company.

I understand the strong desire of the sponsors of S. 144 to go forward quickly with legislative action enabling the formation of export trading companies. But I believe that it would be time well-spent by this Subcommittee to pause for a moment to consider whether there is not a better and simpler solution to the antitrust question than the creation of a complex, bureaucratic, regulatory-type certification process. In the end, in any event, I think it likely that what export trading companies can and cannot do is going to be determined by the courts after Justice Department action. Going straight to that result, with the added help of amended substantive law provisions, seems to me preferable to the complex procedures now embodied in S. 144.

I appreciate the opportunity afforded me by this Subcommittee to express these views as a private citizen. Thank you.

Senator HEINZ. Mr. Ewing, we thank you. We thank all of you.

VARIOUS VIEWS CONCERNING S. 144

Mr. Fogt and Mr. Seidler, both of you have urged the committee to consider the grandfathering of existing Webb-Pomerene associations, and you provided language to the committee to incorporate those suggestions into the bill. I think the committee will be extremely sympathetic to what it is you propose, and I want to assure you personally that I am not only sympathetic but am committed to seeing to it that any uncertainty that might impinge upon existing Webb-Pomerene associations is clarified, and that I, for one, intend to offer your amendment or a similar version of it.

I do want to be clear that as I understand your amendment, its only purpose is to give you the option of maintaining the status quo. As I understand what you proposed, it does not provide any particular advantage for either of the groups that you represent over any other group that might be coming in in the future in terms of obtaining a new certificate under the new act as it is set forth in our bill. Is that correct?

Mr. SEIDLER. That is absolutely true, Senator.

Senator HEINZ. Assuming that the amendment holds up under careful scrutiny to pass that test—and I have no reason to believe at this point that your statement is not accurate—then it would be this Senator's intention to urge that amendment or that type of amendment on the committee.

Mr. FOGT. Thank you.

Mr. SEIDLER. Thank you.

Senator HEINZ. I particularly note that both of you have really spoken rather kindly of the legislation, even though it doesn't help you particularly. You have some concerns—understandable, well-expressed in both your testimonies—that you don't know how exactly the new provisions are going to work, if they should not work

out as well as we think they're going to work out. You don't want to be carried down with them.

But I do note, Mr. Seidler, that you do support putting the certification process in the Commerce Department. I was wondering why you might want to do that instead of leaving it in the hands of the Justice Department.

Mr. SEIDLER. I think it's more consistent with the objectives of the legislation, Senator. The Commerce Department is more concerned with increasing the exports of the United States. We have found over the years that the antitrust division has been somewhat less friendly to those objectives.

Senator, I served 25 years in the antitrust division, and believe me, we did not particularly like exemptions from the antitrust laws, and we were careful to scrutinize those who had exemptions from the antitrust laws. But again, that type of scrutiny is most likely to inhibit the very objective of the act to encourage people to form such associations.

Senator HEINZ. Mr. Fogt, I understand that you feel the same way.

Mr. FOGT. That is correct, Senator.

Senator HEINZ. Very well. Mr. Victor and Mr. Ewing both—Mr. Victor, you have been extremely, I think, forthcoming in your testimony. I think it's one of the strongest endorsements of the bill that I've heard. You've said that you're not opposing the legislation; you don't quarrel with the purposes, that genuine uncertainties exist regarding the effectiveness of the antitrust exemption, that our bill creates no substantive changes in the antitrust law, that it is procedural in nature, and you have no quarrel with covering services. And I think that's one of the strongest statements from somebody who has ever urged caution upon this committee that I've ever heard.

You did indicate that you felt the committee should wait until the Commission created by S. 432 makes its study. Is it your understanding the S. 432 is now law?

Mr. VICTOR. Of course not, Senator. But I'm hopeful that it becomes law, just as I know that there are many who are hopeful that S. 144 becomes law.

Senator HEINZ. Do you have any idea when S. 432 might become law?

Mr. VICTOR. No, sir. I'm sure you have a much better idea than I do in that regard.

Senator HEINZ. Were it to become law, do you have any idea how long it would take S. 432 to provide guidance to this committee?

Mr. VICTOR. I would assume that it's about a 1-year time. The Commission might be 6 months. I haven't read the current version. It's either 6 months or 1 year. And I daresay that in light of increasing exports, that doesn't seem to be a very great deal of time, considering the importance of the antitrust exemptions.

Senator HEINZ. In fact, it would take 15 months—60 days to appoint members, 30 days to have the first meeting, and 1 year from the first meeting for a report which would effectively come at the very end of this Congress if the bill were enacted now. It would probably be too late to take any action in this Congress, and we would have lost 2 years.

While it may sound like only a little bit of time, that's before we start into our next round of hearings, which would make 5 years of hearings, because we've already had hearings for 3 years. I have some problem with that suggestion, and I think the 3 years of hearings that we've had are, in fact, a fairly healthy record.

Let me ask both you, Mr. Victor, and you, Mr. Ewing, the same question. As I understand you're both saying, there's no substantive change in our antitrust laws, that the procedure is complex, that there are some better ways of going to the heart of the issue, taking up the Holy Grail and amending the Sherman Act is what Mr. Ewing proposed in particular. Our committee has kind of a practical question that I would put to you.

THIRD PARTY SUITS

First, I'd like you to clarify something for me. Is it not true that a business concern doesn't merely have the Justice Department to worry about if they are currently a Webb-Pomerene association? Aren't they subject to third party suits?

Mr. VICTOR. Under the current law? Well, if they have registered as a Webb-Pomerene association, I don't really recall, but I think so.

Senator HEINZ. The answer is that they're subject to third-party suits, and in our hearings earlier we had a witness come forward, Mr. Gutmann, who explained exactly what happened to him. He was doing business in the Far East, and he had formed an association. It was doing business, and they were informed—and I quote:

There were a number of domestic firms here in this country who had partial expertise and felt left out of the opportunity to offer their services. They were the ones who told us what we were doing was against antitrust, specifically restriction of trade, and threatened to go to court.

The result was, they didn't contest the issue. They didn't want to face the legal fees that Mr. Schulman alluded to as not only a burden, but all of the uncertainties of which would surround his company. So I think the record—unless you, Mr. Ewing, have a point to the contrary—is clear on that point.

Mr. EWING. No, Mr. Chairman, I agree with you and your conclusion. I would like to point out, however, that even under S. 144, if a new export trading company was acting ultra vires of its certificated exemption, it would still be subject to a triple damage suit under the normal provisions of the Clayton Act. I think that's going to be true in practically any kind of a system which you could create.

My proposal would limit that to a certain extent by saying that first you had to persuade the Justice Department to sue and establish an ultra vires position of the association before you could thereafter maintain a private triple-damage remedy.

Senator HEINZ. That's in your proposal?

Mr. EWING. That's in my proposal.

Senator HEINZ. My question at the present time really related to comparing the bill to change the law, the present law, and any comments you could make on that, of course.

Is it not correct that either the Justice Department or the FTC or a private third party could enter into costly, lengthy discovery

simply by filing against an association under existing law? Is that not the case now?

Mr. VICTOR. Litigation is litigation. If somebody thinks there's been a violation of law, then the court is the place to resolve that, yes.

Senator HEINZ. Both of you are lawyers, and let us assume one of the people in the audience comes to you—maybe it's Mr. Schulman—and says, "I'd like some legal advice," and he says, "I want to know which is preferable. Is it better for me to form a Webb-Pomerene association under S. 144's certification process, which is about a 90-day process"—that's the one that's been described as somewhat lengthy and complex—"or is it preferable for me to run the risk under existing law of a protracted antitrust discovery litigation with an average length of time of 5 to 7 years, which might arise from the Justice Department, the FTC, or a private third party?"

What advice would you give him? Let me ask Mr. Fogt or Mr. Victor—excuse me—to comment on that.

Mr. VICTOR. As I think you can appreciate, Senator, without really studying Mr. Schulman's situation, the nature of competition in his industry, the nature of the potential purchasers abroad, the nature of the activities that he wants to engage in, the potential suitors or complainors, the probable attitude of the Justice Department or the FTC, it's really quite difficult to respond to that question in the abstract.

Mr. EWING. Mr. Chairman, let me attempt the following historical kind of response. In history, I think lawyers have successfully advised clients to form Webb-Pomerene associations only in about 150 instances, and there are only about 30 of them left in existence in comparison with the number of joint activities that have been, if you will, cleared by private counsel in the export area. That seems to me a very small number of cases. So I think by and large if you look at the last 60 years, you will find that private firms make a good profit going about their business without forming Webb-Pomerene associations, except in a very, very few instances.

Senator HEINZ. Let me ask if either Mr. Fogt or Mr. Seidler had anything to say. Do you want to comment, either of you?

Mr. FOGT. Senator Heinz, I think the one very important potential value to S. 144 is that it does hold out the prospect for substantially reducing the burden, the uncertainty and the cost of forming and operating joint export companies. I think that there can be just no question that the legislation and the regulatory process may materially reduce the risk that American companies face today with respect to joint export activities and may materially reduce the cost involved in exploration. I suggest that the proposed alternative, that the subject matter jurisdiction of the Sherman Act doesn't apply to such conduct, simply leaves one open to the risk of tremendous legal costs, the risk of triple-damage exposure, and government action.

Mr. SEIDLER. Senator, I would add, too, that violation of the Sherman Act can be prosecuted as felonies. Any advice I would give to a client, I assure you, would be most conservative in that area and most inhibitive.

ATTITUDES TOWARD JUSTICE DEPARTMENT

Senator HEINZ. Let me pose one last question, particularly to Mr. Victor and Mr. Ewing. I think it's clear, both of you, that there is a genuine perception abroad among the American business community that causes business to have a good deal of nervousness where the Justice Department is concerned, particularly where it is possible for the Justice Department to file suit, particularly when there are statements made which are carefully qualified such as the one Mr. Ewing made on page 9 of his statement:

Normally—and I emphasize the word “normally”—the Department would not challenge a joint venture whose only effect was to reduce competition among the parties in foreign markets, even—emphasis supplied on “even”—where goods and services would be exported from the United States.

That sounds like, well, if you're going to export something from the United States, you'd better be extremely careful. Otherwise we might—because normally we wouldn't take any action to get you if you weren't exporting, but if you're exporting, we're not going to treat that as too normal, so watch out.

That is the perception that people have in the real world, and one of the things that Mr. Ewing in particular suggested is to change the substance of antitrust law to deal with this issue.

Let me ask you this. If we change the substantive law of antitrust as applied to international trade activities, how does that change the real perception which I just alluded to that business has toward the Justice Department and that has caused business to be reluctant to enter into international markets?

Mr. EWING. Mr. Chairman, I think it would actually help the perception problem to a greater degree than would the creation of a certification procedure, because I think most small- and medium-sized businesses who are nevertheless are under the certification procedures, are going to ask, “What can I do at the margin of the certification effort?” That's where the problem is going to come.

We can't eliminate some risk—we can't eliminate some uncertainty whether you use the approach of S. 144 or whether you change the substantive law.

My concern here is that we do something. I think S. 144 does something—would do something, and the doing of something will help the perception problem a great deal. My own view is that we should do it in a more direct manner, but that's a question obviously of degree and emphasis.

Senator HEINZ. Mr. Ewing, I have some specific followup questions to ask of you, but my 10 minutes has expired.

When Senator Proxmire and Senator Danforth have completed their questioning, I do want to return to this subject on the question of perceptions.

Senator Proxmire.

Senator PROXMIRE. Thank you, Mr. Chairman.

Mr. Victor, S. 144 establishes a new office within the Commerce Department to promote—and I'm quoting now—“to promote and encourage, to the greatest extent feasible, the formation of export trade associations.”

Secretary Baldrige, in testimony before this committee, acknowledged that the Department does not have a lot of expertise in antitrust matters, yet S. 144 places the responsibility for certifying

export trade associations with accompanying antitrust immunity to the Commerce Department which lacks that expertise.

Justice can sue, but the real action will be in the day-to-day administration and granting of certifications.

CONFLICT OF INTEREST

My question is: To what extent will the Commerce Department be faced with a basic conflict of interest? On the one hand, they're charged with the promotion of exports.

On the other hand, they're charged with the effective enforcement of antitrust.

Mr. VICTOR. I think, if I may, Senator, I'll point out that in my view the purpose of the bill, if it's passed, is quite clear, to promote exports. That's very understandable to the Justice Department, as well as to the Commerce Department.

The problem that we're trying to deal with and discuss here is the immunity problem. Everybody recognizes that immunity is not to be granted lightly. The basic thesis upon which America does business is still competition and not immunity for joint conduct.

Therefore, it seems to me that in the absence of the sophistication that the Justice Department has concerning antitrust issues, and also in light of its generally helpful behavior toward companies that are desirous of doing business abroad, and not a very, very overbearing prosecutorial bent with respect to foreign commerce activities, it would make sense to me to let the Justice Department tackle directly the problem of certification, if that indeed is going to be the solution here.

The conflict that you mentioned would exist probably to a greater extent if the Commerce Department is involved. I daresay I doubt that they would fully appreciate the issues as well or have the experience for a good number of years, as the Justice Department would immediately upon being given that responsibility.

Senator PROXMIRE. Mr. Ewing, what's your feeling about this?

Mr. EWING. Senator, the provision in S. 144, while placing responsibility on the Secretary of Commerce, do require that Commerce obtain the advice of the Justice Department. If the Justice Department disagrees with the Secretary's action, it is my interpretation at least that the Justice Department might indeed appeal to the court of appeals.

In addition, Senator Proxmire, the Justice Department, under S. 144, is given the right to go into district court in an action that the district court could try de novo to decide whether the activities of export trading companies went beyond that allowed under the statute.

What I think we have in S. 144 is a very bifurcated kind of responsibility as to where the ultimate decision of the executive branch is going to be on immunity.

My own sense is that perhaps we can have a less complicated mechanism centering responsibility. I would center it in the Justice Department with officials that can be held accountable to the Congress on the issue of how well they administered an act, the purpose of which clearly is to expand our exports.

Mr. FOGT. Senator Proxmire, may I make one comment?

Senator PROXMIRE. I wish you would, Mr. Fogt.

Mr. FOGT. I think historically the record is clear, that the Department of Justice is not by nature, or tradition, or desire a regulatory agency. It is a prosecuting agency.

The Department of Commerce, on the other hand, has a much greater record of regulatory activity.

I would be very surprised if the Department of Justice would want to compromise that prosecutorial function by undertaking what would be a major shift of its responsibilities.

Senator PROXMIRE. Wait a minute. We're talking about a major shift. S. 144 is new legislation.

If it accomplishes anything, it would provide for certification and, therefore, for the leading determination of exemption. The initiative is on it in the Commerce Department.

Mr. FOGT. Yes.

Mr. Ewing's suggestion is that that function—pardon me, Mr. Victor's suggestion is that that be placed in the Antitrust Division and not in the Commerce Department. It is to that suggestion that I was speaking.

Senator PROXMIRE. I think I understand your objection. At the same time, I'm very troubled by the point made by Mr. Victor, in agreeing that the Commerce Department does not have the expertise, does not have the experience, does not have the sophistication, therefore that it's not in a position to make the kind of judgment the Justice Department would make, and they make the decision. It's true they confer, but their obligation is not to protect the antitrust laws and their experiences in this area. Their concern is to promote exports.

Mr. FOGT. I presume their obligation is to carry out the mandate that the Congress provides. If that mandate is to preserve and protect domestic commerce from any substantial and direct restraints that result from joint export activity, they will carry that out.

Senator PROXMIRE. The question is who best can do it, Commerce or Justice?

EQUAL STATUS OVER CERTIFICATE ISSUANCE

Let me follow up then with this question: As you pointed out, S. 144 requires Commerce to consult with the antitrust experts in the Justice Department for advance certification of export trade associations. Certification carries with it a substantial antitrust immunity. While the certification is in effect, the trade association is immune from suit by private parties and under State antitrust statutes. Because of the significant antitrust immunity to be granted under S. 144, shouldn't the Justice Department have at least equal status with the Commerce Department over the issuance of certificates, so a certificate could not issue except upon agreement?

If the certificate were unreasonably withheld, the trade association would be entitled to a hearing under S. 144.

Mr. FOGT. Are you directing that question to me?

Senator PROXMIRE. Yes, sir, because, as I understand it, what the S. 144 does, it gives the Commerce Department the clear, unquestioned authority to make a decision if they disagreed with Justice; or with Justice, Justice can if they want to do so, go to court, and

so forth. But they would have to take that kind of overt action against a department.

And the accommodation of being what it is in the Cabinet, doubt that that would happen except under most unusual circumstances.

Mr. FOGT. As a person who spends a fair amount of my time counseling Webb-Pomerene associations that are in existence now and people who are interested in forming them, I think that there would be a great deal of concern if a situation were that we had two branches of the same Federal Government who had to agree upon a proposed course of action before the certificate with the accompanying antitrust immunity could be granted.

So, in my view, that would be perhaps a worse situation than having simply one of the Government agencies.

Senator PROXMIRE. I can understand that objection. Maybe that objection is valid.

Would you gentlemen agree with that, that it maybe ought to be with Justice or Commerce, not split?

Mr. VICTOR. I would think so. For example, Senator, in this situation, if it's 50-50, and they both have to make a single decision—sometimes you may have no decision or a hearing, or whatever.

If Commerce keeps the authority, at least as I understand the legislation, Justice could still go to court, if it really disagrees, and try to prevent the association from taking effect.

Senator PROXMIRE. So I take it that both you, Mr. Victor, and you, Mr. Ewing, feel that Justice should make the decision, but rather than have it a divided decision, better have it in the Commerce Department than divided?

Mr. EWING. Senator, I wish I could simply say yes, I agree. I must complicate the hearing record a little bit by saying that I don't agree.

I think we need to set responsibility for antitrust rules in the Justice Department. And my proposal is that we directly deal with the issue of the content of the rules and the perception of businessmen about them. By amending the substantive provisions of sections 1 and 2 of the Sherman Act. As I indicated in my testimony, I do not think we ought to have a situation where the Secretary of Commerce, alone, without any antitrust expertise ever being shown by that department, could proceed to make rulings on how we are going to engage in our export commerce in areas where substantive harm could be done to the competitive system that has brought us this far.

Senator PROXMIRE. How about giving it to Justice?

Mr. EWING. I would be inclined to think that that would be a very good idea.

Senator PROXMIRE. Mr. Victor, would you agree with it?

Mr. VICTOR. I would.

Senator PROXMIRE. Of course, I would take it that Mr. Fogt would not.

Mr. FOGT. I would not. I would think that that would result in the continuation of a perception that American business people have today that there is serious ambivalence about joint export activity and the prospect for significant new associations to be formed would be substantially reduced.

Senator PROXMIRE. Mr. Seidler, do you want to make it a tie?
Mr. SEIDLER. It is a tie, Senator.

It does seem to me that it would very much discourage the formation of new associations were a certification authority to be vested in the antitrust division—those are the fellows who are charged with the vigorous enforcement of antitrust laws.

Senator PROXMIRE. Why shouldn't they be?

Mr. SEIDLER. Exactly right.

Senator PROXMIRE. Well, like the President of the United States reflects the views of the administration, which I think can be communicated with the Justice Department. And if the people have elected a man like President Reagan, who is very strongly in favor of exports, he can communicate that to his Attorney General. I'm sure his Attorney General would agree with his position.

On the other hand, the Justice Department would have the expertise, the confidence, the experience, the staff, the sophistication to raise whatever objections should be raised, that therefore why shouldn't they have that veto?

As I say, that veto in this administration, or any administration, would reflect the views of the United States. And I think they should.

Mr. SEIDLER. Senator, I served many years in the antitrust division as a litigating attorney. Now that I'm in the private bar, I point out to my clients that this is the antitrust division's job, vigorous enforcement is their job, and that's what we have to expect. That's why I try to keep my clients on the straight and narrow.

But as far as encouraging them to join an association which would be subject to the antitrust division, I think it would discourage them. This would be counter to the purpose of this legislation.

Senator PROXMIRE. Both Mr. Seidler and Mr. Fogt, however, both of you gentlemen seem to be operating with some success under existing law which is administered by Justice and the Federal Trade Commission. You're doing very well now.

Mr. SEIDLER. That is correct, Senator.

Senator PROXMIRE. What's wrong with it now?

Mr. FOGT. Senator, it's slightly inaccurate to say that we are under the administration of the Department of Justice at this time. We are, as any private entity, subject to the civil and criminal investigative powers of the Department of Justice. Those powers have been exercised.

We are subject to the theoretical regulation by the Federal Trade Commission under section 5 of the act.

Mr. SEIDLER. Senator, if I might just say, our association members decided to form the Webb-Pomerene association because of the particular unique pressures that existed in their export trade and that made a Webb-Pomerene association almost essential to them. It was a matter of balance between the risks incurred by a Webb-Pomerene association and the advantages to be gained.

Frankly, my job is to make sure that they do operate within the law. And that's what I'm there for.

But there's still is the risk, and I think that other companies in other industries, without that pressure that they find in the

market, it may be more difficult for them to form an association under current law.

Senator PROXMIRE. My time is up, but I think that competition is so important for our free enterprise system that we just ought to do everything we can to preserve it and maybe take a risk now and then and make a sacrifice in order to see that we preserve our antitrust laws. It's a unique aspect of the American economy that I think has made us strong.

My time is up, Mr. Chairman.

Senator HEINZ. Senator Danforth.

Senator DANFORTH. Thank you, Mr. Chairman.

Mr. Ewing, you are now a partner in a law firm. But prior to your present position, you were the Deputy Assistant Attorney General in the antitrust division.

When did you leave the antitrust division?

Mr. EWING. October 24, 1980.

Senator DANFORTH. Prior to that time, for how long did you serve as Deputy Assistant Attorney General?

Mr. EWING. Since the first part of January 1978.

Senator DANFORTH. During that time, were you generally responsible for working with other people in the Justice Department and with various people in the Carter administration, and with my staff, in connection with negotiating the terms of the bill that's now before us in its form from the last Congress?

Mr. EWING. Subject to the supervision of innumerable superiors, I was responsible for helping with technical drafting assistance; yes, sir.

Senator DANFORTH. You were simply a technical draftsman?

Mr. EWING. I certainly met many times, Senator, with your staff.

Senator DANFORTH. You and people working under you played a major part, isn't that right, in the negotiations leading to the bill which was finally passed by the Senate last year?

Mr. EWING. Senator, I would answer that yes, but with this important caveat. We have worked with your staff on your original proposal, which was simply an amendment to the Webb-Pomerene Act, and did not encompass at that time export trading companies at all.

If you recall that history—and I'm sure you do, sir—we joined the two later on, and I had very little to do with the marriage of the two.

WEBB-POMERENE ACT CHANGES

Senator DANFORTH. All we're talking about now is the Webb-Pomerene Act and changes to the Webb-Pomerene Act. And it's my understanding that you played a lead role in the Justice Department in those negotiations, and that the negotiations were quite elaborate and extensive and they involved a number of people in the Justice Department. They involved the Commerce Department; they eventually involved the White House; they certainly involved my staff over a period of maybe 10 months. You don't dispute that, do you?

Mr. EWING. No, sir, not at all.

Senator DANFORTH. When all of that was over with and it was all worked out and there were various opinions expressed within the

administration, it is true that the Carter administration did sign off on the bill that was eventually passed by the Senate last year?

Mr. EWING. Yes, sir, that's true. Secretary Klutznick and a number of other representatives of the Carter administration testified on the Hill in support of that.

Senator DANFORTH. And that was the official position of the administration. And prior to taking that position, the administration specifically considered the relative roles to be played by the Justice Department, the Commerce Department in the administration of this act?

Mr. EWING. That's correct, sir.

Senator DANFORTH. Now, you have, in your oral testimony and also in your written testimony, described a hypothetical case. And at the end of that description, you say, "Why are we creating such a complicated, indeed convoluted, certification mechanism that seems to toss responsibility back and forth among various Government officials?"

Is it your position that the hypothetical case that you describe in your testimony would be a typical garden variety Webb-Pomerene situation?

Mr. EWING. No, sir, I certainly don't. In fact, my testimony indicates that it is about the hardest case I can conceive of—that is, a case where there is real disagreement as to the activities of the association and whether they comply with the provisions of section 204 of the bill.

Senator DANFORTH. This complicated, convoluted situation that you spell out would be a very, very rare exception, would it not?

Mr. EWING. I would certainly hope that it would be a rare case.

Senator DANFORTH. You don't anticipate, for example, that it would be very often—that, as you say, what we might find is that the applicant has appealed to the U.S. Court of Appeals for the District of Columbia, meanwhile, the antitrust division, as an aggrieved party, has also appealed to the court of appeals in the name of the United States—you don't anticipate that that would happen very often, do you?

Mr. EWING. No, sir, I don't.

Senator DANFORTH. You also have the Solicitor-General involved in this. You don't think that the Solicitor-General would not be involved very often in Webb-Pomerene matters, do you?

Mr. EWING. I certainly hope not.

Senator DANFORTH. You don't think he would, do you?

Mr. EWING. No, sir.

Senator DANFORTH. It would be very, very rare, and unusual, wouldn't it?

Mr. EWING. Yes, sir. And the reason it's rare and unusual, if I might add one comment here, is that I think most of the activities of the associations and trading companies that will go through the certification process are so clearly legal anyway that they could be engaged in it today without bothering with the certification process.

Senator DANFORTH. That would be their business judgment, of course.

But the attainment of the certification in the normal, rather than rare, case would not be a difficult process, would it?

Mr. EWING. I certainly hope it would not.

Senator DANFORTH. You don't think it would be, do you?

Mr. EWING. When you say the normal, run-of-the-mill case, it worries me just a little bit.

Senator DANFORTH. Let's say 95 percent of the cases.

Mr. EWING. Sir, I wouldn't predict the numbers, because seated at the other end of this table are two associations that clearly have had the benefit of expert counsel. They clearly have been in positions where agencies inquired as to their activities, and I am not at all certain that new associations, new trading companies, formed to take fullest advantage of this act by imaginative counsel in New York, Washington, and elsewhere, wouldn't provide a number of years' worth of hard cases of one kind or another.

So I don't want to be in a position of trying to give you an opinion that 95 percent of the cases in the next 4 years, if this bill became law, would be easy cases.

Senator DANFORTH. I'm sorry, I made a mistake. I should never ask a lawyer to give a percentage.

But it is fair to say that the convoluted mechanism that you anticipate would be a rarity.

Mr. EWING. I certainly hope so; yes, sir.

Senator DANFORTH. And you think so?

Mr. EWING. Senator, I really don't want to—

Senator DANFORTH. Just being fair, truly, it's the case that nothing like this is going to occur, other than in very odd circumstances, and in those cases, the businesses seeking to form the association and wanting to contest it this far would certainly have the kind of interest and the tenacious desire to establish it that they would be willing to push it forward. They could get out of it anytime, couldn't they?

Mr. EWING. Senator, the reason I can't give a clearer answer really goes to the kind of issue that I think will in fact occur. Under section 204, as it amends section 2(a)(3), an association describes its activities as collecting the prices, for example, that the participating members are charging as a means of helping to establish the price the joint marketing agency will use abroad. Does that, within the meaning of section 2(a)(3) of your bill, unreasonably enhance, stabilize, or depress prices within the United States?

I think that the antitrust division is going to have to struggle with some of those answers in the 90 days, or thereafter in the court.

Senator DANFORTH. Maybe it will, but you're not throwing up the specter that in the normal course of events, applicants for Webb-Pomerene certification are going to face this kind of convoluted process.

Mr. EWING. No, sir. I don't want to overstate my concerns on that. No.

ULTRA VIRES ACTS

Senator DANFORTH. Good. Now, with respect to ultra vires acts and the susceptibility to litigation in the case of ultra vires acts, by acts, you mean ultra vires acts, associations that are doing things that are not covered in its certification; isn't that correct?

Mr. EWING. That's correct.

Senator DANFORTH. But the acts that are covered in that certification would be immune both from Justice Department and from private litigation?

Mr. EWING. But the way the bill is written, I believe it would be interpreted by the courts to require that the Secretary's certification of activities described by the applicant be a certification of exemption of those activities only to the extent that those activities met the requirements of your section 2(a).

I just read one of the provisions of 2(a), so that there are obviously always going to be questions at the margin of this certification exemption as to whether an activity that may be OK, so long as it doesn't have certain effects, may not be OK if it suddenly starts producing effects beyond that; effects back here in the United States, for example, under the "unreasonably enhanced, stabilized, or depressed" price language of the bill.

Senator DANFORTH. Well, it's my understanding that once the certification is granted for an activity, then that activity is immune from antitrust litigation until such time as the certification is withdrawn. And it is not in fact available to a potential litigant to question the effect. It's a matter of the act that's involved at that point.

Mr. EWING. Well, certainly the bill would contemplate that at that point the Justice Department would go into district court, I think, and either seek to have the company be decertified or seek to have the activity declared ultra vires of the certificate.

Senator DANFORTH. The certification would be the form that it would take, not litigation?

Mr. EWING. Well, sir, I can't say just a simple yes, because I do believe that the bill will allow the Justice Department to sue on acts ultra vires of the certificate.

Senator DANFORTH. I think that that's correct, but if the certificate certifies that certain acts are permitted, then the fact is that they would be immune from litigation, public or private, and that the proper means of approaching it would be decertification.

Mr. EWING. That's correct. Again, I would have to say for completeness of this record, you have to exercise caution by saying that certification by the Secretary has to be in accordance with your section 2(a).

Senator DANFORTH. Could I ask one more question? Could you tell me approximately the number of lawyers within the antitrust division of the Justice Department?

Mr. EWING. Yes, sir, I can tell you as of October 24, 1980, there were 425 lawyers in the antitrust division, and the total personnel of the division—lawyers and nonlawyers as well—was approximately 900.

Senator DANFORTH. Thank you. Thank you, Mr. Chairman.

Senator HEINZ. Senator Danforth, thank you. Mr. Ewing, I am going to ask just one or two brief questions at this point.

In your testimony, you have done something I think we all are grateful to you for; you have endorsed bank ownership of trading companies as proposed in the bill. And we appreciate your support of that type of a bill. It's welcome. It lays to rest one issue that I think has been discussed at some length.

not the most sympathetic Federal agency to exemptions from the antitrust law.

WEBB-POMERENE ADJUSTMENTS

I am told that under the provisions of the present Webb-Pomerene Act, paragraph 5 thereof, that if at any time the Federal Trade Commission believes a Webb-Pomerene association is acting outside the parameters of the act, it can suggest to the association recommendations for the readjustment of its business in order to comply with the act.

Now, notwithstanding this intent of Congress to afford Webb-Pomerene associations the ability to readjust their actions without incurring liability. In the 1940's, the Justice Department sued a Webb-Pomerene association, maintaining that it had independent authority outside the scope of the Webb-Pomerene Act to sue, thereby circumventing completely the readjustment concept of the existing Webb-Pomerene Act.

My question is don't you think that that is an issue that our legislation addresses, and doesn't it need to be addressed?

Mr. EWING. Senator, I can't sit here and say to you that I agree with your premise. I think the courts established that the Justice Department did have the right under the Sherman Act and the Clayton Act to sue for actions that were not exempted under the Webb-Pomerene Act. The court's having so found, I think, means that the Justice Department was not, in your words, circumventing the will of Congress.

I think it was carrying out the will of Congress. I do appreciate, sir—

Senator HEINZ. To this extent, the act does state that recommendations to the association may be made for readjustment of its business in order to comply with the act.

Mr. EWING. I do appreciate, sir, that the act does say that, and that the Federal Trade Commission might well have had an obligation to act, in cases that I am simply not familiar with, to advise Webb-Pomerene associations of what they should be changing in order to avoid challenge by either the Justice Department, the FTC, or private parties.

Senator HEINZ. Very well. Mr. Fogt, do you have a comment on readjustment?

Mr. FOGT. I think from a historical perspective, one of the major problems that existed at that time, and one of the real hopes that this legislation holds out, is that the dereliction of FTC's duty, in fact, which occurred during the 1930's and 1940's, and in effect prompted the Department of Justice to sue the Alkali Association, will not be the case when this act becomes law, when the focus of responsibility is direct, when the commitment is present, when the Justice Department will have the opportunity to participate in the process.

So I think that when S. 144 passes, the same kind of problems should not again arise as it did in the 1930's and 1940's.

Senator HEINZ. I think that is precisely the point. Senator Proxmire?

Senator PROXMIRE. Mr. Ewing, section 4 of S. 144 provides the certification procedure. Among other matters, no application can be filed giving the name of the association, its ownership, and a

description of the goods or services which are proposed to be exported. I should say, an application is required for that.

The purpose of the application, of course, is to arrive at the specification of the export trade activities, meet the standards of section 2, and that are therefore eligible for certification. On one of the matters, section 4 requires to be disclosed, or the export trade activities the trading company intends to engage in, including but not limited to agreements in pooling resources, any territorial price maintenance, membership, or other restrictions to be imposed by members of the association or export trading company.

Does the language, "intend to engage" sanctioned price fixing or geographic market restrictions by trading companies overseas? These cartel-like activities are not to be authorized—or if so, shouldn't the section be revised to prohibit such activities?

Mr. EWING. I believe that the words are intended to allow the export trading company to obtain from many different manufacturers in this country goods that will be sold under one price abroad. To the extent that that is fixing a price for the goods of what would otherwise be competitive products, clearly, this act contemplates that the export trading company would do that.

On the other hand, Senator PROXMIRE, I must tell you that in most instances trading companies today can do exactly that. A trading company can purchase the goods from competing manufacturers and provide it in itself as a trading company—was not attempting to monopolize the market and was not agreeing with its foreign counterparts on prices, it could set one price.

So I think the intent of the words here goes to a kind of activity that would not be pernicious in your view or mine. Whether it accomplishes what it's supposed to, I don't know.

PRICE FIXING

Senator PROXMIRE. It prevents competition between American companies—or does it not, as I interpret your response? It would permit price fixing, I should say. It doesn't prohibit it, but it permits price fixing.

Mr. EWING. Your question, sir, goes to the heart of some of the hardest issues in antitrust, which are those of a joint selling agency composed of competitors.

Senator PROXMIRE. As I read it, it says "any territorial or price maintenance membership." Whether it should be imposed upon members of the association or export trading company, could they say one firm is going to get France, another is going to get Italy, another is going to get Spain, and that's it? We'll stay out of the market; we won't compete with American firms?

Mr. EWING. I do not believe that this language permits an export trading company to make such an agreement with its British, French, or German counterpart. I don't think that is what this language is intended to permit.

Senator PROXMIRE. But how about its own American counterpart, its own American competitor?

Mr. EWING. I also don't believe that this language is intended to permit, let's say, an export trading company owned by the Chase Manhattan Bank from entering into an agreement with an export

trading company owned by the First of Chicago to divide up the world in the supply of widgets around the world.

Senator PROXMIRE. Supposing that the five big manufacturers in a particular line get together in a trading company. Wouldn't this permit them, then, to carve up the markets; then say, well, let so-and-so in this firm deal with Italy and this other firm deal with France and so forth?

Mr. EWING. No, sir, I don't believe the language is intended to make legal that kind of agreement.

Senator PROXMIRE. Shouldn't the intention be clarified to make sure that such conduct with the——

Mr. EWING. I certainly wouldn't oppose a clarification at all.

Senator PROXMIRE. Would you favor it?

Mr. EWING. Yes, sir.

Senator PROXMIRE. Do you think it's desirable?

Mr. EWING. I think as a matter of principle it's desirable, but I don't have any particular language to suggest to you to clarify it.

Senator PROXMIRE. You're an expert in this, and I'm certainly not, and I'd appreciate it if you could suggest any language we could consider. Will you do that?

Mr. EWING. Yes, sir, I will be glad to talk with your staff.

Senator PROXMIRE. All right. Talk with Marinaccio on that and work it out.

Senator HEINZ. Senator Proxmire, may I just say, so that this isn't a fruitless exercise, that you're referring once again to the reporting section of this bill, and if you want to amend the bill so that it is an illegal act to report to the Government what it is that somebody intends to do, counsel—Mr. Ewing would be most expert in that area. But it's not going to help solve any problems.

Senator PROXMIRE. Now wait a minute, Senator. Let's read the whole section, page 30, line 4. "The export trade activities in which the association or export trading company intends to engage"—"engage"—this is for certification. It's not simply a matter of reporting. This is with the intent to engage, and they get certification. That enables you to engage in that.

Am I wrong, Mr. Ewing, or is Senator Heinz wrong?

Mr. EWING. Actually I'm in a happy position. I think you're both right.

As I understand it, the procedure is to have the export trading company or association explain to the Government what it is going to do, what it intends to do. Then the Secretary of Commerce will measure what it intends to do against the statutory requirements of section 204, and if they mesh, he will certify.

Senator PROXMIRE. Certainly by putting in the statute what they intend to do—the trading company intends to do—does that not indicate a degree of approval? You can see down here, it indicates what they can specify that they intend to do—or does it?

Mr. EWING. As I think I just indicated, sir, the Secretary is supposed to certify what is explained to him by the applicant as what he is going to do, provided that what the applicant says he is going to do complies with the substantive provisions of section 204.

Senator PROXMIRE. Now, Mr. Ewing, another existing Webb-Pomerene clause involves trading companies who engage in activities that do not restrain the export trade of any competitor. S. 144

would amend Webb-Pomerene to permit trading company activities that do not substantially restrain export trade with any competitor.

Does the insertion of the word "substantially" alter the standard, and how much is substantial? Does it depend upon the size of the exporters and their competitors?

Mr. EWING. As to the first question, obviously the insertion of the word "substantial" does alter the standard to some degree. As a practical matter, I think it simply reflects the way it has been operated up until now anyway.

As to the second question, what is the meaning of "substantial", I can only refer you to the long, long history of the Clayton Act's many, many cases where the standard in section 7 is substantially to lessen competition. I think there is some content to it. I cannot sit here now, obviously, sir, and give you numerical values for it. That has to be determined in the context of the market in which the issue arises.

Senator PROXMIER. Now existing Webb-Pomerene allows trading companies to engage in activities that do not artificially or intentionally enhance or depress prices within the United States. S. 144 would amend Webb-Pomerene to permit trading companies to engage in activities that do not unreasonably enhance, stabilize, or depress prices within the United States.

Does the word "unreasonable" alter the standard? For example, is reasonable price stabilization to be sanctioned? If so, how does this square with the usual standard on price which says that price fixing per se is illegal, and no inquiry will be made of its alleged reasonableness? Does that alter it—weaken it?

Mr. EWING. I believe you have asked me three questions. The answer to the first question is, "yes," it does change the standard because the words are different. I am not an expert on what the word "artificial" has been held to mean. Perhaps the counsel at the other end of the table are much better equipped to answer questions on that than I am.

As to your next question, yes, we are getting into a hard area here where under our normal rules any kind of an agreement to fix prices is considered per se unlawful, even if it, in fact, does not alter the market at all. We have simply said for our normal domestic commerce, we are not even going to engage in a determination—factual determination—of whether an agreement, say, between two service station operators to have the price of gasoline at x is going to affect the market. It is quite conceivable in this world that it does not affect the market at all, but we are just not going to bother with that kind of a factual inquiry here. We are going to have a per se rule.

Now when you go abroad, where we are talking about effects abroad, I think it is not unreasonable to say that some things we would call a cartel simply do not have any market power. They do not have the market power to either restrict output or raise prices, so that we should judge them under something else. This gets, in short, into the issue of when we should continue to have our per se rule apply when we are engaged in the export part of our commerce—which is a very difficult issue.

That is a long winded answer to your question, but it is the best I can do at the moment, Senator.

Senator PROXMIRE. It is a good answer, I guess. It is hard for me to assimilate what you told me here.

DEFERRAL OF S. 144

Mr. Victor, you recommend deferral of S. 144 until S. 432 has been addressed. S. 432 would establish a commission on the international application of U.S. antitrust laws.

Could you review for us the provisions of S. 432, the areas that would cover—specifically why it would be best to defer action on S. 144?

Mr. VICTOR. Yes, I think that it is under section 3(a)(1) and 3(b), which says that—

The Commission shall—(1) conduct a comprehensive study and make recommendations concerning the international aspects of the antitrust laws of the United States, the applicable rules of court, related statutes, administrative procedures, and their applications, their consequences, and their interpretation by the courts and Federal agencies (hereinafter referred to as "the United States antitrust laws"); and make reports to the President * * *

(b) Such comprehensive study shall specifically address—(1) the application of the United States antitrust laws in foreign commerce, and their effect on—(A) the ability of United States' enterprises to compete effectively abroad.

It seems to me that this very, very clearly covers exactly what the subject matter of this bill is, and indeed would also cover to a certain extent the very difficult questions you have been asking Mr. Ewing about how these various provisions are to be interpreted and could be interpreted and whether they represent substantial changes and appropriate changes in the context of antitrust enforcement.

Senator PROXMIRE. Thank you, sir. My time is up, Mr. Chairman.

Senator HEINZ. Senator Danforth?

Senator DANFORTH. I think that each of you has already said this, but I just want to make it absolutely clear in light of Senator Proxmire's questions.

This bill does not amend the substance of the antitrust laws; is that not correct?

Mr. EWING. I will try and answer that. I think that is absolutely correct as to the intention of the bill, and I think the provisions in section 204 are an attempt to reflect the best thinking of the case law in this area.

Mr. VICTOR. I would agree with that.

Mr. SEIDLER. I would agree.

Mr. FOGT. Yes.

Senator DANFORTH. I understand what Mr. Proxmire wants is for Mr. Ewing to help draft some language to go into the substantive antitrust laws. My suggestion is that we keep this bill what it has always been—solely an effort to address procedural questions rather than the substantive antitrust law. I'm sure there are a lot of people on the Judiciary Committee who are very interested in the substantive antitrust laws and people in the Reagan administration who are interested in the substantive antitrust laws.

I would doubt that their interests will converge with Senator Proxmire's or with mine, for that matter, but I think that we should make it absolutely clear that what this bill is about is not to

try to change the substantive antitrust laws but simply to try to make sure that we have a Webb-Pomerene procedure which is predictable and which affords protection in a way that can be counted on by American business.

Senator HEINZ. Senator Proxmire?

Senator PROXMIRE. I'm referring—do you have a copy of the bill?

Mr. EWING. Yes, sir.

Senator PROXMIRE. To the language in the bill that we've been through just recently—page 30, lines 4 to line 17. I'll read that quickly.

Export trade activities which an association or export trading company intends to engage—

This is for certification—

and the methods by which the association or export trading company conducts or proposes to conduct export trade in the described goods, wares, merchandise, or services including but not limited to any agreements to sell exclusively to or through the association or export trading company, any agreement with foreign persons who may act as joint selling agents, any agreement to require a foreign selling agent, any agreement for pooling intangibles or intangible property or resources, or any territorial price maintenance, membership, or other restrictions being imposed by members of the association or export trading company.

Is that what our antitrust law reflects right now?

Mr. EWING. These are all entities known to the antitrust laws at the present. As Senator Heinz pointed out before, what this section is asking of the applicant is to tell the Government about anything that comes under any of these categories of activity.

Senator PROXMIRE. You see, I'm having trouble, Mr. Ewing, matching that up with what you say on page 9 when you say:

Against these declarations by the Justice Department during the decade, we have at least two lower court decisions in which the argument was rejected, in which the Sherman Act was upheld, and the primary adverse effect was on the foreign * * *.

Mr. EWING. The Justice Department for years, Senator, has simply not agreed with those two lower court decisions. That's most of what I was trying to say there.

If I may just continue for one moment, sir, back with the provisions of the bill. On page 30, the lines you cite, 4 through 17, describe various categories of business agreements and relationships that are certainly known to the antitrust law, and this section says to the export trading company, "You must tell the Government about any of these types of categories of agreements that you're going to enter into." Then the Secretary must go over to a different section and say whether that type of agreement meets the requirements of this exemption.

The requirements are set out in section 204 of the bill for eligibility for the exemption. So I think we have to look not only at what this bill says to the applicant that he must tell us about, but you've also got to go to the substantive standards against which those activities will be measured before an exemption certification is granted.

Senator HEINZ. Would the Senator yield?

Senator PROXMIRE. Senator Danforth?

Senator HEINZ. I think it's fair to say that the items for stipulation in section 4 which have to be filed with the Secretary and set forth include a laundry list of actions that the trading company intends to engage in. The actions may be legal; they may be illegal.

The purpose of the section is to get the trading company to come forward with what they think they want to do. It is not intended to judge what is legal or illegal. It is simply intended to elicit a full disclosure so that in this instance the Commerce Department, in consultation with the Justice Department, Mr. Ewing's former associates, can judge under the substantive provisions of the law—which remain unchanged if we pass this bill—what is proper and improper, what is consistent and inconsistent with our existing antitrust laws.

Senator PROXMIRE. If you gentlemen agree with that interpretation—

Senator HEINZ. Let me ask. Mr. Ewing, would you agree?

Mr. EWING. Yes, sir.

Mr. VICTOR. Yes, sir.

Mr. SEIDLER. Yes, sir.

Mr. FOGT. Yes.

Senator PROXMIRE. If you do, the difficulty is that I think I have a top flight staff man advising me, Mr. Marinaccio, who used to work in the antitrust division; he's an expert in this area, and he's very troubled by this, and I see nothing wrong, then, with having the language specifying that nothing in what we say here would legalize or indicate any approval of any of this or indicate that these may be illegal activities—something like that, something that would make it clear that this isn't a sanction, because after all if someone who is very sharp in this area indicates that it might indicate that, I would be concerned.

Mr. EWING. Senator Proxmire, I would hope in either one form or another by amendment of the language or legislative history you would be joined by many other Senators and sponsors of this bill in making clear that this bill's creation of an exemption from our antitrust rules of an export trading company does not give such a trading company the right to go out and with its counterparts around the world cartelize the world's markets. I don't think that's its intent, and it ought to be very plain that this is not authorized here either.

We don't want an export trading company to be so organized that it becomes what I described in my testimony as "USA, All Exported Products, Inc."

Senator PROXMIRE. And you feel that in order to do that, we do need an amendment to the bill as we have it before us?

Mr. EWING. Sir, I can't say that I think we need an amendment.

STRONG REPORT LANGUAGE NEEDED

Senator PROXMIRE. Or we need report language or at the very least a very strong record.

Mr. EWING. I would agree with the latter—report language or a strong record on the floor. I would hope the sponsors would join you in such an effort.

Senator HEINZ. Just to be sure, Senator Proxmire, that there's no misunderstanding, we're referring to section 4, the certification section, and the procedure for application, subsection (a), and as I understand it, Mr. Ewing and Mr. Victor, as you read section 4, subsection (a), you do not believe that there is anything in the bill—that starts on page 28 and runs through the middle of page

31—you do not believe that there is anything in that subsection that changes the substance of antitrust law. You do not believe there is anything in that subsection that in any way suggests that any of the items mentioned are either legal or illegal. Is that correct?

Mr. VICTOR. Senator, I'd like to make my position very clear on this. I haven't parsed every word with that in mind, but I of course have read the bill a couple of times. It is my impression from reading the bill that it is not intended to change the substantive antitrust laws to either legalize or illegalize particular kinds of conduct which would be examined by whoever the regulator will be.

I really believe its essence is to provide a mechanism to determine whether or not some antitrust immunity should be granted after an appropriate regulatory procedure is gone through. But I wouldn't want you to think that I have parsed every word in here to determine whether there could be something that was not intended but nevertheless did, in fact, affect the substantive antitrust laws.

Senator HEINZ. As a result of the study which you and Mr. Ewing have given the bill to date, without necessarily tying you to the fact that it is the very last word that you will ever speak on the subject, do you see anything in section 4, subsection (a), that would lead you to believe that there is any risk that the provisions of that subsection in fact tilt in some way toward a change in substantive law? Can you point to any?

Mr. VICTOR. No, sir.

Senator HEINZ. Thank you.

Mr. Ewing, do you find anything that would apply to anything whatsoever?

Mr. EWING. Once you limit it to subsection 4(a) I would agree with that.

Senator HEINZ. Thank you.

Senator Proxmire?

Senator Proxmire. Yes; I just have a concluding statement.

The problem that troubles me, of course, is the shift of authority from the Justice Department to the Commerce Department, the Department which in the first place has no expertise, and in the second place, in my judgment, has a clear and conspicuous blatant conflict of interest. And that, coupled with the fact that we lose sight of in these discussions what the purpose for all this is.

The purpose for this is to try to provide competition at a time when our No. 1 domestic economic problem is inflation. There is no better regulator of prices than competition.

At a time when we are anxious to get the Government's nose out of regulation as much as possible, the best way to do that is to have vigorous antitrust and have effective competition.

We don't want to back away from it at a time when the transition team of the administration recommended we abolish outright the antitrust division of the Federal Trade Commission.

They backed away from that yesterday when Senator Packwood went to the administration and had a talk and apparently came out with an assurance that they would not cut the funds for that antitrust division.

At a time when Murray Weidenbaum sat before this committee in this room about a week or so ago and said that there would be no jawboning of inflationary price hikes at a time—maybe that's good policy. But coupled with all these other things, it gives me considerable pause when we have a situation in which we are taking away authority of the Justice Department over international price fixing. I am very concerned about that.

I would like to make one other point, and that is that Mr. Ewing indicated, in response to Senator Danforth, that there were 400 lawyers in the antitrust division of the Justice Department. Of course, there are a couple of hundred lawyers, I guess, in the Federal Trade Commission. I am not sure how many, but a couple hundred.

There are 600,000 lawyers in the private sector. There are firms that have more lawyers than the entire Justice Department has on antitrust alone. And I think that anybody—I am not a lawyer—but the lawyers tell me, who have been in the antitrust division, that going to court on an antitrust case they are overwhelmed. On one side will be one or two harassed lawyers picking papers out of their pockets trying to put things together. On the other side are enormously skilled people that not only outnumber them, but certainly outsalary them. And it is not a very fair battle, at least.

It is kind of like the Little Sisters of the Poor playing the Philadelphia 76'ers.

Mr. EWING. Mr. Chairman, I hope you will permit me, remembering that I was such a short time ago associated with the Department of Justice, to say to Senator Proxmire: Hear! Hear! Thank you!

Senator PROXMIRE. Thank you.

Let me ask if the chairman would permit Mr. Marinaccio to ask a question.

Mr. MARINACCIO. I would just like to ask Mr. Ewing a clarifying question for the record.

I think Senator Heinz, just before Senator Proxmire, spoke to you, premised his questioning on the language that would be contained in section 4 on certification. And your answer was that your understanding was that that paragraph contained no change in the antitrust laws, if you considered that paragraph by itself.

My question is, if you considered that paragraph in connection with the standards in section 2, would your answer be the same in the light of the word changes that are contained in Webb-Pomerene in section 2, "unreasonable effect on prices" in place of "artificiality" and "substantial restraint of trade" instead of merely a restraint of trade, having full knowledge of the fact that what is contained in section 4 is the material in the application process that has to be matched up against the standard in section 2.

I guess I am asking you, then, reading those two sections together, with the word changes in section 2, is it your testimony that there is no change in the Webb-Pomerene substance?

Mr. EWING. No, sir, it is not my testimony that there is no change. I want to make very clear that my response to Senator Heinz was limited to section 4, subsection (a), which is simply the section requiring an applicant to set out things on a piece of paper.

To further answer your quite different question, I think I previously testified that section 204, which will amend section 2(a) in subsections (1), (2), (3), (4), (5), and (6), certainly does contain word changes from the existing law.

I have tried to say, and I think my colleagues here at the table have tried to say, that they are not in our judgment major changes. But we certainly would not tell you that there are not changes.

Senator HEINZ. Mr. Ewing, my understanding of your statements in this regard is, yes, there are word changes from Webb-Pomerene but that in your judgment what is found in section 2 and the referenced sections is a codification of existing law and therefore does not change the substance of existing antitrust law. Is that correct?

Mr. EWING. I would say it is an attempt to codify what many of the people who participated in this process consider to be the best thinking on what the law should be interpreted to be by the courts.

Senator HEINZ. And in that regard, if you happen to agree with the term "best thinking," which you yourself used, it is presumably not only good thinking, but it represents, in the best judgments of the best minds of the best people, no substantive change. Is that correct?

Mr. EWING. It is not a substantial substantive change. I must say that I previously testified, and it is quite true that the words here, even in section 204, represent a compromise that was made along the way by draftsmen. And certainly very good antitrust lawyers might want to stick other words there.

Senator HEINZ. One of which might have included you, is that correct?

Mr. EWING. Yes, sir.

Senator HEINZ. Thank you.

Let me state for the record that we have received some additional statements that have been submitted, and we will include those in the record.

If there are no further questions, we thank all the witnesses.

[Whereupon, at 12:25 p.m. the hearing was adjourned.]

[Additional material received for the record follows:]

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February 6, 1981

The Honorable H. John Heinz
Chairman
Senate, Subcommittee on International
Finance
5300 Dirksen Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

We understand that your Subcommittee is scheduled to hold hearings February 17 and 18, 1981 on S. 144 which is aimed at stimulating export trade by allowing banks to own export companies and by expanding the Webb-Pomerene Act's exemption from the application of U.S. antitrust laws.

We represent the International Commodities Export Company (the "ICEC") located in White Plains, New York. Mr. Emil S. Finley, the president and chief executive officer of ICEC who has been in the export business for nearly thirty years, has asked that we submit on his behalf certain materials which he has prepared over the past few years pertaining to the Webb-Pomerene Act and its discouraging effects on domestic competition.

The material is submitted to aid the Subcommittee in its consideration of S. 144. Mr. Finley believes that this legislation would not significantly expand U.S. exports but would instead reduce competition by increased economic concentration not only through the expanded antitrust exemption but through unnecessary banking ownership participation in an already viable industry.

The enclosed material presents Mr. Finley's argument as to how the Webb-Pomerene Act, intended to help U.S. firms compete against European cartels, actually encourages anti-competitive cartelization in the United States. Mr. Finley's basic point, made in testimony before the Senate Banking Committee last July, 1980, is that increased competition and increased production will stimulate U.S. exports. S. 144,

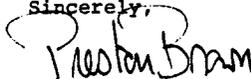
despite good intentions, will, Mr. Finley believes, only decrease competition through the concentration of unnecessary (and undesirable) economic power. The banks in particular have a large and productive role to play through their traditional banking function in supporting U.S. export expansion. As Mr. Finley testified, there are many export companies with years of experience willing to participate in expanded export trade if the banks will increase their traditional types of support. Creative exercise of the historic but separate banking function in export trade would yield the banks healthy returns without unnecessary participation in the control and direction of export companies.

Mr. Finley respectfully urges this Subcommittee to refrain from approving the far-reaching provisions of S. 144 which, in Mr. Finley's view, would only produce harmful and unintended effects on domestic competition.

Should the Subcommittee feel that his testimony would be helpful to its considerations, Mr. Finley is willing to travel to Washington either to offer testimony at a formal hearing or to speak with members of the Subcommittee staff.

If you have any questions, you can reach Mr. Finley in care of our office at 331-9797.

Sincerely,

A handwritten signature in dark ink that reads "Preston Brown". The signature is written in a cursive, slightly slanted style.

Preston Brown

Enclosure

PB:skw

STATEMENT BY
EMIL SHERER FINLEY
PRESIDENT AND CHIEF EXECUTIVE OFFICER
INTERNATIONAL COMMODITIES EXPORT COMPANY
BEFORE THE
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS
UNITED STATES SENATE

JULY 25, 1980

Mr. Chairman:

My name is Emil Sherer Finley. I am President and Chief Executive Officer of the International Commodities Export Company, a firm which I founded over 30 years ago and which has become a prominent exporter of agricultural chemicals, with an annual volume close to a quarter of a billion dollars.

May I first express my appreciation for the opportunity to appear today before you and your committee to present my views and those of my company in connection with S.2718.

Nobody can question the importance of increased exports to our economy. While those of the other industrialized countries frequently represent 20 to 40% of their gross national product, ours represent barely 10%. With a continuing annual trade deficit running into many billions of dollars, it is understandable that all of us are deeply concerned. Unfortunately, some well-meaning legislators and certain private interests are creating a climate of panic to gain

quick acceptance of solutions which eventually will hurt our country much more than the current deficits. Indeed, I am sad to note that Congress can only come up with a bill to encourage the creation of U.S. "trading companies" and expanded antitrust exemption of U.S. export activities by amendment of the Webb-Pomerene Act.

These voices are simply saying that if we will allow virtually unbridled price fixing, with immunity under antitrust laws, our failure to export a substantial share of our gross national product will have been corrected. I am chagrined by this bill as a business man, as an exporter, as an entrepreneur and as an economist.

For the past two decades, we have been told over and over again that billions of dollars worth of potential annual export business is neglected because small and medium size producers are unable to develop foreign markets. We have also been told that only one in ten U.S. manufacturing firms sells abroad. We are told that this new legislation would help materially to get these small producers to export. The fallacy of it is that the world has changed in the last quarter of a century and even the developing and under-developed countries now have local industries which can produce the needed goods we are talking about and therefore, in most cases, make it almost impossible for the U.S. to succeed in such exports. We are also told that important service contracts abroad elude our major contractors.

But there is nothing in our antitrust laws that prevents our major contractors to join together in projects.

This highly publicized bill, S.2718, tells us that we should go the OPEC way. My personal experience tells me otherwise. One measure of the success of my company is the fact that, since 1948, U.S. exports have gone up 1400%, while our own exports have gone up 9200%. We did not need any protective devices or legislation to do this. We were able to do it because we paid close attention to the forces of supply and demand and because we were willing to be competitive. Surely, we have shown that we are in favor of expanding U.S. exports by making this contribution over the years. We are in favor of further expansion, but we believe that such expansion should be on the basis of increased, and not restricted, competition.

The purpose of my coming here is to warn this committee of the dangerous features of any expansion of the antitrust exemptions under the Webb-Pomerene Act. I have testified in 1978 before the National Commission for the Review of Antitrust Laws and Procedures. I have also presented a lengthy policy statement before the National Journal's Policy Forum in 1979.

I have testified before the Subcommittee on Foreign Commerce of the Committee on Commerce on S.2754 in January, 1972. I request that all of these statements and enclosures be included in the hearing record.

In many of these papers, I have described typical Webb-Pomerene associations and have shown that, contrary to the generally accepted concept, the expansion of the Webb-Pomerene Act's antitrust exemption will not stimulate an increase in our exports. As we all know, this exemption was intended by Congress originally to enable small U.S. businesses to compete against the then prevailing European cartels. Contrary to this intent, this exemption has enabled, in fact, large U.S. companies to form cartels of their own, most often in the areas where there is practically no foreign competition. Moreover, this exemption has discouraged, and not encouraged, competition and has led, and continues to lead, to further U.S. cartelization and control over the flow of U.S. exports. If exports are being restrained now, as they certainly are, they would be restrained even more if such bills were to pass. The most disturbing fact about all this is that the Webb-Pomerene associations benefitting from antitrust exemptions are composed mostly of members which, together, dominate also our domestic scene. Their immunized actions taken with respect to export pricing and setting quotas have a direct and adverse effect on the domestic market which they are able to influence simultaneously. Thus, our farmer, our worker, our tradesman and, of course, our consumer, is forced to pay higher prices for the product.

The 1967 FTC study and hearings on the operation of Webb-Pomerene conducted by the U.S. Senate demonstrated how little that Act and its antitrust exemption have done to encourage U.S. exports since 1916. To stimulate U.S. exports, we do not need the continuation and expansion of an act which encourages anti-competitive behavior.

We need, instead, to recognize that our failure to gain our appropriate share of the export market is due to this very anti-competitiveness which, in turn, contributes dramatically to our overall declining productivity, inflation and much, much higher domestic prices of products.

The companies who need it the least benefit from the anti-competitive blessing of Webb-Pomerene and have produced hordes of witnesses to testify about the desirability of continuing that blessing. The general public who will be adversely affected cannot usually muster the resources to make its voice heard.

Our export markets will expand with more - not less - competition. Companies such as ours can contribute to the give and take of the marketplace if they are allowed to.

As my National Journal article illustrates graphically, the Webb-Pomerene associations operate by excluding such companies as ours from the marketplace so that prices can be set for export and domestically production can be restricted.

The bill would also permit banks, bank holding companies and international banking corporations to own export trading companies. The arguments for doing this point to the fact that bank organizations are able to reach out to a large number of small and medium size companies who may manufacture exportable products. My question is -- why don't these banks reach out to these companies now? Or for the past 25 years without this legislation? The other argument for the banks to participate is that their international branches and

correspondents are in an excellent position to identify potential foreign markets and customers. Surely, they have been doing this for many decades and any exporter or manufacturer can get the banks to give them that information. Why is it, then, that they are asking for this legislation? My suspicion is that the power of the banks would be enhanced without corresponding contribution toward the expansion of exports, but with dramatic increase in the leverage which the banks would have to control and restrict exports to achieve their specific objectives and reducing the competition between the banks and making it even less likely for an independent exporter to be able to obtain suitable financing.

It is noteworthy that a number of commissioners of the National Commission for the Review of Antitrust Laws and Procedures favored outright repeal of the Webb-Pomerene Act. Their instinct was right. It is increased competition and increased productivity of capital and labor that represent the foundations on which to build an expanding export trade. It is the essence of free trade and of America. We should all keep these points in mind when the decisions are made on the new export policy of our country.

The Realities of United States Foreign Trade and The Fictions Of Our Cartel Advocates

by Emil Sherer Finley

Emil Sherer Finley is the founder, president and chief executive officer of International Commodities Export Company (ICEC), a division of ACLI International.

Painful facts make fools of some of us all of the time, and almost all of us some of the time. When all the known evidence says "green," some of us proclaim "red" in the hope of finding some evidence of red. When we need fairness, some of us would impose judges who have pre-judged our cases. When we have proof that people have hurt us, some of us would reward them lest they not reform. When we have to know the facts, most all of us resort at some stage to fictions to shelter us from the unpleasant reality. When in doubt, we quite frequently legislate.

Not that truth, beauty and right action don't often emerge and win out. It is the glory of free speech and a democratic process that quite often pigheaded wrongness gets defeated in the marketplace of ideas and therefore in the halls of Congress. It involves a struggle that is rarely inviting. But we have to be existentialists, if not optimists; for to be otherwise is to leave the field by default to the beguiled, the misled and, alas, the greedy. Conscience requires a fight.

In trying to deal with some woes of our foreign trade, we have been besieged and somewhat beguiled by the misled and, yes, the greedy. The cartel advocates are in the marketplace to overcome painful facts with fictions. Realities, which once seen would help us to deal rationally with the painful facts, are lost. And some very good men have made some very wrong proposals.

PAINFUL FACTS AND FOOLISH REACTIONS

The most painful facts of our foreign trade are that in six out of the last eight years the United States has had a deficit balance of foreign payments; and inflation has boomed along, with the cheapened dollar only exacerbating the flow of money out by reducing our buying power. Last year we had a deficit in our balance of trade of \$30 billion.

We are not used to such things. All was right with our trade in this century up to 1971. Because we get worried it becomes time to panic or to avoid real panic by frenzied action. It becomes time to look for quick solutions. And it becomes time to treat painful facts as if

they have nothing to do with our own faults, for self-blame is still more painful. We begin to create myths from long-ago half-truths or from no-truths. Thus, it must be that the foreigners at our gates are conspiring against us and are taking advantage of our good nature and fairness. They bribe better or bigger; they are more organized in combating our poor, fractionalized industries. Indeed, we see grand cartels, government sponsored, taking away our business; and all the while our Justice Department's Antitrust Division and our notions of free competition do not allow us to fight back. Foreigners come here with impunity, and we go nowhere but that we are faced with stifling, organized resistance in Washington and unfair, subsidized competition from the outsiders. The answer—so we are then told—is to fight back with the same weapons. Let us create our own cartels. There are even suggestions that we were wrong in this post-Watergate era to demand that our industries stop bribing foreign officials. Nonsense: all of this.

One need not take seriously the all-too-serious "jokes" about the need to out-bribe our foreign competitors. In the long run, self-defeating corruption cannot be justified. If our society must save itself by being corrupt, then it is not worth saving. I won't do it, but the fact is that Americans can compete successfully without bribing. If there is a cartel that is needed, it is a cartel that has one rule: thou shalt not bribe.

As to the drive to create more cartels, that requires some analysis, for it is not plainly immoral and becomes amoral only when reality catches up with the fictions that are used to support the cry of more cartels.

Here is the reality.

THE WEBB-POMERENE ACT

There is already in existence in the United States a piece of cartel-creating legislation dating from 1918, the Webb-Pomerene Act. The Webb Act allows for the creation of associations of producers of goods solely for the purpose of engaging in export trade. The associations can operate if they register with the Federal Trade Commission and as long as they do not restrain the export trade of any "domestic competitor." Webb associations are not supposed to "enter into any agreement, understanding or conspiracy, or do any act which artificially or intentionally enhances or

depresses prices within the United States . . . or which substantially lessens competition within the United States or otherwise restrains trade therein." Under a consistent interpretation by the FTC and as followed by the courts, Webb associations can and do fix prices and set up quotas.

"Under a consistent interpretation by the FTC, and as followed by the courts, Webb associations can and do fix prices and set up quotas."

While the original vision of the Congress and of the Federal Trade Commission Report that recommended the Webb Act saw the true function of the association as a cost-reducing expediter, there is no question that the role of price-fixer and market allocator has been the predominant feature of Webb associations over the years. In brief, Webb associations have taken on the usual roles of cartels. Thus, we have in America government sanctioned cartels that are exempted in the export trade from the normal operation of the antitrust laws.

The prime justification back in 1918 for Webb associations was that they were needed by small companies in order to compete with foreign subsidized businesses and cartels. At the time, American corporations were only beginning to become factors in world commerce. The theory was that associations could cut costs and thus would allow American corporations to compete successfully on the basis of price as well as quality of goods.

WEBB ACT PERFORMANCE

In 1967, the Federal Trade Commission completed a study—an empirical study—of Webb associations over their first 50 years. The report found that the Webb Act had failed to promote United States exports in any significant way during those 50 years. The 1967 FTC study revealed that the export associations that succeeded for any length of time were those involved in industries where the members were leaders of a domestic oligopoly, were dominant factors in the foreign trade and dealt with a homogeneous product. The small company did not take advantage of the Webb-Pomerene Act. Of the 465 members of Webb associations during the period between 1958 and 1962, for example, only 17 per cent had assets of \$1,000,000 or less, and only 22 per cent had assets of between \$1,000,000 and \$5,000,000. The large firms counted for about 80 per cent of all exports by Webb associations. There were never any more than 57 registered associations in any one year, and some companies were members of more than one association. During that same period of 1958 to 1962, Webb associations

accounted for only 2.4 per cent of total United States dollar exports. The 1967 FTC Report concluded:

"In summary, Webb-Pomerene activity is limited to comparatively few associations handling a limited range of products, and the number of beneficiaries from such activity is also quite small. . . . These members [of Webb-Pomerene associations], for the most part, were drawn from the upper reaches of the business population and, at the same time, were the major beneficiaries of Webb-Pomerene assistance. . . . Fifty years of experience, including a recent period of uninterrupted trade expansion, reveals the Webb-Pomerene Act as no panacea for the expansion of foreign trade by small business and, indeed, points to the conclusion that it plays a very minor role in over-all U.S. exports." (FTC Report, pp. 317-18)

The data available since 1967 proves that nothing has changed. If anything, the utter failure of our legalized cartels in promoting American exports is more pronounced. By 1976, only 1.5 per cent of the total U.S. exports came through Webb associations and the number of registered Webb associations was only 33. Today, there are 35 registered associations with 338 members, many of which are in more than one association. The registration rolls at the FTC make it plain that the firms that benefit most from the Webb Act are still those that market homogeneous products and dominate their industries. I have taken a look at the nature of the products of the 35 currently registered Webb Act associations. Only four of them seem to be in industries where there are non-homogeneous products.

As of 1976, a total of six Webb associations accounted for nearly two-thirds of the dollar value of all Webb-assisted exports. These six associations (plus one other) are the only presently registered associations that were in existence in 1962. Four of the big six produce homogeneous goods: dried fruits (2), rice products and paper. The other two are both film-industry associations, formed by the 10 dominant firms in the industry.

" . . . there is no question that the role of price-fixer and market allocator has been the predominant feature of Webb associations over the years. In brief, Webb associations have taken on the usual roles of cartels."

The pattern is clear. Webb associations have benefited those firms that need help the least, and the firms use the associations not to promote volume but to stabilize export prices. Since the future (and past strength) of United States exports lies in complex, differentiated products, Webb associations are not likely to play any larger role in the United States export picture than they have in the past.

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THE EFFECT ON DOMESTIC TRADE

Although irrelevant to small United States companies and insignificant in the scheme of over-all exports, Webb associations have had a deleterious effect on domestic pricing and competition.

With most homogeneous products there is a traditional relationship between the domestic price and export price (usually a percentage "discount" on the domestic price). Usually, the export market is viewed as a way to sell off "surplus" and ward off domestic price deterioration. As a result, export price fixing is always bound to mean price fixing or stabilization in the domestic market. We cannot be blind to what common sense screams at us: When major producers of the same or virtually the same product set export prices in unison and "predict" what they will be for the future, they know necessarily that they are helping to set a level for domestic prices and are helping to stabilize these prices.

"When major producers of the same or virtually the same product set export prices in unison and predict what they will be for the future, they know necessarily that they are helping to set a level for domestic prices and are helping to stabilize these prices."

There is also a domestic monopolizing aspect to Webb associations. Successful Webb Act associations dealing in undifferentiated products control or dominate the "surplus" export market; and that surplus market often is the difference between a profitable trading year or an unprofitable one. Even when large producers remain outside the cartel, the road to survival or entry of the small firm is more difficult.

That Webb-Pomerene cartels are needed to fight foreign cartels has always been grounded in a theoretical fallacy and no real truth. The existence of foreign cartels that fix prices theoretically could only help American competition. They could only create price umbrellas for their American competition. In the United States, for example, when these Webb-Pomerene Act associations come into being, the large American companies outside the cartels are quite happy because they can easily underprice the rigid cartel or the cartel sets a price that the competitors gladly follow. Indeed, it is a commonplace in the true market that the best policemen of Webb-Pomerene pricing are those outside the cartel.

In fact, as the FTC found in 1987, large oligopolistic American corporations do not need the associations to compete with any foreign business concern or groups of concerns. Today American companies dominate the

fields where Webb associations operate successfully. By stabilizing prices and establishing quotas, the members of Webb associations do not compete in any traditional sense with the foreigners. If they wanted to compete for business, they would not be fixing prices, they would be setting prices independently based on costs and reasonable profit. And dealing mostly in homogeneous products and in dominated markets, Webb association members do not compete unless they compete on prices or services that amount to price savings.

THE REACTION ABROAD

It is a fact that Webb associations are welcomed by their supposed enemies abroad. When Webb associations are created or expand, the foreign competitors hail the event. The "reviews" abroad become "mixed" only because the purchasers of the products—usually found in undeveloped nations—know that they can expect increases in the United States prices and stabilized prices everywhere. All one has to do—if one really wants to find out what the reality is—is to read the trade journals when one of these Webb Act associations is created or increases its membership.

For example, *Green Markets*, a fertilizer market trade weekly published by McGraw-Hill, reported that Brazilian traders and users were quite unhappy when the Phosphate Chemical [Webb-Pomerene] Association—"Phoschem"—expanded its membership of fertilizer producers last year. The July 17, 1978, edition quoted one Brazilian "source" as saying it was "rotten." Another Brazilian was reported to have said, "We expect drastic increases in U.S. prices." Another said that it was likely to "jeopardize" the "import volume." Brazil is a major importing market for American fertilizers. But the article further reported: "One Canadian producer thinks higher U.S. export prices might even stabilize the Canadian market and help his company." It said also: "An official of the South African Fertilizer Society [a cartel] said stable prices and a better market would probably result." The article noted: "Most European producers are optimistic. They feel that as well as raising prices, the Phoschem expansion will provide the market stability which has been absent in recent months."

That's reality. What Webb Act cartels are about are price stabilization, price-increases, production control, hoped-for worldwide "regulation," not competition and vigorous promotion of American products. The result is less trade for us—controls, controls, controls for the sake of prices. It is no accident that since Phoschem's expansion, the prices of its products—export and domestic—have gone up about 50 per cent and that hike does not reflect cost increases. Inflation guidelines are ignored. And so the theories of those not in the marketplace are exposed as fantasies. Read what businessmen say; listen to us in the trade, who know our "customers."

"By stabilizing prices and establishing quotas, the members of Webb associations do not compete in any traditional sense with the foreigners. If they wanted to compete for business, they would not be fixing prices; they would be setting prices independently based on costs and reasonable profit."

SEVERAL OTHER REALITIES

Furthermore, the function of selling agent is not best done by a Webb-Pomerene Act association or, in fact, often done by the associations. Again, a little investigation will show that Webb association members do their own selling and their own marketing and use the association offices only as a conduit and a means to prevent competition. According to the FTC, only eight associations reported sales agencies in the United States and only six reported overseas agencies in 1976. Moreover, only 12 directly assisted exports, and these exports accounted for less than 17 per cent of dollar Webb-assisted exports in 1976. As the FTC has found: All the sales functions can be, and have been done historically, with more vigor and with a lot more results by independent exporters. Agreed market division means complacency and no real promotion. Webb associations beget an atmosphere of "cordiality" with foreign competitors that is indistinguishable from gentlemen's agreements.

Moreover, it is a fact that in many industries where Webb associations exist, there is no real foreign competition. Even if you believe the answers that the associations have supplied to the annual FTC questionnaires, Webb Act associations have hardly been fighting foreign cartels. Only 11 out of the presently registered associations have claimed competition from cartels or government-sponsored organizations. And their answers have to be suspect; there is, at least, hyperbole in them.

Again Phoschem provides a good example. Its answers to the FTC claim competition from overseas cartels and foreign government organizations. In the two major products that it deals with, diammonium phosphate and triple superphosphate ("DAP" and "TSP"), Phoschem has no significant competition in most world markets. And, by some "magic," Phoschem will not offer much material to those few places where the foreign production has had its "traditional" sway. Over-all, the Americans dominate what they choose to dominate. They are the giants. In 1977, for example, the

world export trade in DAP and a related product totaled 1,870,000 tons (of P_2O_5). The American share of that market was 1,367,500 tons (of P_2O_5). In 1977, the total world export of TSP totaled 998,500 tons (of P_2O_5). American exports accounted for 504,600 tons (of P_2O_5).

Thus, there is no need for Webb-Pomerene Act associations in fields such as the one with which Phoschem is involved; they serve nothing but anticompetitive ends. And Phoschem, I submit, is typical.

Our problems stemming from the Webb Act cronyism and artificial price structuring are exacerbated by still another development unforeseen in 1918: Multinational corporations are found in good number among Webb associations. And they aren't merely multinationals in unrelated businesses; many Webb association members have foreign subsidiaries that (1) buy from the Webb associations and (2), believe it or not, compete with the Webb associations—without the slightest compunction and without protest within the associations. There hasn't been a word of criticism from the Federal Trade Commission. Necessarily, where multinationals participate in American price-fixing and quota-setting, something beside the promotion of American exports has to be involved. In fact and in effect, our foreign competitors participate in our price-fixing decisions and their interest is not in "selling American."

Factually, foreign buying "cartels" have come about in response to price-fixing selling cartels—our Webb associations. There is no evidence that foreign buying cartels or foreign government purchasers have hurt United States exports or forced anybody to sell anything other than at a fair and profitable price. There is no evidence that they have had an unfair bargaining position vis-a-vis American exporters. We in the market know that the reality is that government agencies are most often easier to deal with than multiple foreign purchasers. It is not a fact that we sell cheaper to government sponsored buyers. For example, Asian government agencies and buying cartels traditionally pay higher prices than do the multiple private purchasers in Brazil.

When you are concerned with standardized products in demand—the products that are the prime items for Webb-Pomerene associations—there are, in fact, no barriers with which the Webb-Pomerene Act has to deal. With these products, there are producing nations and there are consuming nations. Consuming nations are always disturbed by cartelization, because they know that that means higher prices (and in the instance of fertilizers and Phoschem, for example, higher food prices for their populations). The hurtful barriers come, if at all, from producing nations to protect home industry. Webb-Pomerene Act associations and the Webb Act itself have nothing to do with fighting those barriers. Webb-Pomerene associations encourage those barriers because they naturally tend to respect them. Price-minded cartels are interested in keeping out foreign competition from the United States (because they are the major producers here). There is

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an understood rule of reciprocity at work, which stabilizes prices and protects home markets.

All of the facts should tell us, then, that we should have more competition, not less competition, if we want to increase our trade. Give us more aggressive marketing, not less. The facts establish, at very least, that Webb association export outlets are hardly worth the harmful effects on the domestic market. Those facts should also advise us: Be careful of these price-fixing and quota-setting organizations with their meetings, constant information-sharing and daily price-"predicting."

THE RESPONSES AND THE DANFORTH BILL

But our balance of payments is bad; and that means fewer jobs at home, a weaker dollar, a greater impetus to inflation and a thousand other ramifications that economists say we fall heir to. So the cartel believers come out of the woodwork and are listened to. Groups of them, particularly the National Construction Association, importune the Commerce Department. (They know enough to stay away from watchful Justice and sleeping FTC.) They go to the Congress. And, despite the empirical evidence that lies for the reading in FTC reports and records and despite a recent critical report of the President's special commission on the antitrust laws, we have the Commerce Department lobbying for more cartels and the lessening of restrictions on them. And we find some very able Senators believing in the benefits of more cartels and the lessening of restrictions on them. Logic and the facts are ignored; myths and plain fiction take over.

Indeed, Senator Danforth in conjunction with Senators Bentsen, Chafee, Javits and Mathias (a most formidable group) introduced a bill in the Senate last February that would amend the Webb-Pomerene Act by expanding its antitrust exemptions to allow for more restraints on domestic commerce, enlarging its coverage to activities beyond foreign export trade (as long as they were incidental to it) and placing services as well as goods under amended Webb Act protection. The bill would transfer supervision of the associations from the moribund Federal Trade Commission to the friendly Commerce Department and insulate the associations from direct Antitrust Division oversight. While there would be pre-registration screening for new Webb associations, all present associations would be grandfathered into the antitrust exemption, and no private person could sue to revoke or alter any association's status. A review of the new procedures under the Act would occur seven years from now.

The bill itself and Senator Danforth's Senate speech in support of it make it plain that it is the product of fear and fiction. The "findings" that appear in the bill as a preamble give the painful and scary fact of a \$30 billion trade deficit in 1978, tell ominously of foreign government subsidized competition to United States exporters, note the fall of the United States' share of total

world exports from 19 per cent in 1968 to 13 per cent in 1977 and then declare:

"Small and medium-sized firms are prime beneficiaries of joint exporting, through pooling of technical expertise, help in achieving economies of scale, and assistance in competing effectively in foreign markets. . . ."

That foreign government subsidized competition is not so terrifying and that small and medium-sized firms have never benefited from such joint exporting are now beside the point. Red has become green by proclamation and because of painful facts. The pre-judgers—the Department of Commerce—are the new guardians. The oligopolists and multi-nationals are to be rewarded by automatic inclusion in the new and more tolerant system. When one should hesitate, we legislate.

In his speech to the Senate introducing his bill, Senator Danforth acknowledges the poor performance of Webb associations as promoters of commerce and the fall-off in membership. But he gives some reasons. The first reason for Webb failure, he says, is that the "vast majority of the . . . Webb-Pomerene associations lacked sufficient product-market domination to exert foreign market price control and membership discipline." That, of course, is not changing facts; that is misreading their import. What Senator Danforth is telling us is that only the giants (1) have been able to use the Act and (2) have connived successfully to fix prices because they are dominant and can make their price-fixing stick. That hardly speaks for the need for more associations or the desirability of more leeway for all of them!

"Senator Danforth's bill . . . is the most serious, recent and erroneous reaction to unfavorable foreign trade events. . . . The bill at best sets our sights away from where they should be. It is frightening that very sound men can be so misled."

Senator Danforth then tells us that the second reason for poor Webb-Pomerene performance is our "traditional" primary focus on the domestic market. Surely the primary focus of most of our indigenous industries will always be on our domestic market, the biggest market in the world; but the past two decades have witnessed an explosion of interest in foreign markets and a vast expansion in foreign trade. And look how Americans have jumped—tripped over themselves—at the opening of opportunities in China. Sufficient focus, there is; and foreign trade will expand. The facts bespeak a reason for failure other than a lack of focus on foreign trade: interest in associating has not similarly expanded because the Webb Act can only

benefit the dominant few in very special industries.

For his third reason for Webb-Pomerene failure, Senator Danforth offers the fact that services are not covered by the Webb Act. He then says that the President's National Commission for the Review of Antitrust Laws and Procedures recently recommended that services be covered. That is a gloss. The independent Commission appointed by the President made its report last January. There was a section on the Webb-Pomerene Act. The report reviewed the poor performance of Webb-Pomerene associations. It rejected the proposition that the Webb-Pomerene Act be expanded or even be kept in place. In fact, a number of Commissioners would have repealed it with no further ado. The report declared that automatic exemptions are not warranted, and a needs test should be required of all would-be registrants. The report urged that the Congress review the Webb-Pomerene Act with a view to repealing it or substantially restricting it. Its recommendation on services was that if the Act were retained then it saw no reason not to include services as well as goods.

Whatever, this catering to services is narrow special-interest legislation, a sop to the construction industry pressure groups. I predict that, if the special legislation ever comes to be, it will not spark any more activity abroad; it will only benefit the large corporations already in the market by a gift of immunized collusive price-setting—which will have the usual "predictive" price-setting influence in the domestic market.

For his fourth and "perhaps most important" reason why Webb-Pomerene has failed, Senator Danforth offers the hostile attitudes of the FTC and the Antitrust Division of the Justice Department and the fears that businessmen have that they will be declared antitrust violators if they join the associations. The fear of the FTC has to be a fiction; it has been a docile watchdog; more than docile, it has wagged its tail. It has gathered information from the associations without questioning the accuracy of anything and has done nothing with that information. It let one association rig bids for United States government AID-financed contracts for years; it was the Justice Department and eventually the Supreme Court that put a stop to that multi-million dollar raid on our Treasury.

As to the Justice Department, it has never made a wholesale attack on Webb associations, generally leaving them to the FTC. The Antitrust Division, however, can and does bring a welcome skepticism and questioning to bear on these cartels. Industry and the Congress should be grateful that someone is there ready to worry about whether permitted collusion has slipped into illegal conspiracy in domestic trade. Remember, under the Webb Act, people who are competitors and are not supposed to be setting prices for the domestic trade are in daily contact. They are constantly exchanging price, cost and supply information. They are continually agreeing to prices for future exports based on what they believe will be future

market prices here and abroad. That's at least dangerous territory, if not (as most businessmen who have had experience with Webb associations believe) absolutely lethal ground for fair, competitive pricing.

Still the Antitrust Division has moved dramatically in all the Webb Act years only against the AID gougers. It has respected the Webb-Pomerene exemptions, even if many believe them to be unworkable. The only people who need fear (and, I submit, who have ever feared) the Antitrust Division are those who would *explicitly* (if covertly) use Webb Act functions as an occasion to agree to fix prices and set quotas in the domestic trade. Angels do not fear to tread where a heaven is made for the unholy. It is not fear that has kept people away from Webb Act associations, but the fact that they don't find them helpful.

CONCLUSION

I have picked on Senator Danforth's bill because it is the most serious, recent and erroneous reaction to unfavorable foreign trade events. While it is hard to imagine that the Congress will pass the measure or the President would sign it (even though the Commerce Department cartel advocates speak to us as if they have the ear of the President), the bill at best sets our sights away from where they should be. It is frightening that very sound men can be so misled.

"Let us not for the sake of some minor hoped-for export trade advantage bring in certain major foreign trade and domestic market disadvantages."

Because the evidence is so overwhelming, I am emboldened to suggest what is needed. Let us reaffirm our belief in competition by private enterprise. Let's do away with the inherent unfairness of price-fixing; it is an instrument for oppressing all of us and fosters "greed" to our detriment. Let's speak no more about encouraging cartels. If anything, we should be looking to get rid of them. If there be any truth to the need for limited export associations, let the burden shift to those who would seek an exception to antitrust laws to prove they are not anticompetitive. Let us not for the sake of some minor hoped-for export trade advantage bring in certain major foreign trade and domestic market disadvantages. In any event, let us, first, undertake the study the President's Commission urged—before legislating. It makes no sense to put a truck in high gear and our foot on the pedal until we know whether the grade around the curve is steep.

Let us not be beguiled, misled or scared out of our common senses. ■

Statement
of
Mr. Jack Valenti
President

Motion Picture Export Association of America

I appreciate this opportunity to share with you my views on S. 144, the Export Trading Company Act of 1981.

The issues before you in the consideration of this legislation are of immense importance because the great economic priority of the 1980s will be the capacity of the United States to rise to the challenge of both productivity and export trade. The war for export trade will be waged without pause by a growing number of nations in all parts of this shrunken planet. That is why I am pleased that Title II of S. 144 - - which passed the Senate unanimously in a similar bill last year - - again sets forth the worth and value of Webb-Pomerene associations in this nation's reach for larger shares of world markets.

The Motion Picture Export Association of America (MPEAA) was formed under the Webb-Pomerene Act some thirty-five years ago to promote the export of American films, and to fight the barriers and restrictions which continuously threaten to choke off access to foreign markets. The cooperative action made possible through MPEAA is to a large extent responsible for the remarkable preservation and expansion of American film and television markets abroad.

As president of the MPEAA, I have been a personal witness to the often hostile environment of extensive foreign government cartels, quotas and intervention. Without the embrace of Webb-Pomerene, the United States film and television

industry would have been seriously, perhaps fatally crippled in its efforts to win the patronage of foreign audiences for the creative programming which licenses film to almost 120 nations beyond the rim of our shores.

MPEAA markets American films and television programs throughout the world in a political climate and social atmosphere which is fragile, and in many areas, bracketed and armored against our marketing movements. We continually face a panoply of obstructions and restrictions designed to shrink the American share of the cinema and television world market: import quotas, distribution quotas, screen quotas, printing and dubbing restrictions, special import charges, and the like.

We also face, in some countries, exhibitor monopolies or combinations, where theaters are municipally or government-owned or otherwise bound together in a tightly controlled entity, sealed against intrusion. Then there are government monopolies of the film arena. Eastern Europe is an obvious example of that barrier. And there is the tendency in third-world countries for the government to single out the motion picture industry and organize a monopoly to control all distribution of films. Finally, in the television area, the normal situation is a monopoly buyer, usually a government agency. Under the Webb-Pomerene Act, the MPEAA has been able

to construct trading arrangements, not always as good as we would like, but workable.

I could catalogue other trade barriers: ad valorem duties, arbitrary income taxes, discriminatory admission taxes, special dubbing fees, release taxes, and forced accumulation of blocked funds. The list is long and relentless. The crucial point is that without Webb-Pomerene, the American film industry would be an invalid, and we would not be able, as we are now to return to the United States about \$800 million in surplus balance of trade.

In the fall of 1979, when an extensive review of export trade associations was undertaken by a Presidential Commission and studied in detail by an Advisory Panel of business leaders, I presented my views on the need for export trade associations and pointed out the benefits to MPEAA's members and suggested that these benefits should be available generally to more exporters. As this Committee may recall, the Business Advisory Panel and the Presidential Commission adopted this recommendation and it is embodied in S. 144.

Because the Webb-Pomerene Act, and the limited anti-trust immunity which it provides, have been a vital element in American film exports, I have been outspoken in favor of strengthening its protection and extending its benefits to other American exporters, including service industries.

S. 144 is designed to accomplish all of the objectives which I have mentioned, and the MPEAA supports this legislation and its underlying philosophy. We urge favorable consideration of the Webb-Pomerene provisions of this bill and their passage by the Senate.

Independent Insurance Agents of America

INCORPORATED



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Lawrence R. Herman
Director of Congressional Relations

March 9, 1981

Senator Jake Garn
Chairman, Senate Banking Committee
Room 5300 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Garn:

Our association would like to raise serious objection to certain provisions of the Export Trading Company Act, S 144, now before the Senate Banking Committee.

In general, the Export Trading Company Act's stated purpose represents a dramatic policy shift from the more than 100 year separation of banking and commerce — a separation that this association, in connection with other legislation now before this committee, has fought hard to retain.

The encouragement and facilitation of bank participation in and ownership of export trading companies is bound to have adverse implications for many small businesses not privileged to have access to banks' capital, credit, financial records, and expertise. Moreover, any advantages to export trading company clients that may derive from a bank's ability to engage in a full range of export services through an export trading company may be more than offset by non-competitive tie-ins of these services to credit.

Specifically, language contained in Sections 103 (a) 3 and 4 of the Act virtually ensures adverse impact on a now thriving and highly competitive non-affiliated export insurance market, and on potential export trading company clients.

That section includes within the definition of collateral services to be provided by export trading companies the term "insurance." Since not qualified in any way, the term could be interpreted to include insurance sales, services, or underwriting, for domestic or international coverages, within the context of onshore or offshore insurance operations.

Additionally, the proposed bill contains no language that would protect export trading company clients from direct or implied tie-ins of insurance sales to the credit and managerial services the companies will be offering.

Moreover, it is unclear from the Act, or from any previous committee record, whether all of the permissible insurance services are to be subject to the traditional state regulatory apparatus established by the McCarran-

Ferguson Act. Specifically, it is unclear whether, if included within the definition of insurance, offshore export insurance-captives are intended to be subject to state regulation, or will be able to escape the rigors of state oversight and enforcement.

Export trade insurance services are available today from many sources at competitive prices. Introduction of additional sources, of undefined scope, unfairly advantaged by access to capital, credit, and managerial services, would seem at best unnecessary and at worst extremely harmful to existing markets and potential clients.

IIAA would propose as a remedy the deletion of the word "insurance" from sections 103 (a) 3 and 4. Additionally, the committee's report should make explicit the committee's awareness of the dramatic shift in heretofore traditional public policy that enactment of S. 144 would engender, including possible adverse effects on businesses now associated with export trading, but denied access to the competitive advantages export trading companies will enjoy should this bill become law.

Sincerely,



Robert Reynolds, CPCU
President, IIAA

STATEMENT OF WILLIAM M. POOLE, PRESIDENT,
GEORGIA INTERNATIONAL TRADE ASSOCIATION
IN FAVOR OF S.144:
PROMOTING THE FORMATION OF
EXPORT TRADING COMPANIES

The Georgia International Trade Association ("GITA"), a twenty-eight-year-old association of over two hundred members involved in international trade, welcomes this opportunity to lend its support to S.144, a bill intended to facilitate the formation and operation of Export Trading Companies ("ETC's") and Export Trade Associations ("ETA's"). The GITA believes that the creation of ETC's and ETA's is a significant step which will facilitate increased export activity by Georgia industries which are already involved in international trade and will encourage those Georgia companies that are not engaged now in international trade to enter the export field. The GITA supports the concept of the ETC as a way of: (1) reducing the financial risks of exporting by arranging purchase and resale of goods by the ETC in overseas commerce; (2) pooling the financial resources of potential exporters so that they can obtain the best advice available on export matters; and (3) achieving desirable economies of scale in the overseas marketing of U.S. goods and services.

Many Georgia companies could compete successfully with foreign firms in the export market, but they have chosen not to do so because of the obstacles which they face. On its own, how can one small or even medium-sized firm identify foreign markets, arrange reliable delivery schedules, conduct negotiations involving foreign currencies and methods of payment, and obtain sound legal advice concerning applicable U.S. and foreign laws? It cannot. But the GITA believes that an ETC will give these potential exporters the assistance necessary to guide them through the unfamiliar and complicated procedures associated with export trade.

The GITA also supports the clarification of the antitrust laws included in title II of S.144. The GITA believes that the U.S. antitrust laws, as currently implemented, have had an inhibiting effect on U.S. exports, whether intended or not. By setting forth the specific eligibility standards for an ETA's antitrust exemption, the Justice Department, the Federal Trade Commission, and now the Department of Commerce can more effectively enforce the antitrust laws when necessary. The provision of a certificate of limited antitrust exemption will give business an indispensable certainty previously denied--so long as the certification process is expeditious and does not become a new hurdle.

In addition to the proposed S.144, the GITA expresses its support for Congressional efforts to deal with other export disincentives. These disincentives include limitations on DISC tax deferral benefits, which the GITA believes should be extended to ETC's; excessive taxation of U.S. employees who live and work abroad; certain unreasonable provisions of the Foreign Corrupt Practices Act; and export controls which have been dictated by U.S. foreign policy.

Finally, the GITA encourages all efforts of Congress and the Administration to restore the nation's economic health. We remain confident that United States ingenuity and determination, diligently applied to the challenge of improving our balance of trade through increased exporting of United States products, will allow us to regain our pre-eminent position in world trade and commerce.

THE SECRETARY OF COMMERCE,
Washington, D.C., March 11, 1981.

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

DEAR SENATOR HEINZ: As you prepare for Committee markup of S. 144, I repeat how pleased I was to testify before the International Finance Subcommittee on the export trading companies bill last month. As I indicated then, the Administration feels strongly that the need for this legislation has been well demonstrated.

The legislation is important because it addresses the problem we have had in encouraging medium- and small-sized U.S. manufacturing companies to export. We need to be sure that this large segment of American industry which is highly productive and competitive makes use of its strength and is not unduly restrained from entering the export market. This legislation will foster a fundamental improvement in export performance.

S. 144 responds to our export problems and remains responsive to other important policy considerations. The banking provisions in the bill provide incentives to mobilize the skills and resources of banking institutions yet, through careful regulation, they respect the safety and soundness of the banking system. Similarly, the Webb-Pomerene revisions in the bill grant a degree of certainty to exporters without altering or impairing the fundamental antitrust laws which are necessary for our domestic economy.

While the Administration sympathizes with the goal of providing some direct financial backing for trading companies, we cannot advocate such a course in light of overall budget priorities.

I thank you and members of the Committee for your prompt consideration of this legislation.

Sincerely,

MALCOLM BALDRIGE,
Secretary of Commerce.

SENATE COMMITTEE ON BANKING,
HOUSING AND URBAN AFFAIRS

SUBCOMMITTEE ON INTERNATIONAL FINANCE
HEARINGS ON
EXPORT TRADING COMPANY ACT OF 1981

STATEMENT OF
NATIONAL ASSOCIATION OF EXPORT COMPANIES, INC.
200 Madison Avenue
New York, N.Y. 10016

I. Introduction

This written statement is being submitted by the National Association of Export Companies (NEXCO), the principal national association of United States companies engaged in exporting and facilitating the exportation of goods and services produced in the U.S. NEXCO members consist of export management and export trading companies that fall within the definition of export trading companies (ETCs) in Section 103 of the proposed Export Trading Company Act of 1981.

The Association is disappointed that a representative of NEXCO was not given an opportunity to testify in person at the recent hearings of the Senate Banking Subcommittee on International Finance on export trading company legislation (S.144). Instead, we can only hope that these written comments on the legislation will prove adequate to

give the members of the Senate Banking Committee an accurate picture of the existing export trading company industry and the dramatic effect S.144 is likely to have on it.

NEXCO supports the general thrust of the Export Trading Company Act in recognizing the invaluable role that ETCs play in promoting the sale of U.S. goods and services overseas. We endorse the statutory mandate directing the Secretary of Commerce to encourage the development of export trading companies.

Moreover, NEXCO welcomes steps that would foster a partnership between banking organizations and ETCs in order to facilitate the marketing and financing of U.S. goods and services abroad.

We heartily embrace measures that will attract financial support to our industry and permit ETCs to have access to the widest possible group of banks. This is the only way to ensure the safe and healthy growth of ETC-backed exports in the U.S.

In this regard, NEXCO supports the legislative concept embodied in S.144 of granting banking organizations authority to make equity investments in ETCs. However, we cannot endorse those provisions of the legislation that would permit banks to own and fully control export trading companies. We are convinced that outright ownership by banks would disrupt our industry without the prospect for meaningful improvement in U.S. export performance any time soon. Outright control would force ETCs to become "captive borrowers" of their owners and limit the spectrum of potential lenders to ETCs. Moreover,

outright control by banks would represent a major commercial experiment and a dismantling of the 1933 Banking Act that Congress should approach gradually and only with extreme caution.

NEXCO recommends, instead, an alternative approach to the question of bank ownership of ETCs in line with the suggestions of the Federal Reserve Board. We believe banks should be permitted to take an equity position in ETCs, but a non-controlling position of less than 20 percent ownership. Furthermore, such investment might best be exercised through bank holding companies or Edge Act corporations in order to reduce potential conflict of interest problems that could well arise as banks try to meet the non-discriminatory loan-term requirements of S.144.

NEXCO urges Congress, while considering the Export Trading Company Act, to study the need for the removal of disincentives for ETCs and the desirability of constructive incentives. For instance, Congress should permit ETCs to charge fees for ocean freight brokerage, fees which are denied them under the regulations of the Federal Maritime Commission. Brokerage fees would enable U.S. ETCs to compete on an equal basis with foreign ETCs that are permitted to profit from such brokerage. Moreover, Congress should examine the need for tax incentives for ETCs, extending Domestic International Sales Corporation benefits for smaller exporting firms.

II. Export Trading Companies Are Already
A Vital Factor in Promoting U.S. Exports

The best estimates for the performance of export trading companies indicate that ETCs accounted for \$17 billion to \$22 billion in exports of manufactured products in 1980. In other words, exports by ETCs represented approximately 8-10 percent of the total \$217 billion in U.S. exports last year. If the approximately \$25 billion in 1980 agricultural commodity exports sold by U.S. grain trading companies are added in, the share of exports handled by all ETCs approaches 22 percent of U.S. exports.

We calculate there are some 1,000 export trading companies in the United States serving close to 10,000 manufacturing and service companies in selling their products overseas. Although ETCs serve the export needs of major U.S. corporations, particularly divisions of major companies whose products cannot easily be handled by the primary exporting arm of the parent company, the bulk of the U.S. companies that rely on ETCs are small and medium sized concerns. On balance, these smaller enterprises range in size from \$500,000 to \$200 million in annual sales and depend on the marketing expertise and related services of ETCs to facilitate their competition in foreign markets.

Export trading companies serve American manufacturers ranging from companies that ship 10 percent of their production abroad to companies that derive more than a half of their sales revenues from exports. Although some of these

companies are able over time to increase their export volume sufficiently to justify their joining the ranks of U.S. corporations that export independently, many of them must rely on continued support from ETCs in order to export effectively. Occasionally, companies have terminated their use of ETCs and struck out on their own in foreign markets, only to return to using ETCs when their own export efforts proved inadequate. More often, however, companies turn to ETCs after an initial disappointment in the marketplace overseas.

The essence of an effective export trading company operation involves service to a cluster of firms sharing compatible product lines. A synergy occurs when large and small companies' products are marketed by a single export trading company. The ETC is able to provide a panoply of foreign contacts and export services that would not be available to an individual manufacturer or for manufacturers in widely disparate product areas. In a sense, the ETC creates a critical mass which varies depending on particular circumstances and this mass enables ETCs to provide the economies of scale that individual small exporters do not enjoy.

This synergy is the product of a fairly delicate balance among the suppliers of an ETC and can be destroyed easily should the cluster of an ETC's exporters be disturbed. Export trading companies have increasingly recognized the importance of the cluster effect and have concentrated their efforts to increase the benefits derived from grouping product lines in a unified sales and marketing strategy.

This synergy has played an important part as NEXCO member companies have achieved a seven-fold rate of growth during the past decade. We estimate that similar increases have been attained throughout the industry. In comparison to this 700 percent increase in export trading company business, U.S. exports of manufactured products have expanded only 403 percent, from \$29 billion in 1970 to \$117 billion last year, while total U.S. exports increased only 329 percent from \$66 billion to \$217 billion. Rather than stagnating, ETCs have been a growth industry and the \$17 billion to \$22 billion estimated exports that we generated last year supported approximately 680,000 to 880,000 American jobs, based on the Commerce Department's projection that every \$1 billion in exports creates 40,000 jobs.

Plainly, the ETC industry is a healthy and rapidly expanding industry that contributes in considerable measure to the promotion of U.S. exports. We want to enlarge our contribution to the export potential of the United States and believe that more active support from the Commerce Department and banking organizations will be helpful. Nonetheless, the U.S. should not permit this vital industry to be jeopardized by legislative proposals that would greatly alter the ownership of ETCs without any accompanying assurances that such changes will work for the good of the industry rather than merely disrupt it.

III. NEXCO Is Concerned The U.S.
May Place Too Much Trust In
A Legislative Cure For Its
Balance Of Payments Problems

Congress and the Executive Branch have properly expressed great concern that the United States has accumulated a balance of merchandise trade deficit of nearly \$100 billion during the past three years. Nonetheless, this concern must be tempered by a recognition of the full spectrum of trends and factors that determine the state of the U.S. balance of payments. Dismay over the failure of U.S. exports to produce a balance of payments surplus must take into consideration the dramatic surge in our imported oil bill to \$80 billion in 1980 and the fact that the U.S. balance of current account -- which includes the merchandise trade account -- was \$5 billion in the black last year and is expected to grow into a \$15 billion surplus in 1981.

Export trading companies, while not an inconsequential factor in U.S. export performance, share the spotlight with other, more pervasive influences. The decline in U.S. productivity rates, the obduracy of U.S. inflation and fluctuations in the business cycle all play a greater role in determining the competitiveness of U.S. exports in foreign markets in terms of price, technological superiority and availability. In addition, government policies and regulations can often act as deterrents to American exports. Familiar examples of such export disincentives are U.S. antitrust laws, East-West trade controls, the extraterritoriality of U.S. environmental

statutes, anti-boycott laws, the uncertainties contained in the Foreign Corrupt Practices Act and certain cargo preference laws. These deterrents to exports affect ETCs as well as the entire U.S. business community.

Export trading companies cannot be expected to compensate for an unhealthy U.S. economy, nor negate the impact of overregulation of U.S. exporters.

Some will doubtless point out that export trading companies are only one aspect of U.S. promotion and that Congress and the Executive Branch are considering a variety of proposals to enhance U.S. export sales. Nonetheless, we are concerned that the U.S. may be placing too much trust in a legislative cure for the U.S. balance of payments trade deficit by seeking to inject bank ownership into the export trading company industry. We welcome greater participation by banks in the export activities of ETCs but question the desirability of extending such participation to include outright ownership and control of ETCs. We suspect that pressure for legislation such as Title I of S.144 would be a great deal less intense, and perhaps minimal, if the bill were being considered in the wake of other legislation to increase U.S. export performance rather than in the vanguard.

Our concerns that S.144 may be a symptom of overly great expectations among those who hope to increase U.S. exports is also based on the rhetoric of the bill's proponents. For instance, the Commerce Department has long heralded the prospect that there are at least 20,000 American companies

waiting to export, companies that will do so once export trading companies take an interest in them. This vision appears to ignore the inherent mechanics of the U.S. open market system which has historically been a remarkable vehicle for matching untapped demand with profit-minded suppliers. The Commerce Department estimate assumes that these 20,000 latent exporters can be harnessed merely by permitting banks to own ETCs.

In fact, NEXCO members, and many other ETCs, participate on a regular basis in "match making" conferences sponsored by the Department designed to bring potential exporters together with ETCs. Unfortunately, the results have often been disappointing to the ETCs as well as the manufacturers involved. The mere fact that a U.S. company produces a good or service does not necessarily mean that the company can compete overseas. The products must compete with many similar products from the U.S. and other exporting countries. The price, technology and availability must be comparable, if not superior, in order to penetrate foreign markets. Often U.S. companies are unable or unwilling to tailor their products to suit the foreign market. As export markets become increasingly important to U.S. companies, many of these problems will doubtless be resolved. However, the solution will not turn on the issue of ownership of ETCs.

Other proponents of bank ownership of ETCs paint enticing pictures of American trading companies patterned after trading enterprises operating in Japan and western

Europe. However, when they contrast the magnitude of the export sales of the leading Japanese export trading companies -- expressed often in the tens of billions of dollars annually -- these advocates fail to mention the vastly different social, political and economic structures of the United States and Japan. The bulk of Japanese exports are channelled through export trading companies, even the exports of the largest Japanese industrial corporations. Major U.S. corporations prefer to export their products themselves. Although this fundamental difference is understood by most people familiar with export trading companies, the vision of globe-straddling U.S. export trading companies patterned after Mitsubishi or Mitsui continues to beguile advocates of bank ownership of ETCs. We heartily endorse the need for greater U.S. support for ETCs and better financial arrangements; however, we are highly skeptical that outright bank control is the answer.

IV. Bank Control Of ETCs Will Disrupt
The Industry In Spite Of Legis-
lative Safeguards

The Federal Reserve Board and Federal Deposit Insurance Corporation have expressed deep concern over bank controlling ownership of export trading companies and have recommended that banking organizations be authorized to make only equity investments in ETCs of less than 20 percent of outstanding shares. The agencies base their concern on such bank-related issues as risk exposure, diversion of limited bank capital resources from critical capital formation functions and philosophical objections to a breach in the protections afforded by the Glass-Steagall and Bank Holding Company Acts.

However valid these concerns may be, they lie outside our areas of expertise. NEXCO is disturbed by the disruptive impact bank ownership would predictably have on our industry.

Our concerns over bank control of ETCs are three-fold: (1) the prospect that bank ownership will create widespread uncertainty and disrupt the existing industry; (2) banks have no special capability to manage ETCs and export; and (3) the legislative safeguards in S.144 will be unenforceable in large measure.

Bank Ownership Will Create
Uncertainty And Disruption

The Export Trading Company Act would allow banking organizations to invest as much as five percent of their capital and surplus in equity ownership of ETCs. Witnesses have stated before the Committee that the most likely candidates for such investment are the approximately 200 largest U.S. banks with previous extensive experience in international banking activities.

Unfortunately, limitations such as these have no meaning in fact. According to Fortune magazine, the 50 largest commercial banking companies in 1979 recorded a total of \$35.2 billion in shareholders' equity in terms of capital stock, surplus and retained earnings. Based on the five-percent cap in S.144, these banks would be permitted to invest as much as \$1.8 billion directly or indirectly in ETCs. Citicorp alone, with a shareholders' equity of \$3.6 billion, would be able to invest \$180 million in ETCs. Investments of these magnitudes might be appropriate to enable the banks to buy out

the larger Japanese trading companies; they will surely overwhelm the entire U.S. ETC industry. Citicorp might elect to purchase half a dozen of the larger American firms or dozens of smaller specialized enterprises. Collectively, the top 50 banks could buy out every U.S. ETC. It is academic to speculate about regional and smaller banks owning shares of ETCs because there would be no industry left to own after the big banks had made their selections.

As banking organizations begin to purchase control of ETCs, the industry will inevitably be paralyzed by uncertainty. In spite of legislative precautions barring the use of a bank's name with respect to a bank-affiliated ETC, manufacturers will learn very soon which ETCs are owned by which banks. Moreover, these companies will be under severe pressure or temptation to terminate their relationships with non-bank ETCs or will postpone any decision to commence a relationship until they know whether or not the ETC will become affiliated with a bank. As a result, many existing ETCs will lose suppliers while a majority will be unable to establish new supplier relationships until the uncertainty of bank ownership is resolved.

Once banks decide to buy ETCs or establish their own, the need to get off the ground quickly, before their banking competition does, will dictate that banks will seek out and attract the largest and most attractive exporting manufacturers of existing ETCs. The banks will want to have the largest suppliers, if not simply because the banks are

used to dealing with large commercial enterprises, because they will need to acquire a core of substantial exporters to prop up their new ETCs.

The results of this banking intrusion into the ETC industry will be highly disruptive and not constructive. First, bank ownership will involve a significant shuffling of the deck as companies shift relationships from one ETC to another, largely away from non-bank ETCs and toward bank-affiliated ETCs. Second, at the start at least, this shuffling will in no way increase the size of the deck. Firms may well realign their relationships with ETCs, but this will not entail growth in exports nor the absorption of new exporters.

In fact, the redistribution of exporting manufacturers is likely to cause a diminishment of U.S. export activity through ETCs for an extensive period of time. The reason for this can be traced back to our description of a synergy that ETCs create in behalf of their suppliers when several companies, whose product lines are compatible with one another, are clustered together under the unified marketing strategy of an ETC. We are convinced that important economies of scale and market penetration would be lost if the larger manufacturers were attracted away from existing ETCs to bank-owned firms. Inevitably, the biggest losers would be those smaller suppliers that are most dependent on the synergy created for their products by ETCs. These smaller firms would either have to accommodate themselves, if they could, to the marketing strategies

of bank-affiliated ETCs or stop exporting.

In the early years, at a minimum, bank control of ETCs would likely involve a decline in the number of U.S. companies that export their goods and services, not the increase proponents of S.144 intend. The falloff would be most dramatic among smaller firms while larger suppliers shifted to bank-owned ETCs. Should a majority of the largest suppliers concentrate around bank ETCs, the decline in small exporters might well become permanent -- a perversion of the objectives of S.144.

Banks Have No Expertise
To Market Exports

Banking and exporting are two different businesses. To be sure, financing is an important adjunct to exporting, indeed an essential aspect of exporting. Nonetheless, bank financing is an ancillary step in the process of selling goods and services in foreign markets. Banking and exporting activities are not synonymous nor is marketing an adjunct to banking.

The Export Trading Company Act, in authorizing bank control ownership of ETCs would vitiate this relationship and, in doing so, place bankers in a position of management of exporting firms without the knowledge or competence to succeed. Realizing this fact, banks will doubtless buy the necessary expertise from existing ETCs or buy the firms intact. We cannot make this point too strongly. The backbone of every ETC is its expertise in exporting, expertise which resides in the trained personnel who work for and operate ETCs. This expertise takes years to develop through careful training and

experience. It cannot be replaced easily and must be nurtured. We would be deeply disturbed at the prospect of a sudden wave of bank sponsored raids on our trained export personnel. Moreover, it is NEXCO's strong belief that this entire process need not occur.

S.144 contemplates bank control of ETCs where participation by means of a limited equity investment would suffice. Export trading companies are a highly entrepreneurial breed of commercial activity which has thrived and will continue to thrive on incentives to export. These firms can best serve as a vehicle for expanded U.S. exports, independently of bank ownership. All that is required is a sound partnership between ETCs and banking organizations to provide the financial fillip that ETCs need to compete effectively in foreign markets.

Finance is an important aspect of many industries. And, by their nature, national banks enjoy enormous financial resources. Does that mean, then, that banks should be permitted to control the businesses to which they lend money? Should all small and medium sized establishments become the province of the large banking organizations? The answers, we suspect, will be, no. Nonetheless, S.144 singles out export trading companies as an exception to the rule, presumably because exports are important to the economic welfare of the United States. Exports are, indeed, important. As we have discussed earlier in this statement, however, the success of U.S. export performance relies on a great many factors, many of which dwarf export trading companies in importance. We

endorse efforts to encourage ETCs and have done so for many years preceding the introduction of the Export Trading Company Act. We doubt the wisdom of adopting the extreme solution of authorizing bank control of ETCs when a partnership would be as effective a means of fostering the growth of exports. Bank financing is an important, but nonetheless, subordinate facet of export trade.

Any objective observer of the legislation before the Committee must wonder what the motives of the banks may be in seeking authority for full ownership of ETCs and rejecting partial ownership. In opposing 20 percent ownership of ETCs, banks raise the question of why they are interested in ETC ownership at all. If a minority ownership position fails to make good economic sense, then full ownership might actually be worse. Perhaps, though, banks have a grander design in mind in seeking to enter the field of exporting.

The Nondiscrimination
Safeguards Of S.144 Are
Unenforceable

NEXCO is concerned that the drafters of S.144 have assumed the problems inherent in bank control of ETCs can be disguised or corrected by Federal bank agency regulation. Many of the restricting provisions in Title I -- setting investment and loan ceilings, for instance -- are not restrictions at all, as we observed above, or are largely unenforceable. Nonetheless, the legislation would place responsibility for enforcement in the laps of the Federal Reserve Board and other agencies without setting standards that adequately counterbalance the troubles that bank control of ETCs will surely bring.

In particular, we are convinced the courts and bank regulatory agencies will be unable to enforce the provisions in Section 105(c) (4) of S.144 designed to prevent banking organizations that own ETCs from extending credit to an ETC or customer of an ETC "on terms more favorable than those afforded similar borrowers in similar circumstances..." In the first place, the language does not appear to embrace instances when a bank denies credit to an unaffiliated ETC or ETC customer, even though it has extended credit to its affiliated ETC. A loan turndown has no terms, favorable or unfavorable.

Moreover, it would require a comprehensive Federal monitoring and audit program to attempt to police credit granting to ETCs. This, in turn, would demand a specific office for ETC affairs at the Federal Reserve and other agencies, staffed by persons knowledgeable of the exporting industry. The agencies would have to establish a procedure by which persons could file complaints and receive a fair hearing with regard to the lending practices of bank-ETCs. In the end, however, even the largest agency staff would have trouble policing lending practices which are inherently vulnerable to subjective decision-making even when potential conflicts of interest are not involved. However, potential conflicts of interest are very much present whenever a bank must determine whether to allocate limited credit funds to its own affiliate or a competitor.

Common sense would dictate that the Federal Reserve Board is correct in stating that an arms-length relationship between banks and ETCs can best be maintained if banks are limited to owning less than 20 percent of ETCs.

The banks argue that they must enjoy full ownership of ETCs in order to exercise management control over inherently risky export activities and that control is necessary in order to guard against unsound financial policies. We believe these arguments are flimsy because banks, as major shareholders in ETCs would invariably enjoy a strong position of influence over those companies' export and financial policies. ETCs would be in no position to disregard the views of their bank investors as they would depend in large measure on bank support for their growing export business. Moreover, banks would be able to exercise virtually the same degree of control over ETC policies, whether they own 20 percent or 100 percent of the firm. Control can exist only when banks take an active interest in ETCs, not because they own 100 percent of the shares.

V. Bank Participation Is
Preferable To Bank
Control of ETCs

The United States cannot hope to duplicate the huge Japanese and European trading companies unless this country is prepared to alter its basic economic, social and legal infrastructure. Nor is there any need to create an alien system in order to export more effectively.

As we have pointed out above, Japanese export trading companies -- the frequent role model used in Washington -- account for the vast majority of Japanese export sales. In the United States, the majority of exports are made by U.S. producers themselves. In many respects, the Japanese model is an erroneous one for the U.S. to use.

However, in one essential respect, the Japanese model is thoroughly appropriate. Japanese export trading companies are an efficient partnership between banks and the trading companies themselves. Table 1 shows that the 11 largest Japanese ETCs are not controlled by a single bank, nor even a group of banks. Rather, Japanese ETCs are partners with groups of banks which own collectively a minority position in ETCs ranging from 10.3 percent for Toyota Motor Sales to 36.8 percent for Kanematshu-Gosho. The average bank share in each trading company approximates 5 percent per bank.

TABLE ONE

Major Shareholders of the Largest
Japanese Trading Companies

Firm Name	Dai-ichi Kangyo Bank		Sumitomo Bank		Tokio M.&F. Ins.		Bank of Tokyo		Asahi M.&F. Ins.		Fuji Bank		Taiyoko Bank		Mitsui Bank		Taisho M.&F. Ins.		Daiwa Bank		Tokai Bank		Nippon Life Ins.		Others		Total
	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	Bank	Ins.	
Mitsubishi Corp.		6.2		4.2																							6.5
Mitsui & Co.				4.0																							5.0
C. Itch & Co.	6.8		5.3	4.0	3.6	3.3					4.7				6.0		3.2						2.4				4.0
Marubeni Corp.			3.5																				3.6				3.7
Sumitomo Corp.			6.1		3.6						6.5	4.5															24.0
Nissho Iwai Corp.	6.7			3.9	3.5																						19.8
Toyota Motor Sales			2.5			.4																					5.3
Toyoy Menka															2.6												4.5
Kanematsu-Gosho				9.2	10.0								8.8		4.1		5.2										3.2
Nichimen				4.5	6.4																						28.5
Daiei			3.8																								10.3
																											20.5
																											4.4
																											36.8
																											23.1
																											3.4
																											14.8

Source: Onar Sawaf, Harvard Business School
Data for 1977-1978

This aspect of the Japanese model was critically important in encouraging the development of Japanese ETCs and would be particularly helpful in promoting U.S. exports. While bank control ownership would tend to make the ETC a captive borrower, minority participation would encourage ETCs to attract a diversity of credit and financial support from the widest possible spectrum of banking institutions. Of course, the issue is not whether bank participation should involve a single bank or a group of banks. It is that a partnership must develop that both preserves the entrepreneurial vitality of the ETC and encourages bank financing to promote U.S. exports.

In our judgment, the best way to engender such a partnership is enactment of statutory authority for banking organizations to purchase equity holdings in ETCs but limiting bank ownership interest to less than 20 percent of the voting stock in an ETC.

Perhaps such ownership should be further circumscribed by restricting such investment to bank holding companies and Edge Act corporations. This would facilitate the maintenance of a "Chinese wall" between bank lending functions and bank exporting activities -- necessary to avoid violations of the nondiscriminatory lending structures of Section 105(c) (4) of S.144. This would also discourage a captive relationship between bank and ETC and encourage the kind of broad relationship with the banking community so necessary for a truly substantial growth in U.S. export performance.

These recommendations are in concert with a gradual approach to permitting bank ownership in ETCs. By the banks'

own admission, bank control of ETCs is experimental. No one knows what directions bank investment will follow. A 20-percent ceiling would allow banks to immerse themselves in the industry without disrupting it. After a 5-10 year test period, Congress might want to hold oversight hearings to evaluate bank participation and the performance of ETCs. Congress can always raise or abolish the investment ceiling if necessary. On the other hand, if banks are permitted immediately to control ETCs and that venture proves harmful, it would be extremely difficult, if not impossible, to extricate banks from the ETC industry.

In summary, bank participation, rather than control, would be best suited to meet the goals of the Export Trading Company Act: to foster a substantial increase in the number of small and medium sized firms selling their goods and services in foreign markets.

VI. Congress Should Remove
Disincentives To Export
Trading Companies And
Encourage ETC Export
Activities

S.144, as written, affords no practical incentives to export trading companies to enhance their export marketing and export facilitating efforts. Although Section 104 exhorts the Secretary of Commerce to "promote and encourage the formation and operation of export trading companies," it does little more. The Administration has testified in opposition to provisions in Sections 106 and 107 that would channel

Export-Import Bank loan guarantees and Economic Development Administration benefits to the export-related activities of ETCs.

Credit Insurance

In many instances, ETCs make or lose sales depending on their ability to offer terms of credit to foreign buyers. Unfortunately, the relatively low net worth of most U.S. ETCs limits their access to credit from U.S. banks, virtually without regard to the creditworthiness of the foreign purchaser.

NEXCO believes that the greatest share of this problem would be solved as banks join with ETCs in a partnership based on a minority equity investment. However, in some cases, bank investment may be an inadequate solution, especially where the magnitude of the proposed sale is great. Moreover, bank investment will be no cure for those ETCs in which banks do not participate. In order to cover major export sales and help prevent discrimination against non-bank ETCs, we recommend that the credit needs of ETCs be supported through broad guarantee insurance similar to the insurance available from the Foreign Credit Insurance Association (FCIA). Such a master insurance policy would cover both pre-shipment and post-shipment risks, and would provide the certainty needed by banks to offer credit to ETCs beyond the one-to-three times net worth normally available. Banks would be willing to offer broader credit knowing the insurance coverage were backed by the credit of the U.S. government and insurance.

Freight Brokerage

NEXCO recommends that ETCs be allowed to earn brokerage fees on the shipment of merchandise abroad. The current rules of the Federal Maritime Commission prevent parties having a beneficial interest in a product from being licensed to obtain brokerage fees on the shipment of goods. As most ETCs take title to the products they export, they are denied the right to profit from freight brokerage.

Nonetheless, ETCs perform many, if not most, of the functions of freight brokers in an effort to provide their suppliers with an integrated export service. Existing FMC rules, thus, force ETCs to absorb the costs of their freight forwarding services and, at the same time, deny them the right to compete with foreign ETCs that enjoy profits from freight brokerage. As a result, our foreign counterparts are in a position to lower the selling price of their products abroad, take away potential sales from American ETCs, and still make a handsome profit off of the brokerage fees. The right to earn fees from brokerage services has been a major positive factor in the growth of Japanese and European ETCs. It would be of equal help to U.S. trading companies in their growth.

Congress should remove this disincentive to export.

DISC Benefits

We urge that DISC benefits be expanded as an incentive to export. The existing 50-percent "deemed distribution" of DISC earnings should be graduated. Instead of the current

\$100,000 exemption which has been eroded by inflation, there should be no "deemed distribution" on gross export sales volume of \$1 million or less. Between \$1 million and \$50 million there would be a graduated scale of "deemed distribution", until the full 50-percent level is attained.

We urge Congress to reconsider its decision to limit DISC benefits to incremental export earnings. That amendment has had the effect of greatly reducing the value of the DISC provision and its revision or appeal would be a substantial assistance in encouraging export growth.

VII. Conclusion

NEXCO welcomes a fresh look at export trading companies by Congress and supports measures to improve their export performance. We are proud of the seven-fold growth in our members' export sales in the past decade, a growth that has exceeded the increases in overall U.S. export performance during that time. Nonetheless, we can do better and we want to do better.

S.144 is helpful in several ways. It directs the Secretary of Commerce to encourage ETCs and beefs up Eximbank, EDA and Small Business Administration credit and credit guarantees for exports. Moreover, it provides for greater bank participation in ETCs. We support these provisions of Title I.

We are unable to back the provisions in Title I that authorize bank control of ETCs because we are convinced outright ownership by banking organizations will:

- (1) Consolidate exports in a few bank-affiliated ETCs.
- (2) Injure existing ETCs whose larger suppliers will likely be absorbed by bank ETCs and whose smaller suppliers will be forced out of the export marketplace.
- (3) Accordingly, reduce for a considerable time the number of exporting manufacturers.
- (4) Force Federal bank regulators to establish a sizable ETC office to monitor and police unenforceable rules.

Instead, NEXCO recommends that banks be allowed to own up to 20 percent of ETCs, preferably through bank holding companies or Edge Act corporations. Moreover, ETCs should be encouraged through removal of such disincentives as the ban of freight brokerage fees in Federal Maritime Commission rules and enactment of incentives through DISC.

We endorse S.144, with these recommended changes, because the legislation recognizes the need to enhance the role of ETCs in promoting U.S. exports. We urge Congress to

build on existing export management and export trading companies, and not to destroy our industry only to replace it with banks.

We thank the Senate Banking Committee for this opportunity to present our views on the Export Trading Company Act of 1981.

SUBMITTED STATEMENT OF THE
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
TO THE SUBCOMMITTEE ON INTERNATIONAL FINANCE OF THE SENATE COMMITTEE
ON BANKING, HOUSING, AND URBAN AFFAIRS ON S. 144 -- THE EXPORT TRADING
COMPANY ACT OF 1981

March 5, 1981

The AFL-CIO supports exports that promote U.S. jobs and help create a healthy U.S. industrial base. Many industries, including those that provide services, need and deserve the help of the U.S. government in an increasingly complicated international trading world.

We do not believe S. 144 will accomplish these objectives and we oppose it.

S. 144 is a blanket change in U.S. antitrust and banking law that will give giant banks even more power over U.S. trade.

While this country desperately needs reindustrialization, the bill can help the giants to expand even more abroad.

This will create new monetary and budget pressures at a time of world crisis, because international banks are already "loaned up."

Title I would (a) subsidize and enhance the power of huge banks. The bill directs Eximbank to guarantee commercial loans, (b) set up a bureaucratic procedure to regulate Export Trading Companies and to promote exports, (c) add new authority for agency appropriations when exports are involved.

Thus S. 144 is a bill that should be weighed carefully against proposed budget cuts in various programs needed for the U.S. economy.

This bill also ends the traditional U.S. legal separation between banking and commerce, a risky move in a world where inter-

national banks are already "loaned up" and government insurance of exports is at issue in other hearings. The lender and exporter can become one under this legislation -- a damaging change in U.S. law.

S. 144 is a back-door budget and economic policy direction which emphasizes banking and trade without regard to the relationship with the U.S. economy.

Some small businesses pointed out last year that businesses that could export need credit, not further takeovers of export business by huge banks. Many fear that corporate power and size, not exports, will be expanded. Even small banks have been wary of the proposed changes. The language in the bill for small business is so loose that they should indeed worry. Section 107 directs Eximbank to set up a new guarantee program and directs that:

"The Board of Directors shall attempt to insure that a major share of any loan guarantees ultimately serves to promote exports from small, medium-size and minority businesses of agricultural concerns. Guarantees provided under the authority of this section shall be subject to limitations contained in annual appropriations Acts."

At a time when banks and commercial enterprises in the United States are claiming capital shortages, a measure that will result in a further competition for funds a diminution of capital for productive investments is unwarranted

Thus by allowing banks to control Export Trading Companies and providing them with subsidies, risky ventures are encouraged and the reach of the banks is extended to exports. While the DISC tax benefit is not in this bill this year, there is a commitment to bring in separate legislation to give greater tax breaks to exporters.

Title II extends antitrust exemptions of the Webb-Pomerene Act to associations formed for the purposes of exporting services and to export trading companies. Exempting the nation's largest banks and an unidentified number of existing international lawyers, accountants and other so-called "service" firms will add to the competitive problems of many businesses at home.

The statute provides a complicated antitrust exemption for companies which call themselves "services" and banks or "Export Trading Companies." There are provisions to certify Export Trading Companies. This program is to be monitored and supervised by the Secretary of Commerce not the Federation Trade Commission, with a new bureaucratic set of guidelines. The new bill's certification procedure provide for an automatic certification for existing Webb-Promerene associations created under the old law -- regardless of their benefits to export or to the U.S. economy.

What appears to be developed in the bill is a double standard on competition -- one for U.S. exporters and another for U.S. producers. The "exporters" may be giant world companies or banks exempt from U.S. law on antitrust. Trade would be a special privilege while all U.S. activities would be subject to competitive laws.

Our concerns about the bill were heightened by the Emergency Committee for American Trade's request for a specific authority to allow export trading companies to import -- to make contracts for

"buy-back" or "barter trade." We have been told that this request would be interpreted as covered by the current bill. The result is an adverse impact on the jobs, production and technological future of the United States. To this effect, we would like the Subcommittee to consider the statement of Charles Levy, Vice President of ECAT last year:

"Export trading company legislation, or its accompanying legislative history, should clarify the extent to which an export trading company has the authority to engage in the business of importing goods and services into the United States. For example, a growing volume of international trade now involves barter arrangements and third country trade. Without clear legislative authority, a U.S. export trading company could find itself at a distinct disadvantage in participating in barter and third country transactions."

We urge this Committee to make sure that the multinationals do not once again get a measure that will in fact encourage imports under the guise of legislation to promote exports.

As we have stated, the bill would not now widen the DISC tax gimmick to include services, but a companion bill is promised. This bill seeks only Eximbank guarantees. As in the basic DISC legislation, there can be no assurance that exports of such services would result from the tax break. In many cases, the measure would simply provide a "free ride" for multinational banks, insurance companies, lawyers, and warehouse operators who would get an added tax break for continuing to do what they are currently doing. This promised companion bill would create a huge revenue loss.

The debate on the bill raises questions about its purpose: The Japanese trading companies are already in the U.S. and Mitsui is the Number 6 U.S. exporter according to the Congressional Record. If trading companies are in violation of antitrust, how can Mitsui function in the U.S.?

If trading companies are legal, there is no need for this bill, since a trading company already exists. If a law is violated, how can this be ignored?

The benefit to exports, however, from American Mitsui raises questions. The studies of such foreign investors show that their exports are largely raw materials and their imports are largely manufactured products. Japanese-owned companies in the U.S. accounted for most of the imports of metals (steel) and autos and most of the exports of raw materials and farm products, according to the July 15, 1980 Survey of Current Business. We urge the Committee to delete any references to imports in this bill.

In summary, the AFL-CIO believes exports should be promoted. But S. 144 (1) contains many measures which enhance powers of multinational banks by ending the longstanding separation of banking and commerce in U.S. law, (2) exempts from antitrust action producers for export, while leaving the U.S. economy at home subject to competitive pressures from foreign monopolies which can join the Export Trading Companies, (3) establishes supervision and complex provisions that would be expensive to carry out and, therefore, would not be granted budget allocations, (4) sets up new budget authority for agencies designed to help the U.S. economy as long as foreign trade is involved.

The AFL-CIO opposes S. 144 and urges specific bills for specific needs to help exports.