

Fordham International Law Journal

Volume 3, Issue 2

1979

Article 4

New Rules for Edge Act Corporations Under The International Banking Act of 1978

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Abstract

Discusses the intent behind and the provisions of the Edge Act as well as the application of the Act to American international banking practices for the past sixty years.

NEW RULES FOR EDGE ACT CORPORATIONS UNDER THE INTERNATIONAL BANKING ACT OF 1978

INTRODUCTION

The International Banking Act of 1978 (IBA)¹ generally provides for federal regulation of foreign banking in the United States.² The Act also addresses the international operations of United States banks by amending section 25(a) of the Federal Reserve Act, known as the Edge Act.³ The effects of the amendments will be widespread, as establishment of international banking corporations under the Edge Act has recently become one of the most popular methods for participation in international and interstate banking by United States banks.⁴

In addition to amending the Edge Act, Congress directed the Board of Governors of the Federal Reserve System (Board) to revise its regulations concerning the ownership and operations of Edge Act Corporations in order to further the policy objectives set

1. Pub. L. No. 95-369, 92 Stat. 607 (1978) (codified in scattered sections of 12 U.S.C.) [hereinafter cited as IBA].

2. Through this comprehensive piece of legislation, Congress has attempted, for the first time, to balance the inequities in the regulatory framework for foreign banking in this country, which were first brought to light in a 1966 study prepared by Professor Jack Zwick. See JOINT ECONOMIC COMM., 89TH CONG., 2D SESS., FOREIGN BANKING IN THE UNITED STATES (Economic Policies and Practices, Paper No. 9) (Comm. Print 1966) [hereinafter cited as Zwick]; notes 57-60 *infra* and accompanying text. Congress intended that the IBA establish "the principle of parity of treatment between foreign and domestic banks in like circumstances." S. REP. NO. 95-1073, 95th Cong., 2d Sess. 2, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1421, 1422 [hereinafter cited as SENATE REPORT]. See notes 64-68 *infra* and accompanying text. See generally Note, *The International Banking Act of 1978: Federal Regulation of Foreign Banks in the United States*, 8 GA. J. INT'L & COMP. L. 145 (1978) [hereinafter cited as *Federal Regulation of Foreign Banks*]; 19 HARV. INT'L L.J. 1011 (1978).

3. 12 U.S.C. §§ 611-631 (1976). The Edge Act is named after Senator Walter E. Edge of New Jersey, the Act's principal sponsor. SENATE REPORT, *supra* note 2, at 3. See notes 79-102 *infra* and accompanying text.

4. See Pinsky, *Edge Act and Agreement Corporations: Mediums for International Banking*, 11 ECON. PERSPECTIVES 25 (Oct., 1978) (Federal Reserve Bank of Chicago); notes 33, 40-45 *infra* and accompanying text.

out in the IBA.⁵ On June 14, 1979 the Board issued its revised regulation on international banking operations, updating the existing rules and combining them into one comprehensive regulation.⁶

This Note discusses the intent behind and the provisions of the Edge Act in Part I, as well as the application of the Act to American international banking practices for the past sixty years. The amendments to the Edge Act contained in the IBA are examined in Part II. Finally, the problem of whether the Board's revised regulations will successfully implement the policy objectives of those amendments is analyzed in Part III.

I. EDGE ACT CORPORATIONS

A. *The Edge Act*

The Edge Act of 1919⁷ was the last of four congressional attempts to expand the international banking and financial capabilities of United States banks.⁸ It was designed "to provide for the

5. IBA, *supra* note 1, § 3(a). See notes 94-98 *infra* and accompanying text.

6. Regulation K-International Banking Operations, 44 Fed. Reg. 36,005 (1979) (codified at 12 C.F.R. § 211 (1980)).

7. Act of Dec. 24, 1919, ch. 18, 41 Stat. 378 (1919) (codified at 12 U.S.C. §§ 611-631 (1976)).

8. Congress authorized national banks to conduct international banking operations for the first time in the Federal Reserve Act of 1913 (FRA), Act of Dec. 23, 1913, ch. 6, § 25, 38 Stat. 251 (1913) (codified in scattered sections of 12 U.S.C.), by permitting them to establish branches and to receive bankers' acceptances. However, by 1916 only one United States bank, National City Bank of New York, had opened a foreign branch. This led to concern that American foreign banking would be monopolized by a few powerful banks, causing Congress to amend § 25 of the FRA to permit the establishment of international banking corporations by national banks, which agreed to follow Board regulations dealing with their activities. Act of Sept. 7, 1916, ch. 461, 39 Stat. 755 (1916) (codified at 12 U.S.C. §§ 601-604 (1976)). Because this Act did not provide for federal incorporation, these "agreement corporations" became chartered under state law. The third congressional action further amended § 25 of the FRA, permitting national banks to establish international finance corporations. Act of Sept. 17, 1919, ch. 60, 41 Stat. 285 (1919). The purpose of this amendment, which expired in 1921, was to facilitate long-term borrowing by Europeans through private investment rather than government credit, thereby maintaining United States export trade. Three months later, Congress passed the Edge Act, Act of Dec. 24, 1919, ch. 18, 41 Stat. 378 (1919) (codified at 12 U.S.C. §§ 611-631 (1976)), which combined the objectives of the prior two amendments to § 25 of the FRA. No significant legislation on American foreign banking has been enacted since 1919. See generally H. REP. NO. 408, 66th Cong., 1st Sess. (1919) [hereinafter cited as EDGE ACT REPORT]; J. BAKER & M. BRADFORD, AMERICAN BANKS ABROAD 19-31 (1974); F. LEES, INTERNATIONAL BANKING AND FINANCE 18-24, 136 (1974);

financial needs of American foreign trade in a far more comprehensive manner than any preceding legislation."⁹

The Act authorized the federal incorporation¹⁰ of financial institutions organized "for the purpose of engaging in international or foreign banking or other international or foreign financial operations"¹¹ An Edge Act Corporation (EAC) is empowered to provide, on an interstate basis,¹² general banking services for international customers,¹³ to receive deposits in the United States in the course of international business,¹⁴ to establish foreign branches,¹⁵ and to invest in the stock of other corporations.¹⁶ This legislation envisioned two classes of institutions: banking EACs and investment EACs.¹⁷ Both are subject to the same regulatory frame-

McGuire, *The Edge Act: Its Place in the Evolution of International Banking in the United States*, 3 LAW. AM. 427 (1971); Pinsky, *supra* note 4, at 25-26; Tamagna & Willis, *United States Banking Organizations Abroad*, 42 FED. RES. BULL. 1284 (1956); Wiley, *Edge Act Corporations—Catalysts for International Trade and Investment*, 16 BUS. LAW. 1014 (1961).

9. McGuire, *supra* note 8, at 431. See J. BAKER & M. BRADFORD, *supra* note 8, at 49-52.

10. A federal charter was considered beneficial:

First, it eliminated the dual regulations imposed on former Agreement corporations which were under the jurisdiction of both the Federal Reserve and the particular state in which they were incorporated. Second, it was felt by several legislators that control through agreement is plainly not as satisfactory as control through incorporation under a federal act. Finally, it was generally understood that the position and prestige of these corporations overseas would be greatly enhanced by such association with the U.S. Federal Government.

J. BAKER & M. BRADFORD, *supra* note 8, at 51. See EDGE ACT REPORT, *supra* note 8, at 2. See also McGuire, *supra* note 8, at 432.

11. 12 U.S.C. § 611 (1976).

12. No state can exclude EAC entry, by virtue of its federal charter. See note 43 *infra* and accompanying text. EACs are also excluded from the definition of "bank" in the Bank Holding Company Act of 1956, 12 U.S.C. § 1841(c) (1976), and are thus not subject to the interstate banking restrictions of the McFadden Act, 12 U.S.C. § 36 (1976). See note 44 *infra* and accompanying text.

13. 12 U.S.C. § 615(a) (1976).

14. *Id.*

15. 12 U.S.C. § 615(b) (1976).

16. 12 U.S.C. § 615(c) (1976). Those corporations, however, must be organized under the laws of a foreign state, or if organized in the United States, the corporations may only conduct domestic operations incidental to foreign or international business. *Id.*

17. EDGE ACT REPORT, *supra* note 8, at 3. It is not clear from either the Act or the House committee print whether Congress intended an exclusive distinction between banking and investment EACs, although one authority contends that Congress did not provide for the establishment of separate corporations. J. BAKER & M. BRADFORD, *supra* note 8, at 33. The Board's Regulation K, 12 C.F.R. § 211 (1980),

work, but EACs "engaged in banking"¹⁸ are subject to additional regulations concerning lending limits¹⁹ and reserve requirements on their domestic deposits.²⁰

In addition to the general limitation that every financial transaction performed by EACs be incidental to foreign or international business,²¹ the Edge Act contained several other constraints: organization of an EAC required a minimum capital investment of two million dollars;²² a parent bank could not invest more than ten

first issued in 1920, distinguished the two classes but was also unclear on the requirement of separate incorporation. J. BAKER & M. BRADFORD, *supra* note 8, at 33. The Board finalized this distinction in a revision of Regulation K effective in 1957, 21 Fed. Reg. 9,899 (1956), but removed it in a later revision, 28 Fed. Reg. 9,421 (1963). Today the distinction remains one of an operating preference of the owners rather than a regulatory restriction.

18. "An Edge Corporation is 'engaged in banking' if it is ordinarily engaged in the business of accepting deposits in the United States from nonaffiliated persons." 12 C.F.R. § 211.2(d) (1980). *See* notes 165-75 *infra* and accompanying text.

19. 12 C.F.R. § 211.6(b)(1) (1980). *See* notes 140-46 *infra* and accompanying text.

20. Banking EACs are now subject to Regulations D and Q concerning interest rate limitations and reserve requirements. 12 C.F.R. § 211.4(d) (1980). Prior to the IBA and the revised regulations, banking EACs were required to carry reserves in an amount not less than ten percent of their domestic deposits. 12 U.S.C. § 615(a) (1976) (provision removed by IBA, *supra* note 1, § 3(e)).

Nevertheless, the deposit-taking abilities of EACs are very limited. It is clear that Congress did not intend EACs to be "banks of deposit," which would compete with domestic banks for funds. EDGE ACT REPORT, *supra* note 8, at 3. An EAC may accept in the United States only demand, savings, and time deposits from foreign governments, persons conducting business principally abroad, and persons residing abroad. The EAC also may accept any domestic deposits which are incidental to international or foreign business. 12 C.F.R. § 211.4(e)(1), (2) (1980).

21. 12 U.S.C. § 615(a), (c) (1976). The Edge Act empowers the Board to determine whether an EAC's activities are incidental to international trade. 12 U.S.C. § 615(a) (1976). The Board is also given authority to approve applications to organize EACs, 12 U.S.C. § 614 (1976), which has been held to imply the authority to disapprove applications. *Apfel v. Mellon*, 33 F.2d 805 (D.C. Cir.), *cert. denied*, 280 U.S. 525 (1929). In that case, the court found that mandamus would not lie to control the exercise of the Board's discretion in disapproving articles of incorporation of an EAC, due to the petitioners' lack of qualifications and experience in the field of foreign banking. 33 F.2d at 808.

22. 12 U.S.C. § 618 (1976). This minimum contrasts sharply with the 1916 amendment authorizing the establishment of agreement corporations, for which no minimum capitalization was required. An apparent shift in congressional thinking with regard to capital adequacy for international banking corporations occurred between 1916 and 1919. F. LEES, *supra* note 8, at 23-24. For an examination of this and other differences between EACs and agreement corporations, *see* McGuire, *supra* note 8, at 433; Pinsky, *supra* note 4, at 26. The six agreement corporations currently conducting an international banking business are subject to the same grants of authority as well as the same limitations as EACs. 12 C.F.R. § 211.1(b) (1980).

percent of its capital and surplus in EACs,²³ and the ownership of EACs was restricted to United States citizens.²⁴

B. Operations of Edge Act Corporations

EACs have been organized since 1919 by American bankers for many reasons²⁵ with varying degrees of success.²⁶ Early attempts at implementing the Edge Act's provisions indicate that Congress miscalculated the needs of world trade at that time,²⁷ resulting in the failure of all of the EACs formed during the 1920's.²⁸ A subsequent inactive period²⁹ ended as EACs were revived by United States banks to complement the growth of international business in the 1950's.³⁰

23. 12 U.S.C. § 618 (1976).

24. 12 U.S.C. § 614 (1976). This restriction was eliminated by IBA, *supra* note 1, § 3(c). See notes 79, 82 *infra* and accompanying text.

25. EACs have assisted parent banks in the conducting of international banking in the United States, in direct overseas operations, in specialized financing (including securities underwriting), and in making equity investments. F. LEES, *supra* note 8, at 148.

26. Compare McGuire, *supra* note 8, at 437 with 441.

27. See J. BAKER & M. BRADFORD, *supra* note 8, at 60. See also McGuire, *supra* note 8, at 437:

The Edge Act did not seem to stimulate the activity that was expected and desired by its framers. The failure of early Edge Act corporations was not so much due to inadequacy in the legislation as it was to a changing environment for international trade. The Act was intended to facilitate foreign trade by providing ways of extending medium and long-term credit. Federal charters were expected to lend prestige to these institutions. However, the international trade environment was characterized by a growing economic confusion in Europe, fear of competition by some banks, and lack of American interest in foreign financing. Passage of the Edge Act was followed by a world-wide depression. International trade diminished. The deterioration of foreign economies discouraged American exporters [from selling] abroad unless the obligations received were guaranteed by foreign governments. Such guarantees pre-empted the need for services provided by Edge Act corporations.

Id.

28. Shortly after the Edge Act was passed, three corporations were organized under its provisions. Two of them were liquidated in 1925 and the third was liquidated in 1933. Between passage of the Edge Act and 1929 fifteen Agreement corporations were chartered. All fifteen of these corporations had been liquidated or absorbed by other banks by the early 1930's.

McGuire, *supra* note 8, at 436.

29. Only two EACs and one agreement corporation were organized between 1932 and 1956. Pinsky, *supra* note 4, at 28-29. See Bossy, *Edge Act and Agreement Corporations in International Banking and Finance*, 46 MONTHLY REV. 88, 89 (1964) (Federal Reserve Bank of New York); McGuire, *supra* note 8, at 436.

30. See Pinsky, *supra* note 4, at 29. See generally J. BAKER & M. BRADFORD,

Since then, EACs have been organized specifically to respond to changing international economic conditions.³¹ Initially, EACs were utilized as holding companies for a parent bank's overseas branching or foreign investment activities.³² More recently, EACs have provided a means for parent banks to establish domestic interstate networks of international banking facilities.³³

American banks were first attracted to EACs for their "unique" investment powers.³⁴ An EAC may invest in foreign corporations,³⁵ while United States banks were generally prohibited from making such equity investments.³⁶ Other advantages of investment EACs throughout the early 1960's included the ability to make long-term loans to corporations and foreign governments, and the ability to invest in foreign banks in countries where the United States parent banks were prohibited by local law from opening wholly-owned branches.³⁷

Despite statutory amendments in the middle 1960's which removed many of the advantages peculiar to investment EACs,³⁸ the

supra note 8, at 65-66. "[W]hile the period 1930-1950 can be characterized as isolationistic in U.S. international banking, the growth of U.S. international business, banking, and investment has been phenomenal during the 1950-72 period, especially during the 1960s." *Id.* at 65. *See also* F. LEES, *supra* note 8, at 142; McGuire, *supra* note 8, at 438, 441; Pinsky, *supra* note 4, at 29. In 1956 there were seven EAC and agreement corporations in operation. They increased in number to 15 in 1960 and 77 in 1970. *See* J. BAKER & M. BRADFORD, *supra* note 8, at 71. By Dec. 31, 1978, 124 such corporations were in existence. Office of Public Information, Federal Reserve Bank of New York. Their total assets grew from \$550 million in 1960 to \$11.6 billion in 1976. *See* J. BAKER & M. BRADFORD, *supra* note 8, at 71; Pinsky, *supra* note 4, at 25.

31. Generally, EACs have assisted American parent banks in following United States business investment expansion overseas in the 1960's, and they have helped American banks cope with the growth of foreign banking in the United States in the 1970's as the business investment flow reversed. *See* J. BAKER & M. BRADFORD, *supra* note 8, at 70, 135; Lees, *Foreign Banking in the United States: Growth and Regulatory Issues*, 5 DEN. J. INT'L L. & POL'Y 463, 463 (1975).

32. Pinsky, *supra* note 4, at 25.

33. *Id.*

34. *See id.*, at 27; notes 35-36 *infra* and accompanying text.

35. 12 U.S.C. § 615(c) (1976). *See* notes 159-62 *infra* and accompanying text.

36. 12 U.S.C. §§ 24, 335 (1976). F. BEUTEL, *BANK OFFICER'S HANDBOOK OF COMMERCIAL BANKING LAW* § 1-40(10) (1979 Cum. Supp.). *See generally* Hackley, *Our Baffling Banking System* (pts. 1-2), 52 VA. L. REV. 565, 771, 608-12 (1966).

37. *See* Pinsky, *supra* note 4, at 27-28. As foreign institutions were typically permitted to make such equity investments, this authority of EACs also helped United States banks compete with foreign banks on the world market. *Id.* at 27. *See generally* McGuire, *supra* note 8, at 439-40.

38. In 1966 the FRA was amended to permit national banks to invest in foreign

use of these corporations did not decline.³⁹ In fact, EAC activity increased substantially as United States banks shifted their focus from overseas expansion to domestic decentralization of international banking operations.⁴⁰

American institutions initiated this recent domestic expansion both to meet the needs of corporate customers with expanding international operations⁴¹ and to offset the growing competition from foreign bank activity within the United States.⁴² While EACs can be organized on an interstate basis,⁴³ domestic banks are generally prohibited from operating a banking business outside their home state.⁴⁴ Thus through EACs, American banks have established a limited presence in several emerging international financial centers throughout the United States.⁴⁵

banks which are not engaged, directly or indirectly, in any activity in the United States, except that which is incidental to their international or foreign business. Pub. L. No. 89-485, § 12(b), 80 Stat. 241 (1966) (codified at 12 U.S.C. § 601 (1976)). The Bank Holding Company Act of 1970 also eliminated certain advantages of investment-oriented EACs, as it permits bank holding companies to invest in foreign corporations. Pub. L. No. 91-607, tit. I, § 103, 84 Stat. 1763 (1970) (codified at 12 U.S.C. § 1843(c)(9) (1976)). See Pinsky, *supra* note 4, at 28. The 1963 revision of Regulation K also removed the distinction between investment and banking EACs. See note 17 *supra*.

39. See J. BAKER & M. BRADFORD, *supra* note 8, at 70; note 30 *supra*.

40. See F. LEES, *supra* note 8, at 143-44; Pinsky, *supra* note 4, at 31.

41. Pinsky, *supra* note 4, at 29.

42. Lees, *supra* note 31, at 481-82. In addition, EACs have been established by their parents to perform clearing house functions in the growing Eurodollar markets. See McGuire, *supra* note 8, at 441-42.

43. J. BAKER & M. BRADFORD, *supra* note 8, at 70, 131; McGuire, *supra* note 8, at 441; Pinsky, *supra* note 4, at 25, 31.

44. The McFadden Act of 1927, 12 U.S.C. § 36(c)(2) (1976), permits a national bank to establish branches at any place *within* the state where the bank is situated, if state bank branching is explicitly permitted by the statutes of the state in question. This provision is also applicable to state banks which are members of the Federal Reserve System. 12 U.S.C. § 321 (1976). See generally Hackley, *supra* note 36, at 612-15, 773-74; Lichtenstein, *Foreign Participation in United States Banking: Regulatory Myths and Realities*, 15 B.C. INDUS. & COM. L. REV. 879, 894-902 (1974). The current application of the McFadden Act interstate branching restrictions is now being questioned. The IBA has directed the federal monetary authorities to submit a report to Congress on this subject. IBA, *supra* note 1, § 14. The report, originally due in September, 1979, is expected to be submitted in April, 1980. See note 79 *infra* and accompanying text.

45. New York City always has been the center for international finance in the United States. In 1966, half of the 36 EACs and agreement corporations were located there. Pinsky, *supra* note 4, at 31. While New York has maintained its prominence in international banking with 39 out of 124 EACs and agreement corporations operating there in 1978, several other cities reported large numbers of these corporations: Los Angeles (12), Chicago (11), Miami (11), Houston (9), and San Francisco (7). Office of

Notwithstanding the advantages gained through the use of EACs as interstate banking offices, the scope of these corporations' permissible activities within the United States is narrow.⁴⁶ One major restriction in the Edge Act limits EAC activity to purely international business transactions, thereby forbidding these corporations from soliciting domestic deposits and from providing miscellaneous banking services unless incidental to international trade.⁴⁷ In contrast, foreign banks have long been permitted to operate interstate domestic banking offices, which were virtually free from federal regulation,⁴⁸ and subject only to the regulations of the several states in which they were organized.⁴⁹ The provision that incorporation of each EAC requires a minimum capital investment of two million dollars⁵⁰ effectively eliminates all but a few large banks from establishing sufficient numbers of EACs throughout the country to compete with foreign-owned institutions.⁵¹

By 1978, Congress recognized that although the Edge Act had aided international banking in the past, its regulatory framework had become "antiquated," thus preventing EACs from competing effectively with foreign banks operating in the United States.⁵² It also was noted that EACs were not providing sufficient funds for American exports, which was the intent of the Edge Act.⁵³ Through passage of the IBA, Congress attempted to solve the problems linked with EAC activity,⁵⁴ in addition to providing a new framework for regulating foreign banking in the United States.⁵⁵

Public Information, Federal Reserve Bank of New York. *See also* J. BAKER & M. BRADFORD, *supra* note 8, at 131-32.

46. Commentators also see these limitations on the powers of EACs as undue restraints on American banks competing with foreign banking institutions located in the United States. *See* LEES, *supra* note 31, at 481-82; LICHTENSTEIN, *supra* note 44, at 974-76.

47. 12 U.S.C. § 615(a) (1976).

48. *See* Klopstock, *Foreign Banks in the United States: Scope and Growth of Operations*, 55 MONTHLY REV. 140, 154 (1973) (Federal Reserve Bank of New York). *See generally* F. LEES, *supra* note 8, at 183-84.

49. *See* F. LEES, *supra* note 8, at 183-84.

50. 12 U.S.C. § 618 (1976). *See* note 22 *supra*.

51. *See* Wall St. J., June 7, 1979, at 6, cols. 2-3.

52. *See* SENATE REPORT, *supra* note 2, at 4.

53. *Id.* at 4-5.

54. IBA, *supra* note 1, § 3. *See* SENATE REPORT, *supra* note 2, at 3-6.

55. SENATE REPORT, *supra* note 2, at 2.

II. THE INTERNATIONAL BANKING ACT OF 1978

A. Background

Foreign banks had been conducting business in the United States for almost 100 years⁵⁶ when Congress finally commissioned a study of their activities in 1966.⁵⁷ The study concluded that foreign banks doing business in the United States were operating almost totally without federal supervision.⁵⁸ As a result of the disparate regulations of the states, foreign banks experienced certain advantages and disadvantages when compared with domestic banks.⁵⁹ In this study, Professor Jack Zwick advocated an active federal role in foreign bank supervision, to be guided by the principle of "equal access" for foreign banks in America.⁶⁰

In response to the Zwick report, in 1973 the Federal Reserve Board established a Steering Committee on International Banking.⁶¹ This committee drafted the various legislative proposals⁶² for federal regulation of foreign banks which culminated in H.R. 10899, the International Banking Act of 1978.⁶³

56. See Note, *Foreign Banking in the United States*, 6 VAND. J. TRANSNAT'L L. 595, 597 (1973). For discussions on the extent and scope of foreign bank activity in the United States and its anomalous regulatory framework prior to the IBA, see generally F. LEES, *supra* note 8, at 167-89; Halperin, *The Regulation of Foreign Banks in the United States*, 9 INT'L LAW. 661 (1975); Klopstock, *supra* note 48; Lees, *supra* note 31; Lichtenstein, *supra* note 44; *Federal Regulation of Foreign Banks*, *supra* note 2, at 145-59.

57. Zwick, *supra* note 2. See also Lichtenstein, *supra* note 44, at 882-83. The study attempted to delineate the characteristic activities of foreign bank offices in the United States, to assess the influence of these banking offices on domestic banking operations and on the economy at large, and to appraise the existing arrangements for examining and supervising these institutions. Zwick, *supra* note 2, at 1.

58. Zwick, *supra* note 2, at 26.

59. *Id.* at 26-29. Advantages included the ability to transfer resources among institutions located in several states. On the other hand, foreign banks could not obtain FDIC insurance, and thus were excluded from those states which required deposit-taking banks to obtain such insurance. *Id.*

60. *Id.*

61. 59 FED. RES. BULL. 123 (1973).

62. International Banking Act of 1977, H.R. 7325, 95th Cong., 1st Sess. (1977); International Banking Act of 1976, H.R. 13876, 94th Cong., 2d Sess. (1976); Foreign Bank Act of 1975, S. 958, 94th Cong., 1st Sess. (1975). See *Federal Regulation of Foreign Banks*, *supra* note 2, at 145; Comment, *The Regulation of Interstate Bank Branching Under the International Banking Act of 1978: The Stevenson Compromise*, 1 NW. J. INT'L L. & BUS. 284, 286-89 (1979) [hereinafter cited as *Stevenson Compromise*].

63. Pub. L. No. 95-369, 92 Stat. 607 (codified in scattered sections of 12 U.S.C.).

Congress thought that federal regulation was necessary as foreign banks could no longer "be characterized as specialized institutions engaged principally in foreign trade financing on the periphery of our banking system."⁶⁴ The IBA intended to integrate foreign banks into the United States dual banking system⁶⁵ with "maximum fairness and minimum disruption."⁶⁶ Under the policy of national treatment,⁶⁷ foreign banks received "the same rights, duties, and privileges" as domestic banks, and are subjected to "the same limitations, restrictions, and conditions."⁶⁸

B. *Provisions of the IBA*

It is useful at this point to note briefly the broad coverage of the IBA.⁶⁹ The Act permits foreign banks to obtain federal charters for their existing state-chartered institutions.⁷⁰ They may open new federally-chartered bank offices in any state which does not specifically prohibit such offices,⁷¹ and they may acquire existing national

64. SENATE REPORT, *supra* note 2, at 2. Forty-two foreign banks were operating banking offices in the United States in 1966. Zwick, *supra* note 2, at 3. By 1978 that number had risen to 122. In addition, foreign banks were beginning to influence a growing proportion of United States credit markets. These considerations prompted the "need for both Federal monetary policy controls and for a Federal presence in the regulation and supervision of [foreign bank] activities in the United States." SENATE REPORT, *supra* note 2, at 2.

65. The dual banking system refers to the uniquely American regulatory framework which requires all banks to comply with varying degrees of both state and federal regulation and supervision. Until passage of the IBA, foreign banks were only responsible to state regulators. For an excellent general discussion of the United States banking system, see Hackley, *supra* note 36.

66. 19 HARV. INT'L L.J. 1011, 1012 (1978). "The objective in earlier bills of setting up a comprehensive federal regulatory system over all foreign bank operations under the direction of the Federal Reserve Board gradually gave way to the traditional dual banking system concept of shared federal/state regulation." G. Welsh, *The Legislative History of the International Banking Act of 1978*, at 17 (March 1, 1979) (outline accompanying remarks delivered at the Practising Law Institute Course No. 295, *The International Banking Act of 1978*, in New York City).

67. National treatment is a general policy of the United States whereby foreign enterprises operating in this country are subject to the same rules and regulations as, and are treated as competitive equals with, domestically owned enterprises. See SENATE REPORT, *supra* note 2, at 2; Halperin, *supra* note 56, at 661.

68. *Federal Regulation of Foreign Banks*, *supra* note 2, at 159. See SENATE REPORT, *supra* note 2, at 2.

69. For a more thorough analysis of the provisions of this legislation, see *generally* *Federal Regulation of Foreign Banks*, *supra* note 2, at 159-75; 19 HARV. INT'L L.J. 1011 (1978).

70. IBA, *supra* note 1, § 4. See SENATE REPORT, *supra* note 2, at 6-7, 21. See *generally* Hablutzel & Lutz, *Foreign Banks in the United States After The International Banking Act of 1978: the New Dual System*, 96 BANKING L.J. 133 (1979).

71. See Hablutzel & Lutz, *supra* note 70, at 148-51.

banks.⁷² Generally, the interstate activities of foreign banks are now limited to those in which national banks may participate,⁷³ and foreign-owned institutions operating a commercial banking business here are now subject to the non-banking and anti-tying provisions of the Bank Holding Company Act of 1956.⁷⁴ The IBA contains generous grandfather provisions in order to mitigate the impact of these restrictive sections.⁷⁵

To implement these provisions Congress established a framework within which federal monetary authorities may regulate, supervise, and examine foreign banking activities in the United States.⁷⁶ Congress also ordered that studies of the treatment of United States banks abroad⁷⁷ and of the continued viability of the McFadden Act restrictions on interstate banking⁷⁸ be undertaken by these authorities in conjunction with executive branch officials.

72. IBA, *supra* note 1, § 2. See SENATE REPORT, *supra* note 2, at 3, 20.

73. IBA, *supra* note 1, § 5. See SENATE REPORT, *supra* note 2, at 7-12, 21-22. Foreign banks may still establish branch and agency offices in states which permit their entry, but branches established outside a foreign bank's home state are limited to the deposit-taking powers of EACs, *i.e.*, they may only accept domestic deposits incidental to international trade. For a discussion of this final solution to the controversial interstate branching problem, see *Stevenson Compromise*, *supra* note 62, at 289-96.

74. 12 U.S.C. §§ 1841-1849 (1976). IBA, *supra* note 1, §§ 5(a), 8. See SENATE REPORT, *supra* note 2, at 10-11, 14-15. For a discussion of the reasons for the American distinction between commercial banking and investment banking, and the application of that distinction to foreign banks operating in the United States, see Bowen, *The Securities Activities of Foreign Banks in the United States: A Consideration of Proposed Changes in Regulation*, 10 LAW. AM. 510 (1978).

75. IBA, *supra* note 1, §§ 5(b), 8(c). These provisions permit foreign banks to continue those interstate and non-banking activities which were in operation on July 26, 1978. See SENATE REPORT, *supra* note 2, at 15.

76. IBA, *supra* note 1, §§ 6, 7, 11, 13. See SENATE REPORT, *supra* note 2, at 13-14. The IBA authorizes the Board, FDIC, and the Comptroller of the Currency to join the states in examining foreign banks operating in the United States. *Id.* at 13.

77. IBA, *supra* note 1, § 9. See SENATE REPORT, *supra* note 2, at 17-18. In September, 1979 the Treasury Department submitted its study entitled, *Report to Congress on Foreign Government Treatment of U.S. Commercial Banking Organizations*. "The study has the great merit of focusing not merely on what the statutes and regulations of the various countries say but also on administrative practice and the practical problems faced by banks in their overseas operations." B. Nichols, *Foreign Regulation of United States Banks Operating Abroad—An Overview*, at 1 (Feb. 14, 1980) (outline accompanying remarks delivered at the American Bar Association National Institute on Legal Aspects of International Banking in New York City).

78. IBA, *supra* note 1, § 14. SENATE REPORT, *supra* note 2, at 19. See 19 HARV. INT'L L.J. 1011, 1018-19 n.62 (1978); note 44 *supra*.

C. Section 3 of the IBA:
Edge Act Amendments

Three significant amendments to the Edge Act were included in section 3 of the IBA. This section: (1) removed the restriction that all owners of EACs must be United States citizens;⁷⁹ (2) eliminated two statutory limitations on the ability of EACs to compete effectively with foreign-owned credit institutions;⁸⁰ and (3) included a statement of national purpose, which set out the broad objectives and liberal intent of Congress regarding EACs.⁸¹ The first of these revisions was included in each of the earlier versions of the IBA,⁸² but the latter two amendments were included only after the Senate Hearing on the IBA,⁸³ prompted by several proposals⁸⁴ made by Senator Adlai E. Stevenson.⁸⁵

While questioning federal monetary officials⁸⁶ at the Hearing, Senator Stevenson pointed out that it would be in the national interest to enlarge "credit facilities throughout the United States, especially those available for export transactions."⁸⁷ He strongly sug-

79. IBA, *supra* note 1, § 3(c), (f). See note 83 *infra* and accompanying text.

80. IBA, *supra* note 1, § 3(d), (e). See also *id.* § 3(h). See notes 89-92 *infra* and accompanying text.

81. IBA, *supra* note 1, § 3(b). See notes 93-95 *infra* and accompanying text.

82. International Banking Act of 1977, H.R. 7325, 95th Cong., 1st Sess. § 3 (1977); International Banking Act of 1976, H.R. 13876, 94th Cong., 2d Sess. § 3 (1976); Foreign Bank Act of 1975, S. 958, 94th Cong., 1st Sess. § 10 (1975). See *International Banking Act of 1978: Hearing on H.R. 10899 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 2d Sess. 9-10 (1978) (statement of G. William Miller, Chairman of the Federal Reserve Board) [hereinafter cited as *Senate Hearing*].

83. *Senate Hearing*, *supra* note 82. Section 3 of H.R. 10899 which passed the House of Representatives on April 6, 1978 simply permitting foreign ownership of EACs. Subsequent to the Hearing held on the IBA, *see id.*, the Senate added several amendments to the legislation, including a greatly revised § 3, which passed the Senate on August 15, 1978. The House concurred in the Senate's amendments on August 17, 1978, and President Carter signed the IBA into law on September 17, 1978. See SENATE REPORT, *supra* note 2, at 1-2.

84. It was at this Hearing that Senator Stevenson proposed his "deft compromise" on the interstate branching issue as well as his proposals concerning the liberalization of powers granted to EACs. See *Stevenson Compromise*, *supra* note 62, at 286, 294-96.

85. Adlai E. Stevenson III is the Junior Senator, Democrat, from Illinois, and is Chairman of the Subcommittee on International Finance, Senate Committee on Banking, Housing, and Urban Affairs.

86. G. William Miller, then-Chairman of the Federal Reserve Board; John G. Heimann, Comptroller of the Currency; Robert H. Mundheim, General Counsel of the Treasury; George A. LeMaistre, Chairman, Federal Deposit Insurance Corporation. See *Senate Hearing*, *supra* note 82, at 56-59, 74-75, 126-27.

87. *Id.* at 56.

gested that the powers granted to EACs be liberalized to achieve that goal.⁸⁸

Senator Stevenson observed that two specific requirements in the Edge Act prevented EACs from reaching their potential as credit facilities.⁸⁹ One limited the level of liabilities an EAC might issue to not more than ten times the corporation's capital and surplus.⁹⁰ The other imposed a mandatory ten percent reserve requirement on all domestic deposits held by EACs.⁹¹ Both of these requirements were removed to "increase the flexibility of Edge Corporations in their international financial operations."⁹²

The third amendment is section 3(b)'s "declaration of congressional policy which is to serve as guidance to future regulatory actions and interpretations" of the Edge Act by the Board.⁹³ This policy statement explains that the purpose of the Edge Act is to establish federally supervised international banking and financial corporations with powers broad enough to compete effectively with similar foreign-owned institutions, and to provide at all times a means for financing international trade, especially United States ex-

88. *Id.* at 57.

89. *Id.*

90. 12 U.S.C. § 618 (1976). The reference is to liabilities in the form of debentures, bonds, and promissory notes. *Id.* This limitation was originally included in the Edge Act because it was thought that EACs would issue debentures or bonds on the credit of foreign governments and sell them to the American public. Since that has not been the case, this limitation was seen as unnecessary and as a hindrance to EAC competition with foreign-owned credit institutions. SENATE REPORT, *supra* note 2, at 5. Congress remains concerned about the undercapitalization of banking institutions in the United States. While removing the statutory limit on an EAC's debt/equity ratio in § 3(d), Congress added § 3(h) which requires the Board in its annual report to give special attention to the effect of this amendment on the capitalization and activities of EACs, commercial banks, and the banking system. *Id.* at 6.

91. 12 U.S.C. § 615(a) (1976). This minimum was higher than the average percentage prescribed for member banks of the Federal Reserve System and served to place EACs at a cost disadvantage with their competitors. *Senate Hearing, supra* note 82, at 58 (letter from G. William Miller). See SENATE REPORT, *supra* note 2, at 6.

92. *Senate Hearing, supra* note 82, at 58 (letter from G. William Miller). The Board had included these liberalizing provisions in its previous drafts of the IBA. See International Banking Act of 1977, H.R. 7325, 95th Cong., 1st Sess. § 3 (1977); International Banking Act of 1976, H.R. 13876, 94th Cong., 2d Sess. § 3 (1976); Foreign Bank Act of 1975, S. 958, 94th Cong., 1st Sess. § 10 (1975) (no provision liberalizing reserve requirement). However, the version which first passed the House in 1978 did not include these provisions. See H.R. REP. NO. 910, 95th Cong., 2d Sess. 11 (1978); see also note 83 *supra*.

93. SENATE REPORT, *supra* note 2, at 5. A statement of national purpose has been included in the Board's Regulation K since 1963. See SENATE REPORT, *supra* note 2, at 4; e.g., 12 C.F.R. § 211.1(b)(1) (1979).

ports.⁹⁴ The amendment also encourages the ownership of EACs by regional and smaller banks.⁹⁵

At Senator Stevenson's urging,⁹⁶ section 3 required the Federal Reserve Board to review its rules, regulations, and interpretations issued pursuant to the Edge Act⁹⁷ in furtherance of that sec-

94. IBA, *supra* note 1, § 3(b) states:

Section 25(a) of the Federal Reserve Act is amended by adding after the first paragraph (12 U.S.C. 611), the following new paragraph:

"The Congress hereby declares that it is the purpose of this section to provide for the establishment of international banking and financial corporations operating under Federal supervision with powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad; to afford to the United States exporter and importer in particular, and to United States commerce, industry, and agriculture in general, at all times a means of financing international trade, especially United States exports; to foster the participation by regional and smaller banks throughout the United States in the provision of international banking and financing services to all segments of United States agriculture, commerce, and industry, and, in particular small business and farming concerns; to stimulate competition in the provision of international banking and financing services throughout the United States; and, in conjunction with each of the preceding purposes, to facilitate and stimulate the export of United States goods, wares, merchandise, commodities, and services to achieve a sound United States international trade position. The Board of Governors of the Federal Reserve System shall issue rules and regulations under this section consistent with and in furtherance of the purposes described in the preceding sentence, and, in accordance therewith, shall review and revise any such rules and regulations at least once every five years, the first such period commencing with the effective date of rules and regulations issued pursuant to section 3(a) of the International Banking Act of 1978, in order to ensure that such purposes are being served in light of prevailing economic conditions and banking practices."

95. *Id.*

96. See *Senate Hearing*, *supra* note 82, at 57.

97. IBA, *supra* note 1, § 3(a). The revised rules were to be issued in proposed form in 150 days and in final form in 270 days. *Id.* The Board complied with those deadlines. 44 Fed. Reg. 10,509, 36,005 (1979). See generally Part III *infra*.

In addition, § 3(g) ordered the Board to submit its recommendations concerning EAC membership in the Federal Reserve System, which it did on June 13, 1979. The Board would not object if EACs and agreement corporations were permitted to apply for membership. It recommended, however, that such corporations be permitted access to the Federal Reserve discount window without requiring that they become member banks. This would establish equal treatment between EACs and United States branches and agencies of foreign banks, which have access to the discount window under the IBA. Letter from G. William Miller to Walter F. Mondale, accompanying Staff Report on the Advisability of Edge Corporation Membership in the Federal Reserve System (June 13, 1979). Congress has not yet acted on the Board's recommendations. Telephone conversation with C. Keefe Hurley, Senior Counsel, Board of Governors of the Federal Reserve System (March 3, 1980).

tion's purpose.⁹⁸ In addition, the Senate Report⁹⁹ on the IBA directed the Board to review carefully certain regulations in this process, including "those pertaining to limitations on aggregate liabilities, use of loan proceeds, employment of funds in the money market, lending limits, receipt of deposits from domestic concerns, and limitations on certain guarantees issued."¹⁰⁰

Senator Stevenson's efforts prompted congressional review of the performance of the Edge Act and EACs for the first time in almost sixty years. Congress determined that the purposes of the Edge Act were not being served by the prevalent regulatory climate,¹⁰¹ and attempted to liberalize significantly the powers of EACs and the regulations concerning them.¹⁰² It is clear that Congress directed the Board to revise its regulations substantially in order to help EACs achieve their intended stature.¹⁰³ Whether the

98. The purpose of § 3 is:

[T]o eliminate or modify provisions in section 25(a) of the Federal Reserve Act that (1) discriminate against foreign-owned banking institutions, (2) disadvantage or unnecessarily restrict or limit corporations organized under section 25(a) of the Federal Reserve Act in competing with foreign-owned banking institutions in the United States or abroad or (3) impede the attainment of the Congressional purposes set forth in section 25(a) of the Federal Reserve Act as amended by subsection (b) of this section.

IBA, *supra* note 1, § 3(a).

99. S. REP. NO. 95-1073, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1421.

100. SENATE REPORT, *supra* note 2, at 5. The committee also believed that "the Board should insure that its regulations in this area are consistently and uniformly applied by the various Federal Reserve Banks." *Id.*

101. The SENATE REPORT, *supra* note 2, at 3-4 describes the three principal congressional purposes of the Edge Act:

First, it was intended that these corporations play a major role in the financing of U.S. exports. . . . Second, the new corporations were to be given the opportunity and the means of competing with similar foreign institutions. . . . Third, Congress wanted to strengthen Government control and supervision of international banks. . . .

While Edge Act corporations have no doubt assisted in the financing of U.S. exports, the antiquated statutory and regulatory framework under which they must conduct their operations has hampered their usefulness in this regard and has put them at competitive disadvantages relative to foreign-owned banking institutions.

Id.

102. See IBA, *supra* note 1, § 3(a), (b); note 94, 98 *supra*.

103. See H. Cohen, Recent Developments Regarding Edge Corporations 1 (Feb. 14, 1980) (outline accompanying remarks delivered at the American Bar Association National Institute on Legal Aspects of International Banking, in New York City) [hereinafter cited as Cohen].

Board's revised Regulation K fully implements the IBA's directive, however, is not as clear.

III. REGULATION K: INTERNATIONAL BANKING OPERATIONS

On June 14, 1979 the Board issued its final revision of Regulation K pursuant to section 3 of the IBA.¹⁰⁴ The Board reviewed not only the regulations governing EACs but also those governing both foreign operations of Federal Reserve System member banks and foreign investment by bank holding companies.¹⁰⁵ These regulations were revised and combined into one comprehensive regulation which was first issued in proposed form on February 14, 1979.¹⁰⁶ The proposed regulation generated extensive public comment, precipitating its modification in many instances.¹⁰⁷ The final regulation is entitled "International Banking Operations."¹⁰⁸

Consideration of the issues raised during this process has continued a longstanding debate among American bankers, which typically has pitted the large money-center banks against the small and regional banks throughout the country.¹⁰⁹ The revision re-

104. 44 Fed. Reg. 36,005 (1979) (codified at 12 C.F.R. § 211 (1980)).

105. *Id.* This Note discusses the revised regulation only as applied to EACs.

106. 44 Fed. Reg. 10,509 (1979).

107. *See* 44 Fed. Reg. 36,005, 006 (1979). Ninety-six letters of comment were received by the Board concerning the proposed regulation. Staff memorandum from the Legal Division to the Board of Governors of the Federal Reserve System (May, 1979), reprinted in PRACTISING LAW INSTITUTE, INTERNATIONAL BANKING OPERATIONS IN THE UNITED STATES *an update* 401, 403 (Course Handbook 313 (1979)) [hereinafter cited as Summary of Comments].

108. 12 C.F.R. § 211 (1980). The former regulation, 12 C.F.R. § 211 (1979), was entitled "Corporations Engaged in Foreign Banking and Financing Under the Federal Reserve Act," and has been deleted. 44 Fed. Reg. 36,012 (1979).

Unlike the Edge Act, Regulation K has been revised on other occasions. In 1957, a more restrictive interpretation of the Act resulted in the formal distinction between banking and investment EACs. *See* note 17 *supra*. The regulation was liberalized by the Board in 1963, removing that distinction, as well as simplifying approval procedures for the issuance of debentures or bonds, and for investment in foreign corporations. The 1963 revision also added a liberal statement of national purpose. *See* note 93 *supra* and accompanying text. In 1969, Regulation K again was amended, enlarging the activities to which the Board gives its "general consent." 12 C.F.R. § 211.8 (1979). *See generally* J. BAKER & M. BRADFORD, *supra* note 8, at 32-36.

109. *See, e.g.*, [1979] INTERNATIONAL REPORTS, INC. 561 (June 1, 1979); *Fed Action Seen Delayed On Interstate Bank Rules*, N.Y. Times, May 30, 1979, at D1, col. 1; *Stevenson Compromise*, *supra* note 62, at 289-93. *See also* notes 174-75 *infra* and accompanying text.

sulted in a compromise of the interests involved, but purportedly did not result in a compromise of its objectives.¹¹⁰

A. Major Issues

1. Branching

The most controversial action taken by the Board in revising Regulation K permitted EACs to establish domestic interstate branches,¹¹¹ thereby furthering the IBA objective of providing expanded international banking services throughout the United States.¹¹² There are several advantages to this new option. It eliminates the requirement of separate capitalization and administration for each EAC, which was seen as an inefficient use of funds and a barrier to entering new markets.¹¹³ It also promotes the use of EACs by both smaller and regional banks, another goal of the IBA.¹¹⁴

The many letters of comment received on the proposed regu-

110. The Board described its actions as furthering certain purposes of the IBA, "including the stimulation of competition in providing international banking and financing services throughout the United States." 44 Fed. Reg. 36,005 (1979). *Contra* H. Cohen, Recent Developments Regarding Edge Corporations (Feb. 14, 1980) (remarks delivered at the American Bar Association National Institute on Legal Aspects of International Banking, in New York City). "Regulation K did not live up to its mandate." *Id.*

111. 12 C.F.R. § 211.4(c)(1) (1980). While the qualifying customer concept drew as many comments (72 out of 96) as the branching issue during the comment period, domestic branching received the most publicity before and after its adoption. *See* Summary of Comments, *supra* note 107, at 404, 430; Cohen, *supra* note 103, at 1; e.g., Am. Banker, June 11, 1979, at 1, col. 2; [1979] INTERNATIONAL REPORTS, INC. 639 (June 22, 1979); *Citibank Plans 10 U.S. Units*, N.Y. Times, Feb. 11, 1980, at D1, col. 6; *Banks Urge More Easing On Branches*, *id.*, April 26, 1979, at D1, col. 3; *Crossing the Line, Expanding U.S. Banks Hope Law Will Allow National Competition*, Wall St. J., June 21, 1979, at 1, col. 6; Wall St. J., June 7, 1979, at 1, col. 2.

112. *See* Federal Reserve Board Staff Memorandum, Revision of Regulation K (May 24, 1979), reprinted in PRACTISING LAW INSTITUTE, INTERNATIONAL BANKING OPERATIONS IN THE UNITED STATES *an update* 363, 377 (Course Handbook 313 (1979)) [hereinafter cited as Staff Revision].

113. *Id.* at 373. *See* 44 Fed. Reg. 36,005, 006 (1979). This enables more banking organizations to enter the six international financial markets which have already attracted EACs, and places other cities in a better position to attract EACs. Staff Revision, *supra* note 112, at 373. *See* note 45 *supra*.

114. *See* 44 Fed. Reg. 36,005, 006 (1979). *See also* Cohen, *supra* note 103, at 1. Those parent banks with more than one EAC would not be prejudiced by this provision, as EACs could change their organizational form. *See* 44 Fed. Reg. 10,509, 510 (1979); Cohen, *supra* note 103, at 2.

lation were evenly divided on the issue of branching.¹¹⁵ Those which agreed with the Board's proposal contended that domestic branching would result in more efficient uses of capital, and would significantly advance the congressional objectives in the IBA by eliminating unnecessary regulatory restrictions.¹¹⁶ The critics of the proposal saw it as a violation of the McFadden Act, and thought it premature in view of the forthcoming study on interstate branching.¹¹⁷ The Board responded by stating that several banks operate EACs in more than one state, and that EACs are specifically excluded from federal laws limiting national banks to one state.¹¹⁸

115. Of the 72 comments mentioning this proposal, 35 clearly stated their approval and 36 disapproved. Summary of Comments, *supra* note 107, at 405, 430.

116. The favorable respondents included eight Federal Reserve banks, Senator Stevenson, and the New York Clearing House Association (NYCHA). See Federal Reserve Board Memorandum, Summary of Reserve Banks Comments on Regulation K (May, 1979), reprinted in PRACTISING LAW INSTITUTE, INTERNATIONAL BANKING OPERATIONS IN THE UNITED STATES *an update* 353 (Course Handbook 313 1979)) [hereinafter cited as Reserve Banks Comments]; Letter from Senator Stevenson to G. William Miller (April 10, 1979), reprinted in PRACTISING LAW INSTITUTE, INTERNATIONAL BANKING OPERATIONS IN THE UNITED STATES *an update* 395 (Course Handbook 313 (1979)) [hereinafter cited as Stevenson Comment]; New York Clearing House Association, Memorandum of Comments on Proposed Revisions of Regulation K, at 37 (April 15, 1979) [hereinafter cited as NYCHA Memorandum]. The members of the NYCHA are the Bank of New York, the Chase Manhattan Bank, Citibank, the Chemical Bank, the Morgan Guaranty Trust Company, the Manufacturers Hanover Trust Company, the Irving Trust Company, the Bankers Trust Company, the Marine Midland Bank, the United States Trust Company, the National Bank of North America, and the European-American Bank and Trust Company. N.Y. Times, April 26, 1979, at D4, col. 6.

Other favorable respondents referred to the authority of foreign banks, granted in § 5 of the IBA, to branch interstate with the powers of EACs but without their concomitant restrictions, as justification for this branching provision. Summary of Comments, *supra* note 107, at 405. See note 73 *supra* and accompanying text.

117. Summary of Comments, *supra* note 107, at 405-06. The American Bankers Association was especially wary of the joint branching and qualified customer proposals advanced. Letter from the ABA to Theodore E. Allison, Secretary of the Board 3 (May 3, 1979) [hereinafter cited as ABA Comment]. See notes 126-27 *infra* and accompanying text. Several respondents also believed that the proposal was not being given the proper consideration. Summary of Comments, *supra* note 107, at 406. Indeed, the schedule set by Congress requiring submission of proposals within 150 days and final revisions within 270 days after enactment of the IBA created several problems. See Cohen, *supra* note 103, at 11.

118. 44 Fed. Reg. 36,005, 006 (1979). EACs are exempted from the definition of "bank" in § 2(c) of the Bank Holding Company Act, 12 U.S.C. § 1841(c) (1976). The McFadden Act, 12 U.S.C. § 36 (1976), only applies to national banking associations.

2. International Customers

The major proposed revision not adopted by the Board was one which would have created a new class of international customer.¹¹⁹ Under the proposal, EACs would have been permitted to offer full deposit and other banking services to any customer which, on an unconsolidated basis, had more than two-thirds of its sales or purchases in international commerce.¹²⁰ This proposal constituted a significant departure from the Board's past practice under which each banking transaction had to be incidental to international trade.¹²¹ The Board criticized its current policy and argued that this proposal would ease the administrative and supervisory burden placed on EACs and the Federal Reserve System.¹²² Had the Board adopted this provision, EACs would have been better equipped to compete effectively for the business of firms specializing in international trade.¹²³ The Board thought that this change was consistent with the intent of section 3 of the IBA, as it would enlarge the ability of EACs to provide international financial services.¹²⁴

Many of the favorable respondents agreed that this concept was consistent with the aims of the IBA, but recommended that the two-thirds requirement be lowered.¹²⁵ Those which disapproved believed that this proposal would enable United States parent banks to carry on an interstate domestic banking business in

119. 44 Fed. Reg. 36,005, 006 (1979).

120. 44 Fed. Reg. 10,509 (1979).

"Unconsolidated" in this context means the separately incorporated business entity conducting business with the Edge, excluding any subsidiaries and/or parent, would be eligible for qualified customer status. Thus, an operating division of a company could not qualify. Nor could a company consolidate with its trade-related subsidiaries in order to qualify.

Staff Revision, *supra* note 112, at 365 n.1.

121. 12 C.F.R. § 211.7 (1979). *See* 44 Fed. Reg. 10,509 (1979).

122. *Id.*

123. *See* Staff Revision, *supra* note 112, at 367.

124. *Id.* *See also* 44 Fed. Reg. 10,509 (1979).

125. Summary of Comments, *supra* note 107, at 407. Senator Stevenson regarded this provision in the proposal as "extremely important" in that it would simplify the operations of EACs and facilitate United States export trade. Stevenson Comment, *supra* note 116, at 395-96. All twelve Federal Reserve Banks endorsed this proposal. Reserve Banks Comments, *supra* note 116, at 353-54. The NYCHA believed that very few companies would pass the two-thirds test, and recommended a requirement of 40-50 percent be used. NYCHA Memorandum, *supra* note 116, at 16.

violation of the McFadden Act.¹²⁶ The American Bankers Association and others were particularly hesitant about the adoption of both the branching proposal and the international customer concept. They feared the "unforeseen impact of the combined proposals on the domestic banking structure."¹²⁷

Despite the strong criticism from politically influential respondents, the Federal Reserve Board staff recommended that the international customer concept be passed, substantially as proposed.¹²⁸ The Board, however, did not follow its staff's recommendation. The ABA's "unforeseen impact" argument seems to have carried the most weight during the deliberations prior to issuance of the final regulation.¹²⁹ As a result, the Board decided to "defer" action on this proposal.¹³⁰ While the deferral is "widely perceived as an indefinite postponement,"¹³¹ several recent actions by the Federal Reserve Board staff show that the proposal has not been forgotten.¹³²

126. Summary of Comments, *supra* note 107, at 408. Senator William Proxmire, Chairman of the Senate Committee on Banking, Housing, and Urban Affairs strongly disagreed with the proposal, stating that it was "contrary to the provisions" of the IBA, which did not grant authority to EACs to conduct a domestic banking business. Letter from Senator Proxmire to G. William Miller (May 8, 1979), *reprinted in* PRACTISING LAW INSTITUTE, INTERNATIONAL BANKING OPERATIONS IN THE UNITED STATES *an update* 397, 398 (Course Handbook 313 (1979)) [hereinafter cited as Proxmire Comment].

127. ABA Comment, *supra* note 117, at 2. The ABA also feared that smaller regional banks would not be able to compete effectively with the EACs of larger United States and foreign banks if the international customer concept were adopted. *Id.* The ABA did note that the adoption of the branching provision without the international customer concept might be desirable and might make EACs more attractive and competitive. *Id.* at 3.

128. Staff Revision, *supra* note 112, at 366.

129. See [1979] INTERNATIONAL REPORTS, INC. 561 (June 1, 1979). See also N.Y. Times, May 30, 1979, at D1, col. 1.

130. 44 Fed. Reg. 36,005, 006 (1979). The Board explained that the information submitted during the comment period was not sufficient to enable it to assess adequately the likely effects of the proposal. *Id.*

131. Cohen, *supra* note 103, at 5.

132. Neal L. Petersen, General Counsel of the Federal Reserve Board, recently stated that the staff at the Federal Reserve Board was in the process of making field observations at EACs throughout the country to determine which tests will be used when the international customer concept is reissued for comment. He suggested several different approaches, none of which permitted EACs to offer total deposit services to qualifying customers. One approach would authorize total lending services without deposits. Another would permit some credit balances without full deposit-taking powers. Petersen believes that some form of the qualifying customer concept "will be back." Remarks delivered by Mr. Petersen at the American Bar Association National Institute on Legal Aspects of International Banking, in New York City (Feb.

3. Capitalization Requirement

The IBA removed the requirement that liabilities issued by EACs not exceed ten times the corporation's capital and surplus.¹³³ In its proposed regulation, the Board included a minimum capitalization requirement of six percent of total assets for EACs engaged in banking.¹³⁴ The favorable comments on this requirement contended that it was more flexible than the previous ten-to-one ratio.¹³⁵ The vast majority of the respondents, however, objected to the provision as not being liberal enough since it did not take into account the risk element of assets held by EACs.¹³⁶ They argued that if a test based on assets were to be used, cash and other riskless assets should not be included in the asset base.¹³⁷

In response to the comments, the Board adopted a more liberal minimum requirement based on seven percent of risk assets,¹³⁸ reiterating its view that banking EACs should be financially sound in their own right.¹³⁹

14,1980). Mr. Petersen added that the Board would probably not reconsider this proposal until after the White House study on the McFadden Act had been submitted to Congress. *Id.*

133. IBA, *supra* note 1, § 3(d). See notes 80, 89-92 *supra* and accompanying text.

134. 44 Fed. Reg. 10,509, 514 (1979) (proposed rule, 12 C.F.R. § 211.6(a)(3)). The provision stated:

An Edge Corporation shall at all times be capitalized in an amount that is adequate in relation to the scope and character of its activities, but in the case of an Edge Corporation engaged in banking, its capital and surplus shall not be less than six per cent of total consolidated assets.

Id.

135. Summary of Comments, *supra* note 107, at 410. Senator Proxmire supported the inclusion of a minimum figure and suggested that six percent might be too liberal. Proxmire Comment, *supra* note 126, at 397.

136. Summary of Comments, *supra* note 107, at 410. See 44 Fed. Reg. 36,005, 007 (1979).

137. Summary of Comments, *supra* note 107, at 410. Other objections to the proposal stated: first, that it was Congress' intent to liberalize the existing ten-to-one ratio and the proposed test did not represent a significant relaxation of the capital requirement; and second, that by applying a more restrictive test to Edge Corporations than is applied to foreign banks in the United States, EACs would be placed at a competitive disadvantage. Additionally, several respondents believed that the requirement would limit lending and disadvantage both smaller and regional banks which would otherwise be encouraged to establish EACs. *Id.* at 410-11. See also Reserve Banks Comments, *supra* note 116, at 355.

138. 12 C.F.R. § 211.6(d) (1980). Risk assets, include all assets on a consolidated basis other than cash, amounts due from banking institutions in the United States, United States securities, and federal funds sold. *Id.* See 44 Fed. Reg. 36,005, 007 (1979).

139. 44 Fed. Reg. 36,005, 007 (1979). The Board thought it necessary to state its

4. Lending Limits

Regulation K previously limited the liabilities owed by one person to an EAC to "50 percent of the Corporation's capital and surplus, or 10 percent thereof if it is engaged in banking."¹⁴⁰ The proposed revision retained these limitations but added the provision that all loans made to one person by an EAC and its foreign subsidiaries, when aggregated with those of both its parent Federal Reserve member bank and the parent's other subsidiaries, may not exceed that parent member bank's lending limits.¹⁴¹

Comments on these provisions were evenly divided but those in opposition raised several interesting points. Retention of the original limits on EAC lending was seen as an unnecessary restriction which would place those EACs which are in competition with branches and agencies of foreign banks in the United States at a disadvantage.¹⁴² Critics also predicted that the administration of the aggregation provision would be too time-consuming and costly.¹⁴³ One bank saw problems in data collection with regard to foreign subsidiaries of United States banks and EACs which are subject to the confidentiality laws of the countries in which they are located.¹⁴⁴ In response to the issues raised, the Board removed the original fifty percent limit on lending to one person by an investment EAC.¹⁴⁵ The aggregation concept was retained in the fi-

position on this matter since several respondents suggested that EACs be permitted to look to their parents' capital and surplus as protection for depositors. Summary of Comments, *supra* note 107, at 411.

140. 12 C.F.R. 211.9(b) (1979).

141. 44 Fed. Reg. 10,509, 514 (1979) (proposed rule, 12 C.F.R. § 211.6(a)(2)).

This requirement was designed to prevent these subsidiaries from being used by a bank to evade its lending limits. . . . The primary purpose of lending limits is to provide for some minimal diversification of assets, which in these cases would be to help reduce the likelihood that a parent bank would have to "bail out" a subsidiary.

Staff Revision, *supra* note 112, at 391-92. The amount of the lending limit itself is determined on the basis of state law (if the Federal Reserve member bank is state chartered) or the National Bank Act, 12 U.S.C. § 84 (1976) (if the bank is a national bank). Cohen, *supra* note 103, at 8.

142. See Reserve Banks Comments, *supra* note 116, at 360.

143. See Summary of Comments, *supra* note 107, at 424. The New York Federal Reserve Bank criticized the aggregation proposal as being discriminatory against Federal Reserve member banks and, as a result, in favor of non-member and foreign banks which own EACs. Reserve Banks Comments, *supra* note 116, at 360.

144. Summary of Comments, *supra* note 107, at 424. See also Staff Revision, *supra* note 112, at 390.

145. "With the imposition of a consolidated lending limit, a separate limit on investment Edge Corporations and foreign subsidiaries appears to be of only marginal value." Staff Revision, *supra* note 112, at 391.

nal regulation, however, as was the separate ten percent of capital limit for EACs engaged in banking.¹⁴⁶

5. Other Revisions

The powers of EACs have undergone several additional revisions which are worth noting, although they are not as controversial as the previous four proposals. In most cases these revisions have resulted in substantial liberalization of EAC activities.

a. *funding powers*

In “[p]erhaps the most meaningful liberalization,”¹⁴⁷ the revised regulation substantially increases EACs’ sources of funds.¹⁴⁸ EACs now enjoy freedom to obtain funds in the domestic interbank market, including federal funds purchases.¹⁴⁹ They may offer savings deposits to qualified depositors,¹⁵⁰ and they may issue negotiable certificates of deposit to foreign governments and foreign persons in connection with international transactions.¹⁵¹

146. 12 C.F.R. § 211.6(b) (1980). The aggregation provision was later modified, however, to indicate clearly that only the parent bank’s majority-owned subsidiaries would be included. See 44 Fed. Reg. 42,152 (1979). See also Cohen, *supra* note 103, at 8.

147. Cohen, *supra* note 103, at 2.

148. Compare 12 C.F.R. § 211.4(e) (1980) with 12 C.F.R. § 211.7 (1979).

149. 12 C.F.R. § 211.4(e)(4)(i) (1980).

150. 12 C.F.R. § 211.4(e)(1), (2) (1980). EACs were previously authorized to accept demand and time (but not savings) deposits in the United States incidental to foreign or international business. 12 C.F.R. § 211.7(c) (1979). It was noted that since NOW accounts are classified as savings accounts in Federal Reserve Board Regulation D, EACs in New York, New Jersey, and the six New England states can offer NOW accounts to depositors who qualify under Regulations D and K, namely, foreign individuals. Cohen, *supra* note 103, at 2.

151. 12 C.F.R. § 211.4(e)(1), (2) (1980). The proposed regulation restricted EACs to issuing non-negotiable certificates of deposit. 44 Fed. Reg. 10,509, 512 (1979) (proposed rule, 12 C.F.R. § 211.4(f)(2), (3)).

The requirement of non-negotiability appears to have resulted from a concern that the purchase by a domestic firm of an outstanding Edge Corporation CD—where such purchase is not related to an international transaction—could cause the Edge Corporation to be engaged in domestic deposit-taking in violation of the Edge Act.

Staff Revision, *supra* note 112, at 382.

Several respondents objected to this limitation, stating that “the ability of EACs to attract funds would be hampered if they could not offer their customers the liquidity inherent in negotiable certificates.” Summary of Comments, *supra* note 107, at 415. The NYCHA noted that this provision is more restrictive than the existing regulation which did not limit the forms of the documents evidencing deposits. The Association pointed out that EACs would be forced to pay a higher interest rate than their foreign-owned competitors and thus would be disadvantaged, in contradiction

b. *financing goods for export*

An EAC's permissible activities have been increased so that the corporation may finance the production of goods and services for which export orders have been received or which are identifiable as being directly for export.¹⁵² Previously, EACs were only permitted to finance shipping and storage of goods incidental to international trade.¹⁵³ The Board thought that this revision would not only make EACs more efficient and competitive but also would promote United States trade in furtherance of the objectives of the IBA.¹⁵⁴ Most of the respondents supported this proposal,¹⁵⁵ but a few opponents feared that large banks would gain an unfair advantage as EACs entered what they considered to be a domestic market.¹⁵⁶

c. *investment powers*

Domestically, the investment powers of EACs have been "significantly expanded"¹⁵⁷ to add money market instruments to the list of permitted investments made with funds not currently employed in international or foreign business.¹⁵⁸ The revised regulation also raised the ceiling for EAC investments in foreign companies, which do not need prior Board approval. According to

with the objectives of the IBA. NYCHA Memorandum, *supra* note 116, at 7-8. In response to these comments, the Board now permits EACs to issue negotiable certificates of deposit. 44 Fed. Reg. 36,005, 006 (1979). See Staff Revision, *supra* note 112, at 382-83.

152. 12 C.F.R. § 211.4(e)(4)(v) (1980). The proposed provision would have permitted the "direct production and preparation of goods readily identifiable as being for export." 44 Fed. Reg. 10,509, 512 (1979) (proposed rule, 12 C.F.R. § 211.4(f)(5)(vi)). Reacting to comments received, the Board clarified the provision and enlarged it to cover exported services, such as architectural or engineering plans. See Staff Revision, *supra* note 112, at 379-80; 44 Fed. Reg. 36,005, 006 (1979). See also NYCHA Memorandum, *supra* note 116, at 18-19.

153. 12 C.F.R. § 211.7(d)(1) (1979).

154. See Staff Revision, *supra* note 112, at 379-80.

155. See Summary of Comments, *supra* note 107, at 409. Senator Stevenson supported this proposal, explaining that it "should help expand U.S. exports and reduce the temptation to shift production overseas." Stevenson Comment, *supra* note 116, at 395.

156. Summary of Comments, *supra* note 107, at 409.

157. Cohen, *supra* note 103, at 4.

158. 12 C.F.R. § 211.4(e)(3) (1980). Acceptable money market instruments include bankers' acceptances, obligations of or fully guaranteed by federal, state, and local governments and their instrumentalities, repurchase agreements, federal funds sold, and commercial paper. *Id.*

the provision, EACs have "general consent" to invest up to two million dollars,¹⁵⁹ instead of the previous limit of \$500,000,¹⁶⁰ in subsidiaries and joint ventures as long as they are engaged in certain specified activities.¹⁶¹ For amounts to be invested abroad in excess of two million dollars, but not exceeding ten percent of the EAC's capital and surplus, the Board has enacted a simplified prior notification procedure.¹⁶² In addition, the previous rule that the issuance of all long-term debentures, bonds or promissory notes needed prior Board approval has been eliminated.¹⁶³ These revisions reduce the costly and time-consuming procedure of prior approval which has hindered EACs in the past.¹⁶⁴

d. *engaged in banking*

One provision of the revised regulation which is not seen as a liberalization of EAC powers or activities defines "engaged in banking."¹⁶⁵ An EAC which has been determined to be engaged in banking is subject to many more limitations on its activities than is an investment EAC.¹⁶⁶ Previously, an EAC was engaged in banking whenever it had "aggregate demand deposits and acceptance liabilities exceeding its capital and surplus."¹⁶⁷ Under the proposed revision, banking status would be given to an EAC "if it ordinarily has in the United States total deposit, acceptance and Federal funds liabilities exceeding its capital and surplus."¹⁶⁸ Several respondents thought that this new definition was unnecessarily re-

159. 12 C.F.R. § 211.5(c)(1) (1980). The amount invested, however, may not exceed five percent of the investor's capital and surplus for EACs engaged in banking, or twenty-five percent of capital or surplus for EACs not engaged in banking. *Id.*

160. 12 C.F.R. § 211.8(a) (1979).

161. 12 C.F.R. § 211.5(d) (1980). This provision lists 14 permissible activities for EACs conducting business abroad.

162. All foreign investments previously made by EACs in excess of the general consent limitations needed prior Board approval. 12 C.F.R. § 211.8(b) (1979). Now some of those investments may be made after the EAC has given the Board sixty days prior notification. 12 C.F.R. § 211.5(c)(2) (1980). Any investments which do not qualify for the general consent or prior notification provisions require the specific prior consent of the Board. 12 C.F.R. § 211.5(c)(3) (1980). See Cohen, *supra* note 103, at 7.

163. 12 C.F.R. § 211.4 (1979).

164. See J. BAKER & M. BRADFORD, *supra* note 8, at 32.

165. See Cohen, *supra* note 103, at 9-10.

166. *Id.* at 9. See NYCHA Memorandum, *supra* note 116, at 32; notes 18-20 *supra* and accompanying text.

167. 12 C.F.R. § 211.2(d) (1979).

168. 44 Fed. Reg. 10,509, 511 (1979) (proposed rule, 12 C.F.R. § 211.2(b)).

strictive, since the inclusion of time deposits and federal funds would blur the distinction between banking and investment EACs, and limit the latter's incidental use of time deposits and federal funds.¹⁶⁹

Noting the comments received, the Board slightly amended its definition for the final regulation, but did so "without any fanfare."¹⁷⁰ Now, an EAC is engaged in banking if "it is ordinarily engaged in the business of accepting deposits in the United States from nonaffiliated persons."¹⁷¹ While earlier definitions focused on the total value of deposits, the present definition seems to rely on the frequency of any level of deposit-taking by the EACs.¹⁷² Thus, this definition acts as a greater restriction on EAC operations, particularly on those of investment EACs which have always carried on some small portion of a deposit-taking business.¹⁷³

In sum, the United States banking community viewed Regulation K as a liberal revision of the rules pertaining to EACs. The banks recognized that complex issues were involved and that in many respects the proposals were constructive and followed the objectives of the IBA.¹⁷⁴ One faction, which included Senator Stevenson and the New York Clearing House Association, believed that the Board did not go far enough in liberalizing the regulations to achieve congressional objectives. On the other hand, the American Bankers Association and Senator Proxmire, traditionally supporters of small and regional banks throughout the United States, feared that the Board went too far in its recommendations, and the political pressure from this faction was sufficient to force deferral of the international customer concept.¹⁷⁵

169. See Summary of Comments, *supra* note 107, at 411-12. The NYCHA considered the proposed definition as inconsistent with congressional objectives, as it would impose additional restrictions on what were previously investment EACs. NYCHA Memorandum, *supra* note 116, at 32-33.

170. H. Cohen, Recent Developments Regarding Edge Corporations (Feb. 14, 1980) (remarks delivered at the American Bar Association National Institute on Legal Aspects of International Banking in New York City).

171. 12 C.F.R. § 211.2(d) (1980).

172. "Ordinarily" was not defined in the regulation, nor was it mentioned in the unpublished interpretations issued by the Board to the Federal Reserve Banks. See Cohen, *supra* note 103, at 13-15.

173. *Id.* at 10, 11.

174. See, e.g., ABA Comment, *supra* note 117, at 1, 4.

175. See, e.g., [1979] INTERNATIONAL REPORTS, INC. 561 (June 1, 1979); N.Y. Times, June 7, 1979, at D1, col. 6.

B. *Effects and Implications of Regulation K*

This revision of Regulation K has already resulted in an increase in the number of applications received by the Board from American and foreign banks, both for original incorporation and for the establishment of EAC branches.¹⁷⁶ The renewed interest in EACs will continue as both United States and foreign banks reevaluate their plans for entry into the interstate international banking market. Foreign banks in particular will find EACs an attractive vehicle for entry into United States markets, since foreign banks which establish EACs here are not restricted as to their non-banking activities, while foreign parent banks which establish branches or agencies in the United States are restricted as to such non-banking activities.¹⁷⁷

The Regulation has created one problem regarding state taxation of EACs. A strict reading of one provision of the Edge Act, permitting states to tax the operations of EACs which have home offices situated in that state,¹⁷⁸ now appears generally to prohibit states from taxing the operations of EAC branches which have parents located in another state.¹⁷⁹ Because the removal of this taxing power clearly was not intended by the Board, remedial legislation is believed to be forthcoming.¹⁸⁰ Other minor areas of confusion

176. Remarks delivered by C. Keefe Hurley, Senior Counsel, Federal Reserve Board, at the American Bar Association National Institute on Legal Aspects of International Banking, in New York City (Feb. 14, 1980). See, e.g., *Citibank Plans 10 U.S. Units*, N.Y. Times, Feb. 11, 1980, at D1, col. 6.

177. See note 74 *supra* and accompanying text; D. Dean, Effect of the Act on State Regulation 282. (June 21, 1979) (outline accompanying remarks reprinted in PRACTISING LAW INSTITUTE, INTERNATIONAL BANKING OPERATIONS IN THE UNITED STATES *an update* (Course Handbook 313 (1979)). Ownership of EACs does not by itself make a foreign bank a Bank Holding Company under § 8 of the IBA, therefore it is possible for a foreign bank to operate a securities affiliate in the United States in addition to conducting EAC operations. *Id.* In fact, the Board has permitted at least one foreign bank to establish an EAC notwithstanding its ownership of a domestic securities affiliate. Cohen, *supra* note 103, at 10.

178. 12 U.S.C. § 627 (1976). This provision was passed at a time when states were prohibited from taxing national banks which existed outside of their home state. Although taxation of national banks has been liberalized, this provision of the Edge Act has not been amended, resulting in a restrictive interpretation of this provision, as applied to the states. O'Brien, *State and Local Taxation of Branches of Edge Act Corporations—Opportunities and Limitations*, 96 BANKING L.J. 893, 895-96 (1979).

179. "The only states that may tax, based upon the presence of a branch of an Edge Act corporation within the state, are those states which impose a shares tax—not an income or franchise tax." O'Brien, *supra* note 178, at 893.

180. *Id.* at 897.

have also surfaced, requiring the Board to issue unpublished interpretations of the Regulation to the Federal Reserve Banks.¹⁸¹

CONCLUSION

The Federal Reserve Board's issuance of revised Regulation K has substantially advanced the objectives of the IBA. Although the practices of many large United States banks may not be greatly affected by the new Regulation, the overall use of EACs as a medium for international trade financing by banks throughout the United States will be enhanced. The Board, however, should continue its efforts to liberalize EAC powers by reintroducing the international customer concept, and by revising its definition of "engaged in banking" to reflect the realities of incidental deposit taking by investment EACs. Through implementing these changes, and through completing the required review of Regulation K every five years,¹⁸² the Board will help the United States move closer to reaching Senator Edge's goal of providing an efficient, private means to promote our export trade.¹⁸³

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181. See Cohen, *supra* note 103, at 13-15.

182. IBA, *supra* note 1, § 3(b) states:

... The Board of Governors of the Federal Reserve System shall issue rules and regulations under this section consistent with and in furtherance of the purposes described in the preceding sentence [*see* note 96 *supra*], and, in accordance therewith, shall review and revise any such rules and regulations at least once every five years, the first such period commencing with the effective date of rules and regulations issued pursuant to section 3(a) of the International Banking Act of 1978, in order to ensure that such purposes are being served in light of prevailing economic conditions and banking practices.

183. United States exports would also be aided by passage of the Export Trading Company Act of 1980, S. 2379, 96th Cong., 2d Sess., 126 CONG. REC. S2148 (1980), which was introduced on March 4, 1980 by Senator Stevenson. This bill would facilitate the formation and operation of companies providing American producers and suppliers with export trade services, such as: freight forwarding, shipping, marketing, advertising, insurance, and legal advice. The Act would also enlarge the powers of EACs to permit them to invest in these domestic export trading companies. Currently, EACs may invest in domestic corporations only if the business conducted by those corporations in the United States is incidental to their international or foreign business, 12 U.S.C. § 615(c) (1976).