

EXPORT TRADING COMPANY ACT OF 1982

The Export Trading Company Act of 1982¹ (the Act), signed by President Reagan on October 8, 1982, is designed to encourage exports by promoting the formation and operation of export trading companies and the expansion of export trade services generally. The Act partially alleviates the impediment of U.S. antitrust laws, allowing small and medium-sized businesses to combine in order to export more profitably.² The Act also allows some banking organizations to invest in export trading companies.³ The legislation is an important step toward removing some of the regulatory obstacles that have hampered the United States' export performance.

The Act is comprised of four titles. Title I contains congressional findings, a declaration of purpose, and definitions. The findings emphasize the need to promote U.S. exports in order to stimulate employment, strengthen the U.S. economy, and compete successfully with foreign firms.⁴ The basic purpose of the Act is "to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers"⁵ The Act seeks to accomplish this purpose through a number of means:

[by promoting the establishment] of export trade associations and export trading companies, by permitting bank holding companies, bankers' banks, and Edge Act corporations⁶ and agreement corporations that are subsidiaries of bank holding companies to invest in export trading companies, by reducing restrictions on trade financing provided by financial institutions,

1. 15 U.S.C.A. §§ 4001-4003 (West Supp. 1983) (codifying Pub. L. No. 97-290, tit. I, §§ 101-104, 96 Stat. 1233-1235 (1982)) [hereinafter cited as the Act].

2. By pooling their resources in an export trading company, businesses that individually lacked the capital to export effectively, will now be able to reach overseas markets. Such pooling of resources will also serve to diffuse among the companies the risks involved in exporting.

3. Export trading companies will benefit from the banking organizations' supply of capital, exporting know-how, and overseas contacts.

4. The Act, *supra* note 1, §§ 4001(a)(1), (2), (10)-(11).

5. *Id.* § 4001(b).

6. Edge Act corporations are federally chartered organizations formed "for the purpose of engaging in international or foreign banking or other international or foreign financial operations . . ." Act of Dec. 24, 1919, ch. 18, 41 Stat. 378 (codified at 12 U.S.C. §§ 611-631 (1976)).

and by modifying the application of [U.S.] antitrust laws to certain export trade.⁷

Additionally, the Act instructs the Secretary of Commerce to establish within the Department of Commerce an office "to promote . . . the formation of export trade associations and export trading companies."⁸

The Act defines "export trade services" as including, but not limited to:

consulting, international market research, advertising, marketing, insurance, product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when provided in order to facilitate the export of goods or services produced in the United States⁹

An " 'export trading company' [includes] a person, partnership, association, or similar organization, [either] for profit . . . or non-profit . . . , which does business under the laws of the United States or any State" and which exports goods or services produced in the United States, or facilitates the exportation of such goods or services.¹⁰

Title II, known as the Bank Export Services Act,¹¹ provides for "participation by bank holding companies, bankers' banks, and Edge Act . . . corporations, in the financing and development of export trading companies [ETCs]"¹² The Act requires the Board of Governors of the Federal Reserve System to issue regulations facilitating the establishment of export trading companies¹³ and "the formation of joint venture export trading companies between bank holding companies and nonbank firms"¹⁴

7. The Act, *supra* note 1, § 4001(b).

8. *Id.* § 4003.

9. *Id.* § 4002(a)(3).

10. *Id.* § 4002(a)(4).

11. 12 U.S.C.A. §§ 372, 635(a)-4, 1841 note, 1843 (West Supp. 1983) (codifying Pub. L. No. 97-290, tit. II, §§ 201-207 (1982)) [hereinafter cited as BESA].

12. *Id.* § 1843 note (Bank Export Services).

13. *Id.*

14. *Id.* The Board of Governors is also directed to pursue regulatory policies that will provide U.S. commerce "a means of exporting at all times," and that will "foster the participation by regional and smaller banks in the development of export trading companies." *Id.*

Title II amends the Bank Holding Company Act of 1956 (BHCA)¹⁵ to permit bank holding companies and their affiliates to make investments and hold controlling interests in ETCs, subject to prior approval by the Federal Reserve Board of Governors.¹⁶ The BHCA is amended to include the definition of "export trading company."¹⁷ It is defined as a company "exclusively engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods or services produced in the United States" or for purposes of facilitating the exportation of such goods or services.¹⁸

A bank holding company is limited to an investment in ETCs of no more than five percent of the bank's consolidated capital and surplus.¹⁹ The Board of Governors may disapprove any proposed investment only if "necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest,"²⁰ or if the "investment would affect the financial or managerial resources of a bank holding company to [such] an extent [that it] is likely to have a materially adverse effect on the safety and soundness of [a] subsidiary bank of [the] bank holding company,"²¹ or if "the bank holding company fails to furnish [required] information"²²

A bank holding company which invests in an ETC may not extend credit to the ETC beyond ten percent of the bank holding company's consolidated capital and surplus.²³ The extension of credit may not be "on terms more favorable than those afforded similar borrowers in similar circumstances, and . . . shall not involve more than the normal risk of [nonpayment]."²⁴

Title II also directs the Export-Import Bank of the United States to establish a program to provide loan guarantees to financial institutions or other public or private creditors to facilitate ex-

15. 12 U.S.C. §§ 1841, 1843 (1976).

16. BESA, *supra* note 11, § 1843.

17. *Id.* § 1843(c)(14)(F)(i).

18. *Id.*

19. *Id.* § 1843(c)(14).

20. *Id.* § 1843(c)(14)(A)(iv)(I).

21. *Id.* § 1843(c)(14)(A)(iv)(II).

22. *Id.* § 1843(c)(14)(A)(iv)(III).

23. *Id.* § 1843(c)(14)(B)(i).

24. *Id.* § 1843(c)(14)(B)(iii). A bank holding company may be required by the Board to terminate its investment in an ETC if the ETC takes "positions in commodities or commodity contracts, in securities, or in foreign exchange, other than as may be necessary" for export operations. *Id.* § 1843(c)(14)(D).

ports.²⁵ Allowing banking organizations to invest in ETCs will serve the dual purpose of making greater capital available to ETCs and allowing ETCs greater access to the exporting information that banking institutions have available.

Title III of the Act allows for a limited exemption from anti-trust laws²⁶ for ETCs and firms engaged in export trade. Under Title III, an ETC may apply to the Secretary of Commerce for a "certificate of review"²⁷ which will afford protection from any criminal or civil action that may be brought under the antitrust laws.²⁸ A certificate of review will be issued to any applicant that establishes that its export activities will: (1) not substantially lessen competition or restrain trade within the United States nor substantially restrain the export trade of a competitor; (2) not unreasonably affect prices within the United States of similar goods and services; (3) "not constitute unfair methods of competition against competitors engaged in the export of" similar goods and services; and (4) not result in sale or resale within the United States of the goods or services exported.²⁹

Title IV, known as the Foreign Trade Antitrust Improvements Act of 1982,³⁰ provides for an exemption from the Sherman Act³¹ for "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations."³² Not exempted, however, is conduct which:

has a direct, substantial, and reasonably foreseeable effect — (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with

25. *Id.* § 635(a)-4. Title II also amends section 13 of the Federal Reserve Act, 12 U.S.C. § 372 (1976), to compel institutions to accept certain drafts or bills of exchange resulting from import or export transactions. BESA, *supra* note 11, § 372.

26. For purposes of Title III, the term "antitrust laws" means the antitrust laws defined in the first section of the Clayton Act, 15 U.S.C. § 12 (1976), and section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976) (to the extent that section 5 prohibits unfair methods of competition), and any state antitrust or unfair competition law. 15 U.S.C.A. § 402(b) (West Supp. 1983) (codifying Pub. L. No. 97-290, tit. III, § 311, 96 Stat. 1245 (1982)).

27. *Id.* §§ 4011-4012.

28. *Id.* § 4016.

29. *Id.* § 4013(a)(1)-(4).

30. 15 U.S.C.A. §§ 1 note, 6a, 45 (West Supp. 1983) (codifying Pub. L. No. 97-290, tit. IV, §§ 401-403, 96 Stat. 1246 (1982)).

31. 15 U.S.C. §§ 1-7 (1976).

32. 15 U.S.C.A. § 6(a) (West Supp. 1983).

foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States³³

Section 45(a) of the Federal Trade Commission Act³⁴ is also amended by a provision nearly identical to that provision which amends the Sherman Act. This partial removal of antitrust obstacles for ETCs reflects a recognition by the drafters of the Act that alternative forms of business arrangements must be permitted in order for U.S. exporters to compete effectively in the highly competitive global market.³⁵

The Export Trading Company Act will be valuable in helping U.S. businesses compete more effectively with powerful foreign trading conglomerates. ETCs will be able to take advantage of greater economies of scale in all aspects of export marketing and will benefit from the exporting expertise of banking organizations that may invest in the ETCs. Consequently, the Act should serve as a strong incentive for U.S. businesses to greatly expand exports and gain a greater share of world markets.

Stephen R. Crilly

33. *Id.* § 6(a)(1).

34. 15 U.S.C.A. § 45(a)(3) (West Supp. 1983) (codifying Pub. L. No. 97-290, tit. IV, § 403, 96 Stat. 1246 (1982)).

35. See generally, *Hearings on S. 864, S. 1499, S. 1663 & S. 1744 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. (Sept. 17 & 18, 1979). See also *Hearings on S. 144 Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. (Feb. 17 & 18 and Mar. 5, 1981).