FEDEREL RESERVE BANK OF NEW YORK

[Circular No. 9447
January 31, 1983]

Proposed Amendments to Regulation K to Implement the Bank Export Services Act

To All Member Banks, Edge and Agreement Corporations, and Bank Holding Companies in the Second Federal Reserve District, and Others Concerned:

Following is the text of a statement issued by the Board of Governors of the Federal Reserve System:

The Federal Reserve Board has proposed for public comment draft regulations to implement the Bank Export Services Act (BESA) authorizing investments in export trading companies by bank holding companies and certain other banking organizations. The BESA is part of the Export Trading Company Act of 1982.

The Board asked for comment by March 14, 1983.

In proposing the regulations the Board said:

— The Board's regulations have been framed to achieve two objectives set forth in the BESA: to facilitate the export of goods and services produced in the United States and to help avoid adverse effects on the subsidiary banks of the bank holding companies involved.

— Initially, information in some detail will have to be supplied to comply with the provisions of the Export Trading Company Act; as experience is gained with bank holding company involvement in this unfamiliar activity it is anticipated that these requirements can be revised and procedures further simplified.

— Notifications of proposed investments in this activity will be reviewed expeditiously, and carefully, to ensure that the bank holding companies and their subsidiary banks are in a condition sufficiently satisfactory to engage in export trading company activities. The specific kinds of activities proposed and the risks attached to them will be evaluated in relation to the condition of the banking organization and the financial structure of the export trading company.

The regulations proposed by the Board were limited, in light of the directives of the Export Trading Company Act on implementation of the law, to clarification of ambiguities in the law, provision of key definitions and provision of basic guidance to investors as to the policies and procedures the Board will follow in carrying out its responsibilities under the Act.

The BESA, in providing for Federal Reserve review of investments in export trading companies by eligible banking organizations, requires 60 days prior written notice to the Board. If the Board does not disapprove the investment within this time (which the Board may extend by 30 days if it needs additional information) the investment may be made.

The Board may disapprove proposed investments to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition or conflicts of interest, material adverse effects on bank subsidiaries of bank holding companies, or if accurate or material information is not filed.

Investment in export trading companies may be made by bank holding companies directly, or indirectly through an Edge or Agreement corporation subsidiary, but not through a bank. The Act imposes certain investment ceilings and prohibits export trading companies from engaging in manufacturing or agricultural production and from speculating. All provisions of Section 23A of the Federal Reserve Act governing lending by banks to affiliates will apply to extensions of credit by banks to affiliated export trading companies.

To meet the Act's requirements that an export trading company must be exclusively engaged in international trade and principally engaged in exporting for the purpose of promoting United States exports, the Board proposed that its regulations define an export trading company as one that is exclusively engaged in activities related to international trade and that derives more than half its revenues from the export of, or facilitating the export of, goods or services produced in the United States by persons not affiliated with the export trading company or its subsidiaries.

The proposed regulations would require a description of each activity of the export trading company in the required notification to the Board, and further notification when additional investments are made, or when the export trading company expands into new areas that would alter the fundamental character of the company's operation.

The Board invited comment on whether a general consent procedure should be provided for small investments in export trading companies.

Notification procedures would not differ for investments in joint venture export trading companies. The proposed regulations would prohibit lending to a partner in a joint venture on terms more favorable than terms available to others. This would apply to partners with at least a 10 percent interest in the joint venture export trading company.

The proposal reiterates the Act's prohibition of speculation but indicates that this does not prohibit bona fide hedging.

The proposed regulations would amend the Board's Regulation K — International Banking Operations — and companies filing notifications of investment will follow the checklist of information used for Regulation K applications, including information as to the leveraging characteristics of the export trading company.

The Board's notice spelling out its proposals is attached.

In relation to the Board's proposals, the Board discussed but made no decision on reporting requirements for export trading companies. Initially, these reporting requirements may be more frequent than for other bank holding company subsidiaries, due to lack of experience in this new area of activity for bank holding companies. Reporting requirements could be relaxed at a later time in the light of experience.

Export trading companies will be subject to examination automatically when the parent company is examined. It is contemplated that an export trading company would be subject to a special on-site examination within one calendar year after investment by a banking organization in the company.

Printed on the following pages is the text of the proposals. Comments should be submitted by March 14, 1983 and may be sent to our Foreign Banking Applications Department.

ANTHONY M. SOLOMON,
President.

FEDERAL RESERVE SYSTEM

12 CFR Part 211

[Docket No. R-0445]

Regulation K; International Banking Operations; Export Trading Companies

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule.

SUMMARY: The Bank Export Services Act (Pub. L. 97-290, Title II (1982)) amended the Bank Holding Company Act of 1956 to permit bank holding companies, their subsidiary Edge or Agreement corporations, and bankers' banks to invest in export trading companies. The regulation proposed for comment implements and interprets this provision by establishing procedures for prior Board review of these investments and providing guidance on how the Board intends to administer the statute.

DATE: Comments must be received by March 14, 1983.

ADDRESS: Comments, which should refer to Docket No. R-0445, may be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th & Constitution Avenue, NW., Washington, D.C. 20551, or delivered to Room B-2233 between 8:45 a.m. and 5:15 p.m. Comments received may be inspected at Room B-1122 between the hours of 8:45 a.m. and 5:15 p.m., except as provided in the Board's Rules Regarding Availability of Information (12 CFR 261.6(a)).

FOR FURTHER INFORMATION CONTACT: Nancy Jacklin, Assistant General Counsel (202/452-3428), or Kathleen O'Day, Senior Attorney (202/452-3786), Legal Division; or Frederick R. Dahl, Associate Director (202/452-2726), or James Keller, Manager, International Banking Applications (202/452-2523), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System.

SUPPLEMENTARY INFORMATION: On October 8, 1982, the Export Trading Company Act of 1982 ("ETC Act") was enacted into law. The purpose of the statute is to encourage U.S. exports by facilitating the formation and operation of export trading companies and the expansion of export trade services generally. Title II of the ETC Act, known as the Bank Export Services Act ("BESA"), amends section 4 of the Bank Holding Company Act ("BHC Act") to permit bank holding companies to invest in export trading companies subject to certain limitations and after prior Board review. The objective of the BESA is to allow for meaningful and effective participation by bank holding companies in the financing and development of export trading companies.

The terms of the statute and the legislative history of the BESA seek to encourage bank holding companies to own and participate in export trading companies. The Board intends to fulfill its responsibilities under the BESA in accordance with the spirit motivating and underlying the legislation and notifications of proposed investments in this activity will be reviewed expeditiously. The Board's regulations have been framed to achieve two objectives set forth in the BESA: To facilitate the export of goods and services produced in the United States and to help avoid adverse effects on the subsidiary banks of the bank holding information in some detail will have to be supplied to comply with the provisions of the ETC Act; as experience is gained with bank holding company involvement in this unfamiliar activity, it is anticipated that these requirements can be revised and procedures further simplified.

At the same time, the Board is cognizant of its responsibilities for the supervision of bank holding companies and their subsidiary banks. It will review notices of proposed investments carefully to ensure that the bank holding companies and their subsidiary banks are in a condition sufficiently satisfactory to engage in export trading company activities. The specific kinds of activities proposed and the risks attached to them will be evaluated in relation to the condition of the banking organization and the financial structure of the export trading company.

Investors Covered by the BESA

Section 4(c)(14) of the BHC Act (12 U.S.C. 1843(c)(14)) provides that bank holding companies and certain other banking organizations may invest in export trading companies. A bank that is organized solely to do business with other banks and their officers, directors or employees, is owned primarily by the banks with which it does business, and does not do business with the public—commonly called a "bankers' bank"—is regarded as a bank holding company for purposes of Section 4(c)(14), and is the only type of U.S. bank that is authorized by federal law to invest in export trading companies. A state-chartered bankers' bank may invest in export trading companies if such investment is consistent with State law. Foreign banking organizations also may invest in export trading companies on the same basis and under the same procedures as a bank holding company.

Edge corporations and Agreement corporations are companies that operate under sections 25(a) and 25, respectively, of the Federal Reserve Act and conduct international banking operations. An Edge or Agreement corporation may invest in export trading companies if it is a subsidiary of a bank holding company and not a subsidiary of a bank. An Edge or Agreement corporation must file notice of a proposed investment in an export trading company in the same manner as a bank holding company.

Activities of Export Trading Companies

An export trading company is defined in section 4(c)(14) of the BHC Act as "a company * * * which is exclusively engaged in activities related to international trade, and which is organized and operated principally for the purposes of exporting goods and services produced in the United States or for purposes of facilitating the exportation of goods and services produced in the United States by unaffiliated persons by providing one or more export trade services." 12 U.S.C. 1843(c)(14)(F)(i). The legislative history, in discussing the definition, emphasized that the Board was to regulate export trading companies "in a manner consistent with the Congressional intent: that ETCs promote, increase, and maximize U.S. exports." H. Rep. No. 924, 97th Cong., 2d Sess. 22 (1982). In order to assist in determining whether a bank-affiliated export trading company is principally engaged in exporting or facilitating exports of goods and services produced in the United States, the Board proposes to define "export trading company" as a company that, by engaging in one or more export trade services, annually derives more than half its revenues from U.S. exports or the facilitation of U.S. exports produced by unaffiliated persons. The export trading company would be able to engage, where necessary or useful in the conduct of its primary business of exporting, in activities related to importing, third party and barter trade up to half of its business. In determining whether goods are produced in the United States, reference may be made to the definitions used in preparing the Shipper's Export Declaration (a Department of Commerce form) for domestic merchandise exports from the United States. In determining whether services are "produced in the United States," for purposes of the BESA, references may be made generally to the concepts applied by the Department of Commerce in compiling the U.S. balance of payments accounts as to services

exports, following the general rule that services performed by U.S. residents for non-U.S. residents would be considered covered by the term. The Board believes that the foregoing definition will allow the export trading company maximum flexibility in organizing and operating its business.

As to the specific activities of a bank-affiliated export trading company, the company may provide any single export trade service or combination of services listed in section 4(c)(14)(F)(ii) and any other services that serve to facilitate the export of U.S. goods and services produced by unaffiliated persons. In addition, the export trading company may engage in this same range of trade services with respect to importing and third party trade so long as the company overall is principally engaged in exporting and facilitating U.S. exports produced by unaffiliated persons. Consistent with the language and legislative history of the BESA, goods and services of "unaffiliated persons" means goods and services produced by persons other than the export trading company itself or its subsidiaries. Because the services listed at section 4(c)(14)(F)(ii) do not all have precise or generally accepted meanings, the investor, in its notification and reports to the Board, is to describe the nature of the activities in which the export trading company proposes to engage in sufficient detail to allow the Board to determine that the investment is consistent with the purposes and provisions of the BESA.

The statute does prohibit an export trading company from engaging in certain specific activities. For example, section 4(c)(14)(D) permits the Board to order termination of a bank holding company's investment in an export trading company if the company takes positions in commodities or commodity contracts, securities or foreign exchange, except as may be necessary in the course of its business. As in the past, the Board would not regard an organization as speculating where the transactions are necessary in the course of business operations such as for bona fide hedging (*e.g.*, as that term has been applied by the Board in connection with forward and financial futures contracts or by the Commodities Futures Trading Commission in connection with commodity contracts).

Investments and Extensions of Credit

The legislation authorizes banking organizations, as described above, to invest in export trading companies subject to certain prudential limits on aggregate financial exposure by each organization in this new activity. The proposed regulations incorporate the statutory limitations on investment, *i.e.*, a bank holding company, Edge or agreement corporation or bankers' bank may invest a total of five per cent of its consolidated capital and surplus in export trading companies. An Edge or Agreement corporation not engaged in banking (*i.e.*, deposit-taking in the United States from unaffiliated persons) may invest a total of up to 25 per cent of its consolidated capital and surplus in export trading companies.

The legislation also contains certain restrictions on extensions of credit by banking organizations to affiliated export trading companies and their customers. A bank holding company's total outstanding extensions of credit, on a consolidated basis, to affiliated export trading companies are limited to 10 per cent of the bank holding company's consolidated capital and surplus, and this limitation is reflected in the proposed regulations. Extensions of credit by a bank holding company's subsidiary bank to an affiliated export trading company are also subject to the provisions of section 23A of the Federal Reserve Act, as recently amended by Pub. L. 97–320.

In addition to limiting the financial risk to affiliated banks by limiting the investor's financial exposure in export trading companies, the legislation contains a further provision specifically intended to mitigate potential conflicts of interests and associated risks where a banking organization is linked with a commercial venture. A bank holding company or its subsidiary may extend credit to an affiliated export trading company or its customers on terms no more favorable than those afforded similar borrowers in similar circumstances. The proposed regulation provides that the term "customer" includes affiliates of the customer in order to prevent potential evasions of the purpose of this statutory provision.

The proposed regulation also applies the foregoing limitation on preferential lending to extensions of credit by a bank holding company to a co-investor with at least a 10 per cent interest in an export trading company or to affiliates of the co-investor. The Board solicits comments on whether this limitation should apply only to "significant" credit transactions and on what transactions should be considered "significant." The Board is concerned that joint ventures, particularly between banking and nonbanking organizations, create a serious potential for conflicts of interest and concentration of economic resources. However, the Board recognizes that the legislation specifically authorizes joint ventures both between banking organizations and between banking and nonbanking organizations. The limitations contained in the proposed regulations on preferential lending, which are designed to reduce potential conflicts of interest and unsound banking practices that might result from joint venture export trading companies, do not in any way affect the ability of the bank holding company or its affiliated banks to offer to the export trading company, its customers, or a co-investor any rate that is based on the established creditworthiness of the borrower. Rather, the provision merely incorporates principles of sound banking practice.

In light of the foregoing limitations on preferential lending, the banking organization investor shall maintain adequate information on all transactions with its affiliated export trading companies, their customers and affiliates of customers, and co-investors covered by these provisions of the regulations and their affiliates.

Procedures

Section 4(c)(14) of the BHC Act provides that a bank holding company may make an investment in an export trading company after giving the Board 60 days' prior written notice if the Board does not within that time disapprove the investment based on the criteria specified in the statute. The Board may extend the time for disapproval for 30 days if the bank holding company has not provided material or accurate information as required in connection with any notice.

The procedure provide that the bank holding company submit its notice to the appropriate Reserve Bank. A bank holding company should provide in letter or outline form the information required by the regulation concerning its activities (including the four-digit Standard Industrial Classification (SIC), developed by the Office of Management and Budget) and managerial resources, and, the nature and detail of the information provided should be generally similar to that provided in connection with applications for specific consent filed by investors under Subpart A of Regulation K.

The Board anticipates that as a general matter notices will be processed within the 60-day period. In order to expedite the processing of notices, the proposed regulations allow for substantial flexibility in the investment decisions of banking organizations. An investor in an export trading company

may either propose at the outset an investment in an export trading company providing a wide range of permissible services or, alternatively, propose an investment in an export trading company that performs a more limited range of activities—such as activities involved largely in the provision of professional and financial services.

A banking organization may choose initially not to committ the capital required or not to invest in the managerial resources needed for an investment in a "full service" export trading company. The proposed regulations in that case allow the banking organization to engage in the new activity in incremental stages, by notifying the Board of its initial investment. If the export trading company is a subsidiary of the investor, a subsequent notice, which would be regarded as a notice of a further investment, would be required at such time as there is a significant change in the character of the export trading company. The Board seeks comments on whether banking organizations plan to invest in export trading companies in this manner and consequently whether the proposed regulation will facilitate banking organization involvement in export trading companies. In addition, the Board solicits comments on the types of export trading company activities that the proposed regulation lists as necessitating a further notice by the banking organization investor under these procedures.*

As the System gains experience with export trading companies, the Board will consider delegating consideration of investment notices to the Reserve Banks and adopting a general consent procedure for limited investments in export trading companies. The Board invites comment on whether and in what circumstances a general consent procedure might be adopted, including suggested amount and percentage limitations, and the reasons supporting these recommendations.

Supervision and Reporting

The Board intends to monitor the establishment and operation of export trading companies in a manner that minimizes regulatory burden, and is consistent with the Board's responsibility, established by Congress, of ensuring that export trading companies operate to promote U.S. exports without posing serious risk to affiliated banks.

In order to carry out its responsibilities, the Board will require reports on the activities and operation of the export trading company to determine compliance with the provisions of the BHCA, the BESA, and the Board's regulations. The Board will attempt to meet its informational needs through adaptations of reporting requirements currently required under the BHCA or the Federal Reserve Act. At least initially, however, separate reports may be required of export trading companies. These reports may be required on a more frequent basis than is usual for other types of nonbanking subsidiaries, but it is anticipated that frequency would be reduced as the System and the industry gain experience with export trading company activities.

The Board also may request such information as may be necessary to enable the Board to report to the Congress as required by Section 205 of the BESA on the effectiveness of bank participation in export trading companies and to make recommendations concerning the appropriateness of further legislation.

Regulatory Flexibility Act Analysis

For the purposes of regulatory flexibility, the major goal of the proposed regulations is the orderly provision and maintenance of information by bank holding companies so that the Board can effectively exercise its supervisory authority under the BHC Act as amended by the BESA.

The main class of small business entities affected by the proposed regulations is small bank holding companies. The ETC Act generally contemplates investments in export trading companies by bank holding companies with some international experience, acquired, for example, through foreign offices or customers. Hence one relevant group of small business entities is the class of small bank holding companies with such experience, which are relatively few in number. For this group, the costs of the proposed regulations are likely to be substantially the same as for large multinational bank holding companies.

While none of the provisions of the proposed regulation has been specifically designed for small business entities, they should benefit from the simplicity and brevity of the proposed regulations, as well as from a liberal definition of an export trading company. The Board has also sought comment on other possible provisions that might be useful to small entities, such as the entry into export trading company activities by stages and the adoption of a general consent procedure that exempts an investor from the prior notification requirement in making a limited investment in an export trading company.

List of Subjects in 12 CFR Part 211

Banks, banking, Federal Reserve System, Foreign banking, Investments, Reporting requirements.

Pursuant to its authority under section 5 of the Bank Holding Company Act (12 U.S.C. 1844), the Board proposes to amend 12 CFR Part 211 by adding a new Subpart C, reading as set forth below.

Sections 211.601 and 211.602 which currently appear in Subpart B are transferred to the end of this new Subpart C; the text remains unchanged. The text of new §§ 211.31 through 211.34 is set forth below.

PART 211—INTERNATIONAL BANKING OPERATIONS

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Subpart C—Export Trading Companies

Sec.

Authority: Federal Reserve Act (12 U.S.C. 21 *et seq.*); Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*); the International Banking Act of 1978 (Pub. L. 95–369; 92 Stat. 607; 12 U.S.C. 3101 *et seq.*); and the Bank Export Services Act (Title II, Pub. L. 97–290, 96 Stat. 1235 (1982)).

Subpart C—Export Trading Companies

§ 211.31 Authority, purpose and scope.

(a) *Authority.* This Subpart is issued by the Board of Governors of the Federal Reserve System ("Board") under the authority of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*) ("BHCA"), and the Bank Export Services Act (Title II, Pub. L. 97–290, 96 Stat. 1235 (1982)) ("BESA").

* As is the practice under Regulation Y, an eligible investor that has acquired 25 per cent or more of the shares of an export trading company in accordance with these regulations would not be expected to notify the Board of the export trading company's formation of a wholly-owned subsidiary to engage in activities permissible for the parent export trading company.

(b) *Purpose and scope.* This Subpart is in furtherance of the purposes of the BHCA and the BESA, the latter statute being designed to increase U.S. exports by encouraging investments and participation in export trading companies by bank holding companies and the specified investors. The provisions of this Subpart apply to: (1) Bank holding companies as defined in section 2 of the BHCA (12 U.S.C. 1841(a)); (2) Edge and Agreement corporations as described in § 211.1(b) of this Part, that are subsidiaries of bank holding companies but are not subsidiaries of banks; (3) bankers' banks as described in section 4(c)(14)(F)(iii) of the BHCA (12 U.S.C. § 1843(c)(14)(F)(iii)); and (4) foreign banking organizations as defined in § 211.23(a)(2) of this Part. These entities are hereinafter referred to as "eligible investors."

§ 211.32 Definitions.

The definitions of § 211.2 in Subpart A apply to this Subpart subject to the following:

(a) "Export trading company" means a company that is exclusively engaged in activities related to international trade and, by engaging in one or more export trade services, derives more than one-half its annual revenues from the export of, or from facilitating the export of, goods and services produced in the United States by persons other than the export trading company or its subsidiaries;

(b) "Extensions of credit" means extensions of credit as defined in § 215.3 of this Chapter (Regulation O) but does not include investments under this Subpart;

(c) The terms "bank," "company" and "subsidiary" have the same meanings as those contained in section 2 of the BHCA (12 U.S.C. 1841).

§ 211.33 Investments and extensions of credit.

(a) *Amount of Investments.* In accordance with the procedures of § 211.34 of this Subpart, an eligible investor may invest no more than five per cent of its consolidated capital and surplus in one or more export trading companies, except that an Edge or Agreement corporation not engaged in banking may invest as much as 25 per cent of its consolidated capital and surplus but no more than five per cent of the consolidated capital and surplus of its parent bank holding company.

(b) *Extensions of credit.* (1) *Amount.* An eligible investor in an export trading company or companies may extend credit directly or indirectly to the export trading company or companies in a total amount that at no time exceeds 10 per cent of the investor's consolidated capital and surplus.

(2) *Terms.* An eligible investor in an export trading company may not extend credit directly or indirectly to the export trading company or any of its customers or to any other investor holding 10 per cent or more of the shares of the export trading company on terms more favorable than those afforded similar borrowers in similar circumstances, and such extensions of credit shall not involve more than the normal risk of repayment or present other unfavorable features. For the purposes of this provision, an investor in or customer of an export trading company includes any affiliate of the investor or customer.

§ 211.34 Procedures for filing and processing notices.

(a) *Filing notice.* (1) *Prior notice of investment.* An eligible investor shall give the Board 60 days' prior written notice of any investment in an export trading company. The investor shall include in its notice a description of the nature and extent of, and the managerial resources related to, each activity in which the export trading company is engaged or proposes to engage, including the four-digit Standard Industrial Classification for each activity, and such other information as the Board may prescribe.

(2) *Subsequent notice.* An eligible investor shall give the Board 60 days' prior written notice of changes in the activities of an export trading company that is a subsidiary of the investor if the export trading company expands its activities beyond those described in the initial notice to include: (i) The buying or selling of goods; (ii) product research and design; (iii) freight forwarding; (iv) product modification; or (v) other activities not specifically covered by the list of services contained in section 4(c)(14)(F)(i) of the BHCA. Such an expansion of activities shall be regarded as a proposed investment under this Subpart.

(b) *Time period for Board action.* (1) A proposed investment that has not been disapproved by the Board may be made 60 days after the Reserve Bank accepts the notice for processing. A proposed investment may be made before the expiration of the 60-day period if the Board notifies the investor in writing of its intention not to disapprove the investment.

(2) The Board may extend the 60-day period for an additional 30 days if the Board determines that the investor has not furnished all necessary information or that any material information furnished is substantially inaccurate. The Board may disapprove an investment if the necessary information is provided within a time insufficient to allow the Board reasonably to consider the information received.

(3) Within three days of a decision to disapprove an investment, the Board shall notify the investor in writing and state the reasons for the disapproval.

By order of the Board of Governors, January 19, 1983.

William W. Wiles,
Secretary of the Board.