STANDARD FORM NO. 64

Office Memorandum • UNITED STATES GOVERNMENT

TO : Mr. Martin

FROM : Wesano

SUBJECT: SEC

DATE:

As a result of our conversations of last week with SEC, we are proposing to send the attached letter. The entire subject is sufficiently important to warrant your careful consideration of our proposal —

EXPORT-IMPORT BANK OF WASHINGTON
WASHINGTON 25

CABLE ADDRESS
"EXIMBANK"

September 20, 1946

Mr. Edward R. Cashion
Chief Counsel, Corporation Finance Division
Securities and Exchange Commission
Philadelphia, Pa.

Dear Mr. Cashion:

Representatives of this Bank recently discussed with Mr. Caffrey and with you our intention of offering an opportunity to United States commercial banks to participate with us in loans to foreign governments. It was then decided that we should present the essential facts to you for formal consideration.

Export-Import Bank of Washington was created as a banking corporation under the laws of the District of Columbia on February 12, 1934, pursuant to Presidential Executive Order. In January 1935 and from time to time thereafter the Congress continued the Bank as an agency of the United States. By the Export-Import Bank Act of 1945, approved July 31, 1945, management of the Bank was vested in a Board of Directors consisting of the Secretary of State ex officio and four full-time members appointed by the President by and with the advice and consent of the Senate. The Act increased the lending authority of the Bank to $3,500,000,000; the funds therefor to be obtained through the sale by the Bank to the Secretary of the Treasury of $1,000,000,000 of capital stock and of obligations up to two and one-half times the authorized capital.

As expressed in the Export-Import Bank Act of 1945, which is virtually the identical language employed in the Bank's original charter, the purpose of the Bank is to aid "in the financing and facilitating of exports and imports and the exchange of commodities between the United States or any of its Territories or insular possessions and any foreign country or the agencies or nationals thereof". In granting the Bank lending and other authority to carry out this expressed purpose, the Congress included the following provision in the Act:

"It is the policy of the Congress that the Bank in the exercise of its functions should supplement and encourage and not compete with private capital".

The Bank is ever mindful of this expression of policy of the Congress

No loan is made by the Bank unless it is satisfied that private capital is unable or unwilling to make the loan. Failing this, the Bank attempts to have private capital participate with it in the first instance in the making of the loan. An example of such participation on a large scale in the making of a loan may be found in the recent credit of $200,000,000 granted by the Bank to the Kingdom of the Netherlands and in which forty-three United States commercial banks participated to the extent of approximately $100,000,000.

The nature of foreign lending, and particularly the necessarily long-term of such loans, has precluded private capital from engaging therein, either entirely on its own or in participation with this Bank, on any appreciable scale. To further participations by private capital, the Bank has conceived the plan of offering United States commercial banks the opportunity to purchase relatively short-term participations in loans made by the Bank in the first instance without participation by private capital.

A specific example may better serve to illustrate our proposal. In December 1945, the Bank established a credit of $550,000,000 to the Republic of France. Each advance against the credit is evidenced by the general obligation of France in the form of a negotiable promissory note bearing interest at 2-3/8% per annum and the principal of which is payable in sixty (60) approximately equal semiannual installments. To date we have advanced approximately $450,000,000 of the credit and hold notes in such amount. When the entire credit is made available, we will hold a number of promissory notes; each of which will be payable in sixty (60) semiannual installments over a period of thirty (30) years, beginning on July 1, 1946 in the case of notes issued prior to such date and on January 1, 1947 for notes issued subsequent to such date.

It is our proposal to offer United States commercial banks the opportunity to participate in this as well as other loans by purchasing from us all or part of one or more principal maturities of a loan. We will sell without any guaranty of payment on our part. Presumably the banks will only be interested, for the present at least, in maturities of six (6) months to two (2) years; although maturities up to five (5) years may be of interest to some banks. We will continue to hold the unpurchased maturities over the period of the loan, and, to afford purchasing banks the advantage of governmental backing, it may be that we will agree with them to pursue joint action to protect the interests of all in the event of default. While we are not being motivated by a desire for profit, we may attempt to sell the participations on a basis which will at least compensate us for our efforts.

To enable us to give the purchasing banks suitable evidence of their participations, we will call upon the foreign obligor to issue separate notes for each principal installment or part thereof of the notes which we hold. Such new notes might be issued to our order and endorsed over by us without recourse to the purchasers or possibly might be issued in the name of the respective purchasers or to bearer and delivered by us to the purchasers.

It is our opinion that securities so sold would not be required to be registered under the Securities Act of 1933, as amended, by virtue of the exemption provided for in Section 4 (1) of the Act to the effect that the registration provisions are not applicable to "Transactions by any person other than an issuer, underwriter or dealer***"

Clearly not an issuer or a dealer, could the Bank be deemed an underwriter in the transactions described? We believe not. Section 2 (11) of the Act defines an underwriter as one "***who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security***".

The Bank proposes to sell for its own account securities which it acquires as a result of loans made by it as an agency of the Government of the United States to finance and facilitate exports and imports and the exchange of commodities between the United States and foreign countries. In making the loans, the Bank is in no way motivated by a desire to acquire the obligations to be given in evidence thereof for the purpose of disposing of the obligations. Considerations entirely apart from the ultimate disposition of the obligations govern the making of the loans. Indeed, to adopt such a criterion as a factor in the making of a loan, might well be incompatible with the charge imposed upon the Bank by the Congress. The Congress has directed the Bank to finance and facilitate exports and imports and for such purpose voted the Bank $3,500,000,000, the maximum amount which may be on loan. The very nature of the Bank's functions makes it clear that its obligations are acquired as an incident to transactions which bear no relation to the ultimate disposition of the obligations.

This is not to say that the Bank, in acquiring obligations in evidence of a loan, is unaware of the possibility of the sale thereof. As a governmental institution spending public funds, it is not in a position to overlook the possibility that circumstances may call for disposal of obligations acquired by it. Accordingly, in the past, after determining that a loan was to be made, the Bank attempted to obviate possible technical obstructions to a possible future sale of the obligations by providing in the agreement

establishing the loan that, upon request of the Bank, the obligations might be exchanged for others of acceptable denominations and form and that the obligations might be required to be registered under the Securities Act of 1933, as amended, if it should prove necessary so to do. But in merely envisaging the possibility of the sale of the obligations, the Bank did not thereby necessarily acquire them "with a view to" their sale.

Even assuming, however, there was such an implication, one element was still lacking to make the Bank an underwriter. There was no interest intent to acquire the obligations with a view to "***distribution***". The Bank envisaged the possibility of a private sale of the obligations just as much as it envisaged a public sale or distribution thereof.

Indeed, what the Bank now proposes to do is, in our opinion, nothing more than a private sale of the obligations. The sales will be limited to commercial banks. These banks will be acquiring for their own portfolio participations in loans in which this Bank will continue to hold the greater and the longer term interest. While the securities to be given to evidence this participation will necessarily be negotiable in form, they will be of such denominations as will generally preclude Banks from disposing of them to private investors. It is expected that the participations may vary from say $100,000 to possibly $25,000,000 depending on the resources of the banks involved. We may state and indeed represent that our purpose is to have the commercial banks participate for their own account only. We believe that it is the intent of such commercial banks as may be interested in acquiring the securities to acquire them for their own account.

The foregoing is respectfully submitted to you in order that you may determine whether you concur in our opinion that the Bank, in acquiring obligations through its lending activities, does not acquire them "with a view to***distribution" and is not, therefore, an underwriter within Section 4 (1) of the Securities Act of 1933, as amended.

It has been suggested that this Bank might issue and sell certificates of interest or participations in the obligations which it acquires rather than call upon the foreign obligors to issue their securities in exchange for their original obligations as we have proposed above. Although such certificates would in no way obligate the Bank to pay principal or interest, it appears reasonably clear that they would be exempt from registration under Section 3(a) (2) of the Securities Act in view of the fact that they would be securities "issued***" by a person "controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States***". Furthermore, if the sale of the certificates were confined to the transactions proposed above, the transactions involved would appear to be exempt under Section 4 (1)

of the Act since they would be "***transactions by an issuer not involving any public offering***".

We should appreciate your advising us whether you concur with these views.

To enable you to have all the facts for consideration, we are enclosing a copy of our agreement with the Republic of France establishing the $550,000,000 loan. With variations depending upon the circumstances in each particular case, the other loans which we have made and in which we may attempt to sell participations are essentially the same as this French loan. A list of such loans is contained in the enclosed copy of our Second Semiannual Report to the Congress as is a copy of the Export-Import Bank Act of 1945.

We also refer you to the correspondence of April 23, 1946 and April 25, 1946 which we had with Mr. Baldwin Bane with respect to the loan of $200,000,000 which we made to the Kingdom of the Netherlands.

Very truly yours,

Hawthorne Arey
General Counsel

WCS:jem

Enclosures

CC: Mr. Baldwin B. Bane
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