Nos. 13-17408, 13-17618

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

BEST BUY CO., INC., et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

HANNSTAR DISPLAY CORPORATION,
Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Best Buy Co., Inc. has no parent corporation, and no publicly held corporation owns more than 10% of its stock. Best Buy Enterprise Services, Inc. and Best Buy Purchasing LLC are wholly-owned subsidiaries of Best Buy Co., Inc.

BestBuy.com, L.L.C. and Magnolia Hi-Fi, Inc. are wholly-owned subsidiaries of Best Buy Stores, L.P., which is a wholly-owned subsidiary of BBC Property Co., which is a wholly-owned subsidiary of Best Buy Co., Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTRODUCTION

This appeal stems from a global conspiracy to fix the prices of thin-film transistor liquid-crystal display (TFT-LCD) panels, which are used in countless consumer electronics products including computer monitors, laptop monitors, televisions, and mobile phones. In criminal antitrust proceedings relating to this same conspiracy, Defendant-Appellant HannStar pleaded guilty, admitting that its executives participated in a series of meetings held between 2001 and 2006, known as the "crystal meetings," in which TFT-LCD manufacturers conspired to agree on a price that each would charge to its customers for the panels.

Affiliated Plaintiffs (hereinafter, "Best Buy"), who are in the business of selling consumer electronics, experienced substantial financial harm as a result of the TFT-LCD price-fixing conspiracy, paying significantly higher prices for TFT-LCD products than they would have paid in the absence of the conspiracy. As a result of these injuries, Best Buy initiated this lawsuit, seeking overcharge damages from HannStar and numerous co-conspirators stemming both from its direct purchases from several of the vertically-

integrated defendants, and from its indirect purchases of products that contained LCD panels.

Best Buy prevailed at trial against HannStar on its direct-purchaser claims under federal and Minnesota law. The district court, however, granted partial summary judgment permitting the defendants to assert a pass-through defense to Best Buy's indirect-purchaser claims under Minnesota law. As a result, the jury returned a verdict of zero damages on Best Buy's indirect-purchaser claims. HannStar has appealed from the judgment, urging reversal of the judgment in favor of Best Buy on its direct-purchaser claims for two reasons: 1) because the Foreign Trade Antitrust Improvements Act (FTAIA) bars Best Buy's recovery under the Sherman Act; and 2) because Best Buy has not proven damages as to each of the plaintiff entities. HannStar does not challenge the finding of direct-purchaser liability under Minnesota law.

Both of HannStar's arguments advanced in its opening appeal brief should be rejected. As an initial matter, HannStar's FTAIA arguments can be dismissed out of hand because the district court's finding of liability under Minnesota law—which HannStar does not challenge—is

independently sufficient to support the judgment on Best Buy's direct-purchaser claims. Indeed, the FTAIA does not even apply to state antitrust law, and HannStar does not argue otherwise. The Ninth Circuit has, in any event, already decided that the FTAIA does not apply to the very TFT-LCD conspiracy at issue in this case. *See United States v. Hui Hsiung*, No. 12-10492, No. 12-10493, No. 12-10500, No. 12-10514, 2015 U.S. App. LEXIS 1590 (9th Cir. Jan. 30, 2015)(rejecting the argument advanced by HannStar's co-conspirators that the FTAIA barred the federal antitrust claims against them).

Second, Best Buy has adequately proven, and the jury found, that all six of its plaintiff entities sustained actual injuries as a result of this conspiracy, and thus this second of HannStar's challenges to Best Buy's federal antitrust claims fails as well. And, as discussed above, HannStar does not even challenge the finding of damages under Minnesota law. Best Buy proved its damages case (and HannStar defended against this same damages case) using data that was collected by Best Buy for its relevant plaintiff entities in aggregate. Thus throughout the case, and the trial, the harms to each of these six plaintiff entities were proven collectively.

HannStar had every opportunity to cross-examine Best Buy's witnesses in an attempt to demonstrate that some individual Best Buy entity had not in fact been harmed. HannStar failed to do this, and cannot now collaterally attack the jury's finding, affirmed by the district court post-trial, that each of the Best Buy entities sustained injury. Therefore, this Court should affirm judgment in favor of Best Buy.

On Best Buy's cross-appeal, the Court should reverse the district court's summary-judgment decision permitting HannStar to assert a pass-through defense to Best Buy's indirect-purchaser claims under the Minnesota Antitrust Act. Both the plain language of the Minnesota Antitrust Act, and two decisions of the Minnesota Supreme Court interpreting that act, *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996), and *Lorix v. Crompton Corp.*, 736 N.W.2d 619 (Minn. 2007), soundly reject the defense that the district court allowed HannStar to assert. The district court misconstrued its role as a federal court deciding an issue of state law, and erred by declining to follow the Minnesota Supreme Court's express pronouncements in *Philip Morris* and *Lorix* that Minnesota does not recognize a pass-through defense. For those reasons, the district

court's grant of partial summary judgment to HannStar allowing it to assert a pass-through defense on Best Buy's indirect-purchaser claims under the Minnesota Antitrust Act should be reversed, judgment for HannStar on these claims vacated, and the indirect-purchaser claims remanded to the district court for retrial on damages resulting from Best Buy's indirect purchases.

STATEMENT OF JURISDICTION

Best Buy agrees with the Statement of Jurisdiction in HannStar's opening brief.

STATEMENT OF ISSUES

1. In light of HannStar's failure to raise any issues on appeal challenging judgment against it on Best Buy's direct-purchaser claims under the Minnesota Antitrust Act, should this Court summarily affirm judgment for Best Buy on its direct-purchaser claims because state law provides an adequate, independent basis for affirmance?

2. Given that this Court recently held in the related criminal antitrust case of *United States v. Hui Hsiung*, No. 12-10492, No. 12-10493,

No. 12-10500, No. 12-10514, 2015 U.S. App. LEXIS 1590 (9th Cir. Jan. 30, 2015), that the same TFT-LCD conspiracy involved import trade and had substantial "domestic effects," satisfying the requirements of the FTAIA, and given the jury's finding in this case that the conspiracy involved TFT-LCD panels and finished LCD products imported into the United States and that Best Buy purchased TFT-LCD products directly from conspirators at inflated prices, should the Court affirm the district court's finding that the FTAIA's requirements were satisfied?

3. Did the district court properly deny HannStar's motion for judgment as a matter of law, because Best Buy sufficiently proved that each of its plaintiff entities sustained actual injury from HannStar's conduct?

4. Did the district court err in granting partial summary judgment to HannStar, allowing HannStar to assert a pass-through defense at trial to Best Buy's indirect-purchaser claims under the Minnesota Antitrust Act, in light of the plain language of the Act and precedent of the Minnesota Supreme Court interpreting the Act?

ADDENDUM

An addendum containing pertinent statutory provisions and legislative history appears at the end of this brief.

STATEMENT OF THE CASE

This case arises from HannStar's participation in a conspiracy to fix the price of TFT-LCD panels sold for incorporation into consumer electronics. Plaintiffs-Appellees-Cross-Appellants Best Buy Co., Inc., Best Buy Purchasing LLC, Best Buy Enterprise Services, Inc., Best Buy Stores, L.P., BestBuy.com, LLC, and Magnolia Hi-Fi, Inc.[1], referred to collectively as "Best Buy," sued HannStar and several of its co-conspirators under both federal and Minnesota antitrust law to recover damages suffered as a result of the conspiracy. Best Buy settled its claims with many of the defendants for $229,000,000, but HannStar did not participate in that settlement.

Best Buy's claims against HannStar under both federal and Minnesota antitrust law proceeded to trial. After a six-week trial, the jury

[1] This entity is now known as "Magnolia Hi-Fi, LCC," but for the purposes of this appeal, it is referred to by its prior name, which it had during the relevant time period and when this lawsuit was initiated.

returned a verdict for Best Buy on its direct-purchaser claims under both federal and state law, and awarded Best Buy damages of $7,471,493. ER0012-16. The district court adopted the jury's verdict and entered judgment for Best Buy and against HannStar on September 4, 2013.[2] ER0019.

Both parties filed post-trial motions, with HannStar bringing a motion for judgment as a matter of law and to vacate the judgment, and Best Buy bringing a motion to amend the judgment to treble its damages under federal and Minnesota antitrust law. ER0001-11. The district court rejected all of HannStar's post-trial arguments except for the argument that Best Buy's damages must be offset by settlements with other co-conspirator defendants on this case, which was a position that Best Buy did not

[2] The district court referred Best Buy's motion for fees and costs to a Special Master on November 20, 2013. Supp.ER 34 (MDL Dkt. 8788.) The Special Master held a hearing on Best Buy's motion and HannStar's objections to Best Buy's Bill of Costs on January 9, 2014. The Special Master then issued his report and recommendation on February 3, 2014. Supp.ER 6-23 (Dkt. 669.) The district court adopted the report and recommendation of the Special Master on May 12, 2014. Supp.ER 1-5 (Dkt. 685.) Best Buy filed a timely notice of appeal as to fees and costs, and HannStar later filed a notice of cross-appeal. These related appeals are currently pending before this Court. *Best Buy Co., Inc., et al. v. HannStar Display Corp.*, Cross-Appeals Nos. 14-16144, 14-16184.

dispute. *Id*. The district court granted Best Buy's motion for treble damages as a prevailing party under both federal and Minnesota antitrust law, and trebled the damages to $22,415,829. ER0010-11; ER0017-18. The district court then also offset these damages by Best Buy's prior settlements, which totaled $229 million. ER0010-11. The district court entered an amended judgment against HannStar that it was liable to Best Buy under federal and Minnesota antitrust law, but concluded that Best Buy could not recover any of these damages due to the offset. ER0017-18. HannStar filed a timely notice of appeal, and Best Buy cross-appealed. ER0020-23.

SUMMARY OF THE ARGUMENT

At trial, Best Buy prevailed on its direct-purchaser claims, under both federal and Minnesota antitrust law. Because HannStar has not raised any issues in this appeal challenging judgment against it for Best Buy's direct-purchaser claims under the Minnesota Antitrust Act, this Court should summarily affirm judgment against HannStar on this adequate, independent basis. However, if this Court chooses to reach HannStar's arguments about the FTAIA, it should follow its own recent decision in the *Hui Hsiung* case, in which it held that given that much of the TFT-LCD

conspiracy was focused on importing LCD panels into the United States for sale, as a matter of law, the FTAIA presents no bar to holding HannStar and its co-conspirators liable under federal antitrust law for this conspiracy. This Court should also affirm the district court's conclusion that Best Buy sufficiently proved that all of its plaintiff entities suffered actual injury as a result of HannStar's conduct.

As to Best Buy's cross-appeal, the district court's grant of partial summary judgment to HannStar on Best Buy's indirect-purchaser claims under the Minnesota Antitrust Act must be reversed. The district court erred by failing to consider itself bound by the plain language of the Minnesota Antitrust Act and by relevant precedent from the Minnesota Supreme Court, which clearly rejects a pass-through defense. The district court's grant of partial summary judgment for HannStar on this pass-through defense therefore must be reversed, judgment for HannStar on these claims vacated, and the indirect-purchaser claims remanded to the district court for a retrial on damages for Best Buy's indirect purchases.

ARGUMENT

I. The Minnesota Antitrust Act Provides an Adequate Independent Ground to Affirm the District Court's Judgment in Best Buy's Favor on its Direct-Purchaser Claims.

Best Buy prevailed on its direct-purchaser claims under both Minnesota state law and federal antitrust law. While HannStar suggested post-verdict that Best Buy's direct-purchaser claims had only been based upon federal law, both the Special Master and district court expressly rejected this argument. Supp.ER 9-11 (Dkt. No. 669 at 406)(Special Master's report and recommendation concluding, *inter alia*, that Best Buy prevailed on its direct purchaser claim under Minnesota law in addition to federal law); Supp.ER 1-5 (Dkt. 685 at 5)(district court adopting Special Master's report and recommendation); ER0017-18 (Amended Judgment, trebling Best Buy's damages because it prevailed under 15 U.S.C. § 15 *and* Minn. Stat. § 325D.57)(emphasis added). Indeed, HannStar itself had unsuccessfully sought judgment as a matter of law on the ground that the Minnesota Antitrust Act could not be constitutionally applied to Best Buy's claims, an argument it has since abandoned on appeal.

The district court was correct in rejecting HannStar's assertion that Best Buy had not prevailed at trial on its direct-purchaser claims under

Minnesota law as well as federal law. Best Buy's complaint expressly pleaded a direct-purchaser claim under both federal and Minnesota law. Supp.ER 191 (MDL Dkt. No. 7366)(Second Amd. Compl. ¶ 338)("All Plaintiffs except MHF bring a claim under the Minnesota Antitrust Act of 1971 in connection with their direct and indirect purchases of LCD Products containing LCD Panels."). HannStar did not succeed in getting this state-law-based direct-purchaser claim dismissed prior to trial. At trial, the parties agreed to submit a special verdict form to the jury that did not have separate jury questions or damage amounts for Best Buy's direct-purchaser claims based on state law versus federal law. ER0012-16. The jury's findings in response to Question 2 (Best Buy proved that HannStar knowingly participated in the conspiracy), Question 8 (Best Buy proved that it was injured as a result of the conspiracy), and Question 9 (awarding Best Buy $7,471,943 for its direct-purchase damages) support liability under the Minnesota Antitrust Act for Best Buy's direct-purchaser claim. *Id*.

HannStar has not challenged the applicability of the Minnesota Antitrust Act on appeal or raised any claims of error regarding Best Buy's direct-purchaser claims under the Minnesota Antitrust Act, and thus

judgment for Best Buy on those claims remains undisturbed, regardless of the outcome of HannStar's arguments about the FTAIA. HannStar's argument that Best Buy failed to satisfy the requirements of the FTAIA to enable it to sustain a direct-purchaser claim under federal antitrust law is therefore moot, because the Minnesota Antitrust Act provides an adequate independent ground to affirm the district court's judgment in Best Buy's favor.

This Court has held, "[i]t has long been settled that we have no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before us." *Schneider v. Chertoff*, 450 F.3d 944, 960 (9th Cir. 2005)(quotation omitted). Thus, "when a judgment rests on two independent grounds, a failure to appeal either one of them justifies summary affirmance." *Green v. Mazzucca*, 377 F.3d 182, 183 (2d Cir. 2004); *see also Kaminski v. United States*, 339 F.3d 84, 85 n.1 (2d Cir. 2003)("Ordinarily, unless a certificate encompasses all of the grounds for a court's ruling on an issue, an appeal that challenges only some grounds will be moot.").

A. Any Argument that the Application of Minnesota Law to HannStar Is Unconstitutional Has Been Waived.

In its opening brief on appeal, HannStar has not raised the argument it made unsuccessfully before the district court—and included in its notice of appeal—that applying Minnesota law to HannStar is unconstitutional. ER0020-21. Arguments not raised in a party's opening brief are deemed waived. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

B. Any Argument that the FTAIA Applies to Minnesota Antitrust Act Claims Has Been Waived.

HannStar also has not asserted—either before the district court or in its opening brief to this Court—that the FTAIA applies to Best Buy's claims under the Minnesota Antitrust Act. Arguments not raised in a party's opening brief are deemed waived, and this Court generally will not consider arguments raised for the first time on appeal. *Smith*, 194 F.3d at 1052.

C. The FTAIA Does Not Apply to Best Buy's State Law Claims.

Even if HannStar had not waived the argument that the FTAIA applies to Best Buy's claims under the Minnesota Antitrust Act, that argument would fail. The language of the FTAIA itself does not indicate that Congress intended to preempt or otherwise limit remedies under state

antitrust law for foreign conduct that injured residents of a state. *See Boyd v. ABW Ltd.*, 544 F. Supp. 2d 236, 247 (S.D.N.Y. 2008)(stating that the "FTAIA by its express terms applies only to Sherman Act claims…"); Pub. L. No. 97-290, § 402, 96 Stat. at 1246-47 (1982)(Addendum at 18); Conference Report for the Export Trading Company Act of 1982, S. Rep. No. 97-644, at 29 (1982)(Addendum at 48)(stating that the FTAIA's provisions "modify the Sherman Act and Section 5 of the Federal Trade Commission Act"). Importantly, the same day that Congress enacted the FTAIA, it also passed the Export Trading Company Act of 1982, which did include express language limiting both federal and state antitrust law in relation to foreign commerce. Pub. L. No. 97-290, § 103(a)(7), 96 Stat. at 1235 (1982); *id.* at § 311(6), 96 Stat. at 1245)(Addendum at 7)(defining "antitrust laws" for purposes of Export Trading Company Act as including "any State antitrust or unfair competition law"). This language does not appear in the FTAIA, thereby indicating that Congress had no intention to preempt state antitrust law with the FTAIA.

II. The District Court Correctly Denied HannStar's Motion for Judgment as a Matter of Law on Best Buy's Federal Antitrust Claims, Because HannStar's Conduct Violated the Sherman Act.

Price-fixing that involves import trade or commerce, or which has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States is a violation of the Sherman Act, unimpeded by the FTAIA. The jury was instructed that a conspiracy to fix prices violates the Sherman Act if it involves import commerce that produced substantial intended effects in the United States, and the jury found that Best Buy met its burden of proof on this issue. Because the jury's conclusion that HannStar participated in a conspiracy to fix prices of goods imported to the United States and that HannStar's conduct "produced substantial intended effects in the United States" was supported by substantial evidence, the district court properly denied HannStar's motion for judgment as a matter of law, and this Court should affirm.

Moreover, since HannStar filed its opening brief, this Court has held in the related case, *United States v. Hui Hsiung*, 2015 U.S. App. LEXIS 1590, No. 12-10492, No. 12-10493, No. 12-10500, No. 12-10514 (9th Cir. Jan. 30, 2015), that this same TFT-LCD conspiracy involved import trade or import commerce, as well as the "domestic effects" exception to the FTAIA, and

thus federal antitrust claims stemming from this conspiracy are not limited by the FTAIA. Therefore, HannStar's claims here that the FTAIA requires reversal of judgment for Best Buy on its federal antitrust claims must be rejected.

The district court's denial of a motion for judgment as a matter of law after a jury trial is reviewed by the same standard as a jury's verdict: "'both the verdict and the denial of the motion must be affirmed if there is substantial evidence to support the verdict.'" *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999)(quoting *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370-71 (9th Cir. 1987)). Substantial evidence is evidence "adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Harper v. City of L.A.*, 533 F.3d 1010, 1021 (9th Cir. 2008). "If sufficient evidence is presented to a jury and if the jury instructions on the issue stated the law correctly, the court must sustain the jury's verdict." *Id.*

A. This Court's Recent Holding in the *Hui Hsiung* Case That This Same TFT-LCD Conspiracy Involved Import Trade or Commerce, and had "Direct, Substantial, and Reasonably Foreseeable Effects" on U.S. Commerce, is Fatal to HannStar's Argument That the FTAIA Shields it From Liability.

Even if this Court concludes that HannStar's FTAIA arguments are not mooted by the unchallenged determination of liability under Minnesota law, HannStar's arguments relating to the FTAIA still fail.

HannStar relies heavily upon a recent decision by the Seventh Circuit in support of its FTAIA arguments, *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003, 2014 U.S. App. LEXIS 24709 (7th Cir. Jan. 12, 2015), in which the Seventh Circuit affirmed a grant of summary judgment for HannStar's co-conspirator AU Optronics Corp., also one of the defendants in the *Hui Hsiung* case. The decision in *Motorola Mobility* was based in part on the Seventh Circuit's conclusion that the FTAIA barred Motorola's claim, but also importantly upon Motorola's position in that case that it could sue on behalf of its foreign subsidiaries, who were the direct purchasers of the TFT-LCD panels. 2014 U.S. App. LEXIS 24709, at *6. The Seventh Circuit was unimpressed with this position, and heavily criticized Motorola for asking it "to treat it and all of its foreign subsidiaries as a

single integrated enterprise, as if its subsidiaries were divisions rather than foreign corporations." *Id.* at *12. Thus the plaintiff's arguments in *Motorola Mobility* depended upon a legal fiction that ran against the fundamentals of American corporate law, circumstances that are not present in this case. In addition, here, unlike in *Motorola Mobility*, Best Buy was a direct purchaser of the price-fixed goods from HannStar's co-conspirators.

Despite these factual critical differences between Best Buy's and Motorola's transactions in relation to the conspiracy, because *Motorola Mobility* relates to the same TFT-LCD panel conspiracy involved in this case, this appeal might have focused a great deal upon the wisdom of the Seventh Circuit's approach to the FTAIA, were it not for the fact that since the *Motorola Mobility* decision was issued, this Court too had the opportunity to apply the FTAIA in relation to this TFT-LCD conspiracy. Since HannStar filed its opening brief in this merits appeal, this Court has decided this exact issue of the applicability (or lack thereof) of the FTAIA to this conspiracy and the actions of HannStar's co-conspirators, and decided the issue contrary to the position that HannStar advocates in its opening brief.

On January 30, 2015, this Court issued its amended opinion in *United States v. Hui Hsiung*, No. 12-10492, No. 12-10493, No. 12-10500, No. 12-10514, 2015 U.S. App. LEXIS 1590 (9th Cir. Jan. 30, 2015), affirming the criminal antitrust convictions of a number of HannStar's co-conspirators. In that opinion, this Court held as a matter of law that this same TFT-LCD conspiracy—which led to HannStar's liability here—involved both import trade or import commerce that is unaffected by the FTAIA, as well as conduct that meets the "domestic effects" exception to the FTAIA. *Id*. at *7-8 ("In light of the substantial volume of goods sold to customers in the United States, the verdict may be sustained as import commerce falling within the Sherman Act. The verdict may also be sustained under the FTAIA's domestic effects provision because the conduct had a 'direct, substantial, and reasonably foreseeable effect on United States commerce.'"). This Court may therefore swiftly dispose of HannStar's primary argument on appeal by simply following its own recent precedent in *Hui Hsiung*.

The FTAIA excludes wholly foreign conduct from the Sherman Act's reach. 15 U.S.C. § 6a. By its terms, the FTAIA does not apply to import

trade or commerce. 15 U.S.C. §6a ("Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (*other than import trade or import commerce*) with foreign nations unless . . . ." (emphasis added)); *see also Hui Hsiung*, 2015 U.S. App. LEXIS 1590, at *38 (finding this same TFT-LCD panel conspiracy involved "import commerce" and thus rejecting arguments made by HannStar's co-conspirators that the FTAIA barred a Sherman Act claim); *McBee v. Delica Co.*, 417 F.3d 107, 122 (1st Cir. 2005)("The [FTAIA] exempts 'import trade or import commerce' from its extraterritoriality effects test.").

Once a defendant's conduct is determined to constitute import trade or commerce, the Sherman Act applies. The well-established standard governing the Sherman Act's application to foreign conduct is that the conduct is actionable if it "was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

This Court recently noted that import commerce includes transactions between purchasers in the United States and cartel members outside the United States. *Hui Hsiung*, 2015 U.S. App. LEXIS 1590, at *39.

But a defendant's conduct can be considered "import commerce," and is therefore not subject to the FTAIA, even if the defendant is not the importer. *Id*. at *43 (rejecting as irrelevant defendants' claims that they were not importers, because defendants conspired to sell the panels "into the United States, falling squarely within the scope of the Sherman Act."). This Court's approach in *Hui Hsiung* was consistent with the Third Circuit's approach, which is that "the relevant inquiry is whether the defendants' alleged anticompetitive behavior was directed at an import market." *Animal Science Prods. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011); *see also Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002)(stating that the case did not involve import commerce because "plaintiffs did not describe conduct by the defendants that was directed at an import market").

The Third Circuit's recent decision in *Animal Science Products* is instructive because that Circuit has considered the meaning of "import commerce" more often than any other. In that case, the court explained that the focus of the import commerce inquiry is whether the defendant's "conduct target[s] import goods or services." *Animal Science Prods.*, 654

F.3d at 470. The court noted that it concluded in *Turicentro* that the import commerce requirement was not satisfied where foreign travel agents alleged that U.S. airline companies had conspired to fix commissions paid to foreign travel agents. *Id.* (citing *Turicentro S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 303 (3d Cir. 2002)).

To the extent those rates were "imported" into the United States, it was because the *plaintiff* travel agents sold the allegedly fixed-rate services to U.S. customers. *Id.* The Third Circuit in *Animal Science Products* distinguished *Turicentro* from its *Carpet Group* decision, in which it held that the import commerce test was satisfied. *Id.* In *Carpet Group*, the defendants' conduct targeted the U.S. market by taking steps to "ensure that only United States importers, and not United States retailers, could bring oriental rugs manufactured abroad into the stream of American commerce." *Id.* (quoting *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000))(quotation marks omitted). Even though the *Carpet Group* defendants themselves did not import rugs into the United States, their conduct was directed at a U.S. import market, and that was sufficient to constitute import commerce.

Where, as here, a foreign seller conspires to fix prices of inputs with the intent that the finished products will be sold in the United States, that conspiracy is directed at a U.S. import market and constitutes import commerce. *Hui Hsiung*, 2015 U.S. App. LEXIS 1590, at *42-43. Interpreting import commerce to encompass the circumstances present in this case, as this Court did in *Hui Hsiung*, does not expand the extraterritorial application of the Sherman Act as HannStar has alleged. When foreign sellers collude to fix prices of inputs for products they know will be imported into the United States, they cannot credibly claim that their sales are "purely foreign."

HannStar has been subject to criminal penalties for its participation in this TFT-LCD price-fixing conspiracy. HannStar pleaded guilty to the indictment brought by the federal government for its participation in the TFT-LCD conspiracy, and its involvement in the crystal meetings was part of that indictment and guilty plea. HannStar Br. at 5-6; ER0741-762. HannStar acknowledged these facts to the jury during closing argument at trial, admitting as follows: "between September 2001 and January 2006, HannStar did participate in the crystal meetings, and it's responsible for

that. It's accepted that responsibility in the criminal proceedings by pleading guilty, agreeing to cooperate and acknowledging that it broke the law." ER0629-630.

In deciding in *Hui Hsiung* that this TFT-LCD conspiracy involved import trade or commerce, as well as meeting the "domestic effects" exception to the FTAIA, this Court emphasized the fact that importing the price-fixed TFT-LCDs into the United States was one of the defendants' primary goals at the crystal meetings. *Hui Hsiung*, 2015 U.S. App. LEXIS 1590, at *8-9, *42-43. As this Court noted, "[t]he Crystal Meeting participants earned over $600 million from the importation of TFT-LCDs into the United States." *Id*. at *42. "Importation of this critical component of various electronic devices is surely 'import trade or import commerce.'" *Id*. at *43. This Court should therefore apply its own recent precedent in *Hui Hsiung* and conclude that HannStar, an admitted co-conspirator with the defendants in *Hui Hsiung*, similarly is culpable for its role in the conspiracy involving "import trade or import commerce," and thus the FTAIA presents no barrier to Best Buy's recovery on its federal direct-purchaser claims.

B. The Evidence at Trial Was Sufficient to Support the Jury's Conclusion that HannStar's Conduct Involved Import Commerce.

At trial, the jury heard extensive evidence to support its conclusion that HannStar's conduct involved import commerce. The evidence included admissions from HannStar's guilty plea in the criminal antitrust case against it, its involvement in the crystal meetings, and e-mail communications among co-conspirators indicating that HannStar and its co-conspirators intended for their price-fixed goods to ultimately be sold in U.S. markets.

HannStar's corporate guilty plea contained the following admissions, which included that it sold its price-fixed panels into the United States, and that the primary purpose of its participation in the conspiracy was to fix the price of the panels sold into the United States:

> (a) . . . During the relevant period [2001-2006], HannStar Display Corporation ("HannStar"), a corporation organized and existing under the laws of Taiwan, *sold computer notebook and monitor TFT-LCDs into various markets, including the U.S.*. . . . During the relevant period, the defendant was a producer of computer notebook and monitor TFT-LCD, was engaged in the sale of computer notebook and monitor TFT-LCD *in the United States* and elsewhere, and employed between 1,000 and 5,000 individuals.

. . .

(c) During the relevant period, the defendant . . . participated in a conspiracy with major TFT-LCD producers, *the primary purpose of which was to fix the price of certain TFT-LCD sold in the United States and elsewhere*. In furtherance of the conspiracy, the defendant, through its officers and employees, engaged in discussions and attended meetings, including group meetings referred to by some of the participants as "crystal meetings," with representatives of other TFT-LCD producers. During these discussions and meetings, agreements were reached to fix the price of certain TFT-LCD to be sold in the United States and elsewhere.

(d) During the relevant period, TFT-LCD sold by one or more of the conspirator firms, and equipment and supplies used in the production and distribution of TFT-LCD, . . . traveled in interstate and foreign commerce. Certain business activities of the defendant and its coconspirators in connection with the production and sale of TFT-LCD affected by this conspiracy were within the flow of, *and substantially affected, interstate and foreign commerce*.

Supp.ER 94-95 (Trial Ex. 2072R)(emphases added).

Even though Best Buy did not purchase TFT-LCD panels directly from HannStar, HannStar's conduct involved import commerce because HannStar admitted that it engaged in price-fixing of the panels for the purpose of those panels being imported into the United States for sale. The evidence at trial showed that the conspirators, including HannStar, knew and intended that products containing their price-fixed goods would be

sold to U.S. purchasers. ER0004-05 (District Court's Order on Post-Trial Motions, summarizing the evidence of HannStar's involvement in the conspiracy). Multiple e-mails indicated that the U.S. market was the ultimate target for many of the price-fixed panels. *See, e.g.*, Supp.ER 109 (Trial Ex. 2785)(LG e-mail dated Sept. 8, 2004, noting that sales were "not smooth in the U.S. market"). HannStar is, of course, responsible not only for its own efforts to target the U.S. import market, but also for its co-conspirators' efforts targeting imports to the United States. *See Beltz Travel Serv., Inc. v. Int'l Air Transport Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980)("[T]he action of any of the conspirators to restrain or monopolize trade is, in law, the action of all. All conspirators are jointly liable for the acts of their co-conspirators.").

Under the terms of the FTAIA, the jury could have reached the conclusion that HannStar is liable to Best Buy for violating the Sherman Act in either of two ways: (1) the conspiracy involved import commerce, which is not affected by the FTAIA, or (2) the conspiracy involved foreign conduct that falls under the "domestic effects" exception to the FTAIA. *See Hui Hsiung*, 2015 U.S. App. LEXIS 1590, at *38 (quoting *F. Hoffman-La Roche*

Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004)). The jury's answers to Questions 3 and 4 demonstrate that the jury found HannStar liable under both legal theories.[3]

When the verdict form and jury instructions are read together, it is clear that the jury found that the conspiracy involved import commerce and that it had a legally sufficient basis for doing so. The verdict form includes three questions that are relevant to the FTAIA's applicability to this case. The first – Question 3 – asked:

> Did Best Buy prove, by a preponderance of the evidence and in accordance with the instructions given to you, that the conspiracy involved TFT-LCD panels and/or finished products (e.g., notebook computers, computer monitors, televisions, camcorders, cell phones and digital cameras containing TFT-LCD panels) *imported into the United States*?

ER0014 (emphasis added). The jury answered "Yes" to Question 3, and consistent with the instructions on the form, went on to consider Question 4. *Id.* Question 4, based upon the "substantial and intended effects" test articulated by the Supreme Court in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993), asked:

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[3] *See infra* Argument Section II(C) for analysis of why this Court could alternatively affirm under the "domestic effects" exception to the FTAIA.

> Did Best Buy prove, by a preponderance of the evidence and in accordance with the instructions given to you, that the conspiracy involving these imported TFT-LCD panels and/or finished products *produced substantial intended effects in the United States*?

ER0014 (emphasis added). The jury also answered "Yes" to Question 4. Id.

Question 5 then asked:

> Did Best Buy prove, by a preponderance of the evidence and in accordance with the instructions given to you, that the conspiracy involved conduct which had *a direct, substantial and reasonably foreseeable effect* on trade or commerce in the United States?

ER0014 (emphasis added). The jury answered "No" to Question 5.

The jury's answers to these questions must be read alongside the instructions the jury was given. The district court gave the jury the following instructions regarding the elements of Best Buy's federal antitrust claims:

> To prevail against a defendant on a price-fixing claim, the plaintiffs must prove as to that particular defendant each of the following elements by a preponderance of the evidence:
>
> First, that an agreement to fix the prices of LCD panels existed;
>
> Second, that such defendant knowingly – that is voluntarily and intentionally – became a party to that agreement;

> Third, that such agreement occurred in or affected interstate, import or foreign commerce. Any such conduct involving import commerce must have produced substantial intended effects in the United States; any such foreign commerce must have produced direct, substantial and reasonably foreseeable effects in the United States; and
>
> Fourth, that the agreement caused plaintiffs to suffer an injury to their business or property.

Supp.ER 46 (MDL Dkt. No. 8543 at 12); ER0591-92.

Once the jury concluded that HannStar's conduct involved import commerce, the FTAIA became irrelevant, and presented no bar to Best Buy's federal direct-purchaser claims. The district court, therefore, even without the benefit of this Court's precedent in *Hui Hsiung*, correctly rejected HannStar's argument in its post-trial motions that that the FTAIA barred Best Buy's claims. ER0009.

HannStar's strained interpretation of the jury's answers to the questions on the verdict form is unpersuasive. HannStar argues that because the jury found that the conspiracy did not involve "conduct which had a direct, substantial and reasonably foreseeable effect on trade or commerce in the United States" by answering "No" to Question 5, the jury must have concluded that the conspiracy did not involve import

commerce. Import commerce, HannStar reasons, necessarily has a direct effect on the United States. But this reasoning is inconsistent with both the jury instructions and the structure of the FTAIA.

The only reasonable conclusion to be drawn from the verdict form, and the jury's answers of "Yes" to Questions 3 and 4 is that the jury found that the conspiracy involved import commerce. Because the conspiracy involved import commerce, the FTAIA does not apply and HannStar's conduct is within the purview of the Sherman Act. The evidence was more than sufficient to support the jury's conclusion that HannStar is liable to Best Buy for its direct-purchaser claims, so the district court's judgment should be affirmed. And, as detailed above, affirmance is the only legally-sound outcome in light of this Court's recent holding that the same conspiracy involved "import trade or import commerce" in *Hui Hsiung*. 2015 U.S. App. LEXIS 1590, at *42-43.

C. The Evidence at Trial, and the Jury's Finding that HannStar's Conduct Produced "Substantial Intended Effects in the United States" is Sufficient to Apply the "Domestic Effects" Exception to the FTAIA.

This Court need not reach the issue of whether the FTAIA's "domestic effects" exception also applies to HannStar's conduct, because

HannStar's conduct, and that of its co-conspirators, involved "import commerce," as explained above. However, given the evidence Best Buy presented at trial, which included HannStar's factual admissions that formed the basis of its guilty plea, and the jury's answer of "Yes" to Question 4 that HannStar's conduct produced "substantial intended effects in the United States," the evidence against HannStar also supports the application of the "domestic effects" exception to the FTAIA.

This Court concluded in *Hui Hsiung* that this conspiracy involved the defendants' price-fixing of LCD panels, which were sold abroad but then incorporated into finished consumer products ultimately sold in the United States, and that this was sufficiently "direct, substantial and reasonably foreseeable" with respect to its effects on domestic commerce to result in liability under the Sherman Act. *Hui Hsiung*, 2015 U.S. App. LEXIS 1590, at *50-51. This Court continued, "[t]he constellation of events that surrounded the conspiracy leads to one conclusion—the impact on the United States market was direct and followed 'as an immediate consequence' of the price fixing." *Id*. at *51.

In its order on post-trial motions, the district court correctly rejected HannStar's arguments that its conduct did not meet the "domestic effects" exception to the FTAIA. The district court harmonized the jury's "Yes" answers to Questions 3 and 4, and "No" answer to Question 5, explaining why it was consistent with liability under the Sherman Act that the jury found both that HannStar's conduct involved the price-fixing of panels and/or finished products that were imported into the United States, and that HannStar's conduct had provided *"substantial intended effects in the United States*." ER0009 (emphasis added).

This "substantial and intended effects" test was articulated by the Supreme Court in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993)("[I]t is well established by now that the Sherman Act applies to foreign conduct that *was meant to produce* and *did in fact produce some substantial effect* in the United States.")(emphases added). In *United States v. LSL Biotechnologies*, 379 F.3d 672, 679 (9th Cir. 2004), this Court rejected the government's claim that foreign conduct that had only a "substantial" effect on U.S. commerce met the requirements of the FTAIA, given the FTAIA's plain language requiring that the foreign conduct also have

"direct" effects on domestic commerce. *See also Hui Hsiung*, 2015 U.S. App. LEXIS 1590, at *31 (discussing *LSL Biotechnologies*). However, as this Court decided in *Hui Hsiung* when it upheld a jury instruction using the *Hartford Fire* "substantial intended effects" language, that standard remains a legally-viable route for meeting the "domestic effects" exception to the FTAIA, where there is also sufficient evidence of the conspiratorial conduct's "direct" effects on domestic commerce. 2015 U.S. App. LEXIS 1590, at *17, *22-23 (rejecting the defense argument that the *Hartford Fire* jury instruction was a surprise and improper).

Here, the district court appears to have concluded that the jury instructions enabled the jury to find that the conspiracy had sufficient domestic effects to support liability under the Sherman Act by answering "yes" to either Question 4 (the conspiracy involving imported panels and/or finished products had "substantial intended effects in the United States") or Question 5 (the conspiracy involved conduct that had "a direct, substantial and reasonably foreseeable effect on trade or commerce in the United States"). The court concluded, "[t]he jury's 'no' answer to Question 5, which must be read in conjunction with the instructions, is not

inconsistent with this finding, and indeed the verdict form assumes that the jury could answer Questions 4 and 5 differently." ER0009.

This analysis makes sense, given that the standard of culpability in Question 4, requiring "*intended* effects," is actually higher than in Question 5, which only requires "reasonably *foreseeable* effects" of the price-fixing conduct. How could a defendant be found liable for intentionally impacting domestic commerce, as the jury found HannStar here, without having foreseen that its conduct would have those domestic effects? The fact that the jury found that HannStar acted to bring about intended effects presupposes that these effects were foreseeable and actually foreseen by HannStar.

Both Question 4 and Question 5 asked the jury whether the foreign conduct created "substantial" effects, which the jury certainly found by answering "yes" to Question 4. And, as this Court found about this same conspiracy in *Hui Hsiung*, there is no doubt that the foreign conduct of HannStar and its co-conspirators in price-fixing TFT-LCD panels had *direct* domestic effects. "The constellation of events that surrounded the conspiracy leads to one conclusion—the impact on the United States

market *was direct and followed 'as an immediate consequence' of the price fixing*." *Hui Hsiung*, 2015 U.S. App. LEXIS 1590, at *51 (emphasis added). While HannStar goes to great lengths in its opening brief to suggest that its business, and conspiratorial acts, were remote from domestic commerce, HannStar wishes to forget that it admitted as part of its guilty plea for this conspiracy that it sold its panels into the United States, and that the primary purpose of its participation in the conspiracy was "to fix the price of certain TFT-LCD sold in the United States and elsewhere." Supp.ER 94.

Best Buy is aware of no precedent to support HannStar's inference that where, as here, there is evidence that a defendant's conduct met the "substantial intended effects" test articulated in *Hartford Fire Insurance Co.*, coupled with evidence that the conduct had "direct effects" upon domestic commerce, such evidence is insufficient to meet the FTAIA's "domestic effects" exception. In fact, in *Hui Hsiung*, this Court upheld a jury instruction with the *Hartford Fire* "substantial intended effects" language as proper for an indictment under the Sherman Act targeting foreign conduct, 2015 U.S. App. LEXIS 1590, at *17, *22-23, and that liability under the FTAIA's "domestic effects" exception was established where, as with this

TFT-LCD conspiracy, the impact on domestic commerce "follows as an immediate consequence of the defendant[s'] activity." *Id*. at *49 (quoting *LSL Biotechnologies*).

In rejecting HannStar's argument that the "domestic effects" exception was not met, the district court reviewed the evidence in support of this legal conclusion, stating, "Best Buy presented evidence that over a number of years, the international cartel controlled well over 90% of the TFT-LCD market, charged supra-competitive prices for TFT–LCD panels, and those panels were incorporated into billions of dollars' worth of finished products such as computer monitors, notebook computers, and mobile phones that were imported into the United States and sold to United States companies and consumers." ER0009-10. The district court then cited to the Seventh Circuit's opinion in *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 858-61 (7th Cir. 2012)(en banc), for the proposition that when foreign sellers create a cartel and take steps outside of the United States to drive up the price of a product to be sold in the United States, and that product is then sold in the United States, "the challenged transactions either occurred in import commerce or had a direct, substantial and reasonably foreseeable

effect on either the domestic or import commerce of the United States." ER0010. This conclusion was sound.

The district court did not have the benefit of this Court's decision in *Hui Hsiung*, but it correctly reasoned through both the facts of this conspiracy and applicable law to conclude that the FTAIA did not bar HannStar's liability under the Sherman Act. The district court's conclusions below were consistent with this Court's conclusions in *Hui Hsiung*. Thus, as an alternative to affirming the district court's conclusion that HannStar engaged in price fixing relating to import trade or commerce, this Court can also follow its holding in *Hui Hsiung* and affirm on the basis that HannStar's conduct, like that of its co-conspirators, met the "domestic effects" exception to the FTAIA. *Hui Hsiung*, 2015 U.S. App. LEXIS 1590, at *7-8, *49-51.

III. Best Buy Sufficiently Proved, and the Jury Found, that Each Best Buy Plaintiff Experienced an Actual Injury Due to HannStar's Conduct.

HannStar's second argument for reversal of Best Buy's federal antitrust claims is that Best Buy failed to prove that each of its plaintiff entities sustained an actual injury resulting from HannStar's conduct. The

district court correctly concluded that the jury was not required to make separate findings of injury for each of the Best Buy plaintiffs, *see* ER0006-ER0007, and thus this second argument also fails.

The jury found, and HannStar has admitted, that it participated in the conspiracy to fix the price of LCD panels. Best Buy sufficiently proved that it suffered actual injuries as a result of HannStar's conduct in the conspiracy. As the district court stated in its order rejecting this argument as part of the post-trial motions, Best Buy officer Wendy Fritz testified that in aggregate, all of the "Best Buy" plaintiff entities purchased approximately $32 billion of LCD products in the relevant period. ER0007; Supp.ER 81 (Trial Tr. at 1147:18-1148:7). Ms. Fritz testified that "Best Buy" entered into Vendor Master Agreements and Annual Program Agreements with vendors around the world, that the agreements were entered into in Minnesota, and that these agreements governed its LCD product purchases. Supp.ER 82-83; Supp.ER 86; Supp.ER 77-78 (Trial Tr. at 1151:2-1153:1; 1165:1-18; 1398:8-1399:2). Over her four days of testimony, Ms. Fritz testified extensively as to "Best Buy's" purchasing policies, gross margin requirements, and pricing policies, among other damages-related facts.

Ms. Fritz also testified that from 1998 to 2006, "Best Buy" dealt with the following vendors for LCD products: Toshiba, HP, Sony, Gateway, Sharp, Panasonic, Samsung, LG, Phillips and NEC. Supp.ER 85 (Trial Tr. 1164:10-25). Plaintiffs' economist, Dr. Alan Frankel, similarly testified that Plaintiffs purchased LCD products from Samsung, Toshiba, Sharp, LG, Hitachi, Epson, Panasonic, Mitsubishi, Philips and others. Supp.ER 74-75 (Trial Tr. at 1922:12-1923:10). Toshiba witness Takashi Ogawa testified that for some period of time, HannStar supplied LCD monitors to Toshiba Matsushita Display Technology Co, Ltd. ("TMD") for use in personal computers. Supp.ER 67-68 (Trial Tr. at 2376:9-2377:7).

Plaintiffs' expert, Dr. Frankel, also testified that he and members of Dr. Bernheim's staff visited "Best Buy's" headquarters in Minneapolis in 2011 and met with four or five executives to learn about Best Buy's business and the records it kept pertaining to products purchased. Supp.ER 70-71 (Trial Tr. at 1914:7-15). In that meeting, Dr. Frankel and Dr. Bernheim's staff learned that, consistent with Ms. Fritz's testimony, Plaintiffs maintain one large database containing millions of records of all products purchased by all of Best Buy's entities, including from whom

products were purchased, how many were bought, the prices paid for the products, what the products were, and detailed model numbers for each product. Supp.ER 71-73 (Trial Tr. at 1919:19-1921:13).

Based on this evidence, Best Buy presented damage calculations on behalf of all the Best Buy Plaintiffs, without differentiating between entities. HannStar's experts took the same approach, as they used this same data in their damage calculations. In its verdict, the jury found that "Best Buy", a term that includes *all* of the Best Buy Plaintiffs, "was injured as a result of the conspiracy in which [HannStar] participated." ER0015. On this record, the jury was not required to make separate findings of injury for each of the six Best Buy Plaintiffs. *See Inter Med Supplies v. EBI Med. Sys.*, 181 F.3d 446 (3d Cir. 1998). None of the cases HannStar cites support the entry of judgment in its favor in light of the evidence presented at this trial.

In *Inter Med*, the Third Circuit affirmed the district court's rejection of the same argument that HannStar attempts to make here. There, various members of the Orthofix corporate family brought suit against defendant EBI. *Id.* at 451-452. Following a two-month trial, the jury awarded the Orthofix companies $48 million in compensatory damages. *Id.* at 453. The

defendant filed a Rule 50 motion, arguing, as HannStar did unsuccessfully below, that "the plaintiffs failed to present testimony separating the damages attributable to each plaintiff and each claim." The trial court disagreed, explaining that such specificity "would have invited confusion and a greater potential for an excessive or duplicative compensatory award." *Id.* at 462. The court further explained:

> Because all of the claims upon which plaintiffs prevailed arose from the same set of facts surrounding the defendants' plan to convert the Orthofix external fixator market to the purchase of Dynafix, and because the plan succeeded, plaintiffs' lost profits need not be assigned to a given legal theory. Damages ordinarily flow from conduct, not from legal theories.

Id.

The Third Circuit affirmed, again rejecting the defendant's argument that the Orthofix plaintiffs had "failed to present evidence separating the damages by entities and by claim." *Inter Med*, 181 F.3d at 462. It reasoned that "such specificity would have created jury confusion, as well as a strong potential for duplicative or excessive damages." *Id.* The court found it significant that the Orthofix plaintiffs' experts had calculated "lost profits not exceeding $95 million and actual damages not in excess of that number," and explained that "[t]o the extent the plaintiffs prevailed on any

theory which was supported by sufficient evidence, they are entitled to the full measure of compensatory damages, and no more." *Id.* (quoting *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 975 F. Supp. 681, 691 (D.N.J. 1997)).

Here, as in *Inter Med*, the injury and claims at issue all arose from the same conspiracy perpetrated by HannStar and its co-conspirators. Thus, Plaintiffs were not required to differentiate between the various Best Buy Plaintiffs in establishing injury. And as in *Inter Med Supplies*, plaintiff-by-plaintiff proof could have led to duplicative damages awards and injected confusion into the damage computations.

Just as importantly, the parties treated the Best Buy Plaintiffs as a single entity throughout these MDL proceedings and at trial, including, for example, during mini-openings, opening statements, voir dire, the examination and cross-examination of expert economists and witnesses and in closing arguments. *See, e.g.*, ER0630-31 (counsel for HannStar referring to plaintiffs collectively as "Best Buy" during closing arguments).

HannStar certainly had the ability to offer expert testimony and cross-examine Plaintiffs' economists or Wendy Fritz to attempt to establish that any specific Best Buy Plaintiff did not suffer damages or injury in fact,

but it failed to do so. In contrast, Best Buy Plaintiffs introduced extensive expert testimony regarding their purchases of TFT-LCD products containing price-fixed panels and the calculations of resulting harm. In addition to the evidence cited above, Plaintiffs' experts provided to HannStar's experts all of the backup data supporting their analysis of the conspiracy period, their damage calculations, and revised damage calculations. *See, e.g.*, ER0482-83 (HannStar's expert Snyder discussing his review of Best Buy's damages-related data, and describing it as "more data than I've ever seen in any particular case.").

Substantial evidence supports the jury's finding that the Best Buy Plaintiffs were injured by the price-fixing conspiracy in which HannStar participated. *See Inter Med*, 181 F.3d at 462. HannStar's claim that no Best Buy Plaintiff suffered antitrust injury simply cannot be reconciled with the evidence at trial or the jury's verdict. Because substantial evidence supports the jury's finding that the Best Buy entities were actually injured as a result of the conspiracy, this Court should affirm the district court's denial of HannStar's motion for judgment as a matter of law on this issue. *Gilbrook*, 177 F.3d at 856.

IV. The District Court Erred by Granting Partial Summary Judgment to HannStar to Allow a Pass-Through Defense to Best Buy's Indirect-Purchaser Claims Under the Minnesota Antitrust Act.

In its cross-appeal on the merits, Best Buy challenges the district court's grant of partial summary judgment to HannStar on its downstream pass-through defense, holding as a matter of law that HannStar could assert that defense at trial. Supp.ER 24-33 (MDL Dkt. No. 7420). The district court interpreted the Minnesota Antitrust Act, Minn. Stat. § 325D.57, as allowing HannStar to assert a pass-through defense to Best Buy's indirect purchaser claims, and thus argue to the jury that Best Buy sustained no actual damages on the theory that any overcharge was passed along to Best Buy's customers. Supp.ER 33.

At trial, HannStar attempted to prove that any indirect purchaser damages were "passed on" to consumers, and thus Best Buy sustained no damages as an indirect purchaser. *See* ER0486-87; ER0489; ER0496; ER0498 (Snyder Testimony). The jury was instructed that HannStar had the burden of proving that Best Buy passed the overcharge through to its customers, and that if HannStar proved that Best Buy had passed through all of the overcharge resulting from the conspiracy, the jury should award zero

damages to Best Buy as a result of the overcharge. ER0611-612. At the conclusion of the trial, the jury awarded Best Buy zero damages for its indirect purchases. ER0016.

This Court reviews de novo the district court's grant of partial summary judgment to HannStar. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994)(reviewing de novo grant of partial summary judgment, in appeal on the merits after bench trial).

A. The District Court Misconstrued its Proper Role as a Federal Court Deciding Issues of State Law by Disregarding Relevant Precedent from the Minnesota Supreme Court Rejecting a Pass-Through Defense.

In granting HannStar's motion for partial summary judgment, the district court committed legal error. The district court departed from its proper role as a federal court deciding an issue of state law, misinterpreting express statutory language and avoiding the express pronouncements of the Minnesota Supreme Court. First, the district court ignored the plain language of Minn. Stat. § 325D.57, the only plausible interpretation of which is that the Minnesota Legislature intended to disallow the exact sort of defense that HannStar was empowered by the district court to assert. Second, the district court disregarded, rather than

followed, the relevant precedent from the Minnesota Supreme Court interpreting Minn. Stat. § 325D.57, including *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996), and *Lorix v. Crompton Corp.*, 736 N.W.2d 619 (Minn. 2007). Both *Philip Morris* and *Lorix* interpreted the Minnesota Antitrust Act as rejecting the very type of pass-through defense that the district court allowed HannStar to assert here.

This Court should reverse the grant of partial summary judgment to HannStar, which allowed it to assert a pass-through defense to Best Buy's indirect-purchaser claims at trial, leading the jury to award Best Buy zero damages, and remand to the district court for a new trial on damages for Best Buy's indirect purchases.

B. The Plain Language of the Minnesota Antitrust Act, Minn. Stat. § 325D.57, Disallows a Pass-Through Defense.

As a federal court exercising supplemental jurisdiction over Best Buy's claims under state law, the district court was constrained by constitutional principles in the methods through which it could properly interpret the Minnesota Antitrust Act. "When interpreting state law, federal courts are bound by decisions of the state's highest court." *Nelson v. City of Irvine*, 143 F.3d 1196, 1206 (9th Cir. 1998). "When a decision turns on

applicable state law and the state's highest court has not adjudicated the issue, a federal court must make a reasonable determination of the result the highest state court would reach if it were deciding the case." *Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 812 (9th Cir. 2002). "In the absence of [a decision by the state supreme court], a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatise, and restatements as guidance." *Nelson*, 143 F.3d at 1206. Here, however, these secondary materials need not have been considered by the district court, because the plain language of the statute itself, and the Minnesota Supreme Court's decisions in *Philip Morris* and *Lorix*, are directly on-point and decisively reject a pass-through defense.

"The goal of all statutory interpretation is to effectuate the intent of the legislature." *Hous. & Redev. Auth. v. Lee*, 832 N.W.2d 868, 876 (Minn. Ct. App. 2013). This means "giv[ing] effect to all of [a statute's] provisions; 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant.'" *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000)(citation omitted). And where, as here, the statute is unambiguous,

the court must "interpret the text of the statute according to its plain language." *In re Welfare of J.B.*, 782 N.W.2d 535, 539 (Minn. 2010).

HannStar, and the district court, ignored the text and plain meaning of the Minnesota Antitrust Act ("MAA"). The MAA provides as follows:

> Any person … injured directly or indirectly by a violation of sections 325D.49 to 325D.66, shall recover three times the *actual damages sustained*, together with costs and disbursements, including reasonable attorney' fees. *In any subsequent action arising from the same conduct*, the court may take any steps necessary to avoid duplicative recovery against a defendant.

Minn. Stat. § 325D.57 (emphases added).

The district court concluded that allowing a pass-through defense is consistent with Minn. Stat. § 325D.57's statement that plaintiffs may recover their "actual damages sustained." Supp.ER 33 (MDL Dkt. 7420 at 10). Then, ignoring the first portion of the next sentence, the district court focused on the fact that Minn. Stat. § 325D.57 states that a court "may take any steps necessary to avoid duplicative recovery against a defendant."[4] *Id.*

[4] The use of "may" indicates the Minnesota Legislature's intent to make such de-duplication efforts permissive, not mandatory. *See* Minn. Stat. Ann. § 645.44, subd. 15 and 16 (defining "may" as permissive and "shall" as mandatory)(Addendum at 3-4).

Crucially, the district court ignored the first portion of Minn. Stat. § 325D.57's second sentence, which contemplates avoiding duplicative recovery "[i]n any subsequent action arising from the same conduct." Here, contrary to the plain language of Minn. Stat. § 325D.57, the district court empowered itself to take steps *in this same action* to avoid allegedly duplicative recovery.

The district court's interpretation of the MAA renders the second sentence of Minn. Stat. § 325D.57 superfluous, which is contrary to the law of statutory construction. *See Am. Family Ins. Grp.*, 616 N.W.2d at 277 (in construing a statute, "no word, phrase, or sentence should be deemed superfluous, void, or insignificant"). For if a pass-through defense was allowed under Minn. Stat. § 325D.57, then in a first action, no plaintiff would recover damages that the plaintiff had been able to pass through, and thus there would never be a concern of duplicative recovery in a subsequent action. If the Minnesota Legislature had intended to disallow any passed-on damages as part of the calculation of "actual damages" in a first course action, then no such damages would have been awarded as

actual damage, and thus there would be nothing to duplicate "in a subsequent action."

C. The Minnesota Supreme Court's Decisions in *Philip Morris* and *Lorix* also Interpret the Minnesota Antitrust Act, Minn. Stat. § 325D.57, as Prohibiting a Pass-Through Defense.

Two dispositive cases from the Minnesota Supreme Court also interpret the MAA as prohibiting a pass-through defense. *See Philip Morris, Inc.*, 551 N.W.2d at 497; *Lorix*, 736 N.W.2d 619. As it did with the language of Minn. Stat. § 325D.57, the district court failed to consider these opinions carefully and in their totality. Instead, the district court limited *Philip Morris* to its facts, finding that *Philip Morris* "is a standing case, not a damages case." Supp.ER 32 (MDL Dkt. 7420 at 9). Given the district court's obligation to follow relevant precedent of the Minnesota Supreme Court interpreting the MAA, the district court did not have the luxury to adopt such tunnel vision about the Minnesota high court's interpretation of this state statute. *Nelson*, 143 F.3d at 1206.

In *Philip Morris*, plaintiff Blue Cross Blue Shield ("BCBS") brought tort, antitrust, and state statutory claims against Philip Morris, alleging that the tobacco company had conspired to suppress evidence about the

harmful effects of smoking and to encourage nicotine addiction. Philip Morris argued that BCBS did not have standing to bring such claims because it had suffered no injury, arguing that ultimately it was BCBS's insureds, the actual users of tobacco, who had sustained damages as a result of Philip Morris's alleged wrongdoing. *Philip Morris*, 551 N.W.2d at 492-93. Thus while the appeal of the motion to dismiss before the court did relate to standing, the critical role that an "injury-in-fact" plays in determining whether a party has standing meant that a focus upon actual damages sustained was at the forefront of the Supreme Court's analysis of Minn. Stat. § 325D.57 in *Philip Morris*. *Id*. at 493. By concluding that *Philip Morris* was merely a case about standing, the district court failed to acknowledge the relationship between "injury-in-fact" and an ability to allege "actual damages" required in order to have standing.

The *Philip Morris* court explained that, "it was the intent of the Minnesota legislature to abolish the availability of the pass-through defense by specific grants of standing within statutes designed to protect Minnesota citizens from sharp commercial practices." 551 N.W.2d at 491. The Minnesota Supreme Court then rejected Philip Morris's argument—the

same argument that HannStar successfully made to the district court here—that *damages* incurred by the plaintiff would simply be passed down to the next party in the stream of commerce. The Court reasoned, "[s]imilar, but not identical, to the tobacco companies' defense that Blue Cross suffered no injury and could not therefore make out a tort claim, the 'pass through defense' is, in essence, the notion that where an injured party 'passes through' its damages to another entity that is obligated to pay, there is no actual injury to the first party." 551 N.W.2d at 496. When the Minnesota Supreme Court held that BCBS had standing, it meant, *a fortiori*, that BCBS had alleged an actual injury despite the existence of potential pass-through.

In *Philip Morris*, Minnesota Supreme Court explained its rejection of the defendants' pass-through arguments in detail. "The argument that no injury has been suffered because costs were passed through one entity to customers, consumers, or other entities usually arises in antitrust cases. It has been uniformly rejected in the courts, primarily on the theory that the injury is sustained as soon as the price, artificially raised for whatever reason, has been paid." *Id.* at 496. Quoting from Justice Holmes's decision

in *Chattanooga Foundry*, the Minnesota Supreme Court observed that a plaintiff has been harmed if they have been overcharged, period:

> [a] man is injured in his property when his property is diminished. . . . [W]hen a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there.

Id. at 496-97 (quoting *Chattanooga Foundry v. Atlanta*, 203 U.S. 390, 399 (1906)). The Minnesota Supreme Court then appealed to Justice Holmes's opinion in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918), which also rejected the pass-through defense as diminishing in any way a plaintiff's actual damages:

> The only question before us is…whether the fact that the plaintiffs were able to pass on the damage…prevents their recovering the overpayment…The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step…The plaintiffs suffered losses…when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

Philip Morris, 551 N.W.2d at 497. The Supreme Court could not have been clearer in its rejection of the sort of pass-through defense allowed by the district court, stating, "[t]hat the pass through defense

is untenable appears equally evident outside of the context of antitrust and laws relating to regulated industry." *Id.*

The Minnesota Supreme Court explained further that, whereas the U.S. Supreme Court in *Illinois Brick* precluded any consideration of pass-through (either offensive or defensive), the Minnesota Legislature chose a different course. The court stated that the Legislature's enactment of Minn. Stat. § 325D.57—which expressly accorded standing under the Minnesota antitrust laws both to direct and indirect purchasers—was a direct response to the Supreme Court's decision in *Illinois Brick. Id.* at 497. The *Philip Morris* court therefore concluded that "it was the intent of the Minnesota legislature to abolish the availability of the pass through defense by specific grants of standing within statutes designed to protect Minnesota citizens from sharp commercial practices." *Id.*

More recently, the Minnesota Supreme Court in *Lorix* again construed the MAA and rejected the federal test for antitrust standing under the *AGC* case,[5] reasoning that Minnesota does not follow federal law

[5] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

in this regard. In so doing, the court noted that duplicative recovery of damages can be proper under the MAA:

> To the extent that our courts cannot ameliorate the risk of duplicative recovery, as where parallel proceedings in federal courts or courts in other states may result in *later awards* based on the same injuries, this risk is inherent in the dual system of private antitrust enforcement created by *Illinois Brick and California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989).

Id. at 628 (emphasis added).

In short, the district court erroneously credited HannStar's argument that the Minnesota Supreme Court has abolished "pass-through" for purposes of "standing" but somehow preserved "pass-through" as a defense to a "damages" claim. The Court should reject the district court's attempt to rewrite the MAA in a way clearly rejected by Minnesota's high court. *See, e.g.*, *Lorix*, 736 N.W.2d at 628 (refusing to "restrict Minnesota antitrust law in ways that our legislature has not").

The district court's interpretation of the MAA in its partial summary judgment order misapplies the text of the MAA itself and disregards relevant precedent from the Minnesota Supreme Court on this exact issue. This was reversible error. This Court should reverse the district court's

grant of partial summary judgment to HannStar, which allowed it to assert a pass-through defense to Best Buy's indirect-purchaser claims under the MAA at trial, vacate the judgment for HannStar on this claim, and remand to the district court for retrial on damages.

CONCLUSION

This Court can affirm judgment against HannStar on Best Buy's direct-purchaser claims without deciding HannStar's FTAIA-related arguments, because Best Buy also prevailed under the Minnesota Antitrust Act, which provides an adequate, independent basis for affirmance. However, if this Court chooses to reach HannStar's arguments about the FTAIA, this Court must follow its own recent decision in the *Hui Hsiung* case, in which it held as a matter of law that the FTAIA presents no bar to holding HannStar and its co-conspirators liable under federal antitrust law for the TFT-LCD conspiracy. This Court should also affirm the district court's conclusion that Best Buy sufficiently proved that all of its plaintiff entities suffered actual injury as a result of HannStar's conduct.

As to Best Buy's cross appeal, the district court's grant of partial summary judgment to HannStar allowing it to assert a pass-through

defense to Best Buy's indirect-purchaser claims under the Minnesota Antitrust Act should be reversed, judgment for HannStar on these claims vacated, and the indirect-purchaser claims remanded to the district court for a retrial on damages for Best Buy's indirect purchases.

Dated: March 2, 2015

Respectfully submitted,

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STATEMENT OF RELATED CASES

Best Buy agrees with the Statement of Related Cases in HannStar's opening brief.

s/Katherine S. Barrett Wiik
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Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Signature s/Katherine S. Barrett Wiik

Attorney for Plaintiffs-Appellees-Cross-Appellants Best Buy Co., Inc.

Date 03/02/2015

Addendum

325D.57 DAMAGES.

Any person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or indirectly by a violation of sections 325D.49 to 325D.66, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.

History: *1971 c 865 s 9; 1984 c 458 s 1*

645.44 WORDS AND PHRASES DEFINED.

Subdivision 1. **Scope.** The following words, terms, and phrases used in Minnesota Statutes or any legislative act shall have the meanings given them in this section, unless another intention clearly appears.

Subd. 1a. **Appellate courts.** "Appellate courts" means the Supreme Court and the Court of Appeals.

Subd. 1b. **Chair.** "Chair" includes chairman, chairwoman, and chairperson.

Subd. 2. **Court administrator.** When used in reference to court procedure, "court administrator" means the court administrator of the court in which the action or proceeding is pending, and "court administrator's office" means that court administrator's office.

Subd. 3. **County, town, city.** When a county, town or city is mentioned, without any particular description, it imports the particular county, town or city appropriate to the matter.

Subd. 3a. [Repealed, 1976 c 44 s 70]

Subd. 4. **Folio.** "Folio" means 100 words, counting as a word each number necessarily used; if there be fewer than 100 words in all, the paper shall be computed as one folio; likewise any excess over the last full folio.

Subd. 5. **Holiday.** "Holiday" includes New Year's Day, January 1; Martin Luther King's Birthday, the third Monday in January; Washington's and Lincoln's Birthday, the third Monday in February; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Christopher Columbus Day, the second Monday in October; Veterans Day, November 11; Thanksgiving Day, the fourth Thursday in November; and Christmas Day, December 25; provided, when New Year's Day, January 1; or Independence Day, July 4; or Veterans Day, November 11; or Christmas Day, December 25; falls on Sunday, the following day shall be a holiday and, provided, when New Year's Day, January 1; or Independence Day, July 4; or Veterans Day, November 11; or Christmas Day, December 25; falls on Saturday, the preceding day shall be a holiday. No public business shall be transacted on any holiday, except in cases of necessity and except in cases of public business transacted by the legislature, nor shall any civil process be served thereon. However, for the executive branch of the state of Minnesota, "holiday" also includes the Friday after Thanksgiving but does not include Christopher Columbus Day. Other branches of state government and political subdivisions shall have the option of determining whether Christopher Columbus Day and the Friday after Thanksgiving shall be holidays. Where it is determined that Columbus Day or the Friday after Thanksgiving is not a holiday, public business may be conducted thereon.

Any agreement between a public employer and an employee organization citing Veterans Day as the fourth Monday in October shall be amended to cite Veterans Day as November 11.

Subd. 5a. **Public member.** "Public member" means a person who is not, or never was, a member of the profession or occupation being licensed or regulated or the spouse of any such person, or a person who does not have or has never had, a material financial interest in either the providing of the professional service being licensed or regulated, or an activity directly related to the profession or occupation being licensed or regulated.

Subd. 6. **Oath; affirmation; affirm; sworn.** "Oath" includes "affirmation" in all cases where by law an affirmation may be substituted for an oath; and in like cases "swear" includes "affirm" and "sworn" "affirmed."

Subd. 7. **Person.** "Person" may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.

Subd. 8. **Population; inhabitants.** When used in reference to population, "population" and "inhabitants" mean that shown by the last preceding federal decennial census unless otherwise expressly provided.

Subd. 8a. **Public waters.** "Public waters" means public waters as defined in section 103G.005, subdivision 15, and includes "public waters wetlands" as defined in section 103G.005, subdivision 15a.

Subd. 9. **Recorded; filed for record.** When an instrument in writing is required or permitted to be filed for record with or recorded by any officer, the same imports that it must be recorded by such officer in a suitable book kept for that purpose, unless otherwise expressly directed.

Subd. 10. **Seal.** When the seal of a court, public office, or corporation is required by law to be affixed to any paper, the word "seal" includes an impression thereof upon the paper alone, as well as an impression on a wafer, wax, or other substance thereto attached. When the seal of a court is required by law to be affixed to any paper or document, the word "seal" also includes an image of the court seal affixed by the court to an electronic image of the paper or document.

Subd. 11. **State; United States.** When applied to a part of the United States, "state" extends to and includes the District of Columbia and the several territories. "United States" embraces the District of Columbia and territories.

Subd. 12. **Sheriff.** "Sheriff" may be extended to any person officially performing the duties of a sheriff, either generally or in special cases.

Subd. 13. **Time; month; year.** "Month" means a calendar month and "year" means a calendar year, unless otherwise expressed; and "year" is equivalent to the expression "year of our Lord."

Subd. 13a. **Wetlands.** "Wetlands" means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes:

(1) have a predominance of hydric soils;

(2) are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and

(3) under normal circumstances, support a prevalence of such vegetation.

Subd. 14. **Written; in writing.** "Written" and "in writing" may include any mode of representing words and letters. The signature of a person, when required by law, (1) must be in the handwriting of the person, or (2) if the person is unable to write (i) the person's mark or name written by another at the request and in the presence of the person, or (ii) by a rubber stamp facsimile of the person's actual signature, mark, or a signature of the person's name or a mark made by another and adopted for all purposes of signature by the person with a motor disability and affixed in the person's presence. The signature of a person on a document that will be filed with a court, when required by law, may also be made electronically if otherwise authorized by statute or court rule.

Subd. 15. **May.** "May" is permissive.

Subd. 15a. **Must.** "Must" is mandatory.

Subd. 16. **Shall.** "Shall" is mandatory.

Subd. 17. **Violate.** "Violate" includes failure to comply with.

Subd. 18. **Pledge; mortgage; conditional sale; lien; assignment.** "Pledge," "mortgage," "conditional sale," "lien," "assignment," and similar terms used in referring to a security interest in goods include corresponding types of security interests under article 9 of the Uniform Commercial Code.

Subd. 19. **Fee and tax.** (a) "Tax" means any fee, charge, exaction, or assessment imposed by a governmental entity on an individual, person, entity, transaction, good, service, or other thing. It excludes a price that an individual or entity chooses voluntarily to pay in return for receipt of goods or services provided by the governmental entity. A government good or service does not include access to or the authority to engage in private market transactions with a nongovernmental party, such as licenses to engage in a trade, profession, or business or to improve private property.

(b) For purposes of applying the laws of this state, a "fee," "charge," or other similar term that satisfies the functional requirements of paragraph (a) must be treated as a tax for all purposes, regardless of whether the statute or law names or describes it as a tax. The provisions of this subdivision do not exempt a person, corporation, organization, or entity from payment of a validly imposed fee, charge, exaction, or assessment, nor preempt or supersede limitations under law that apply to fees, charges, or assessments.

(c) This subdivision is not intended to extend or limit article 4, section 18, of the Minnesota Constitution.

Subd. 20. **Estimated market value.** When used in determining or calculating a limit on taxation, spending, state aid amounts, or debt, bond, certificate of indebtedness, or capital note issuance by or for a local government unit, "estimated market value" has the meaning given in section 273.032.

History: *1941 c 492 s 44; 1945 c 337 s 1; 1947 c 201 s 4; 1955 c 495 s 1; 1955 c 783 s 1; 1959 c 52 s 2; 1965 c 812 s 25; 1969 c 69 s 1; 1973 c 123 art 5 s 2,7; 1973 c 228 s 1; 1973 c 343 s 1; 1974 c 88 s 1; 1977 c 347 s 64; 1979 c 332 art 1 s 92; 1980 c 487 s 21; 1983 c 247 s 216; 1984 c 656 s 4; 1986 c 444 s 5; 1Sp1986 c 3 art 1 s 82; 1990 c 391 art 8 s 57; 1991 c 354 art 6 s 19; 1996 c 462 s 43; 2000 c 382 s 18; 1Sp2001 c 10 art 2 s 84; 2006 c 259 art 13 s 15; 2009 c 88 art 12 s 18; 2013 c 143 art 14 s 109; 2014 c 204 s 12,13*

Public Law 97-290
97th Congress

An Act

To encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally.

Oct. 8, 1982
[S. 734]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Export trade services, expansion.

TITLE I—GENERAL PROVISIONS

Export Trading Company Act of 1982.

SHORT TITLE

SEC. 101. This title may be cited as the "Export Trading Company Act of 1982".

15 USC 4001 note.

FINDINGS; DECLARATION OF PURPOSE

15 USC 4001.

SEC. 102. (a) The Congress finds that—

(1) United States exports are responsible for creating and maintaining one out of every nine manufacturing jobs in the United States and for generating one out of every seven dollars of total United States goods produced;

(2) the rapidly growing service-related industries are vital to the well-being of the United States economy inasmuch as they create jobs for seven out of every ten Americans, provide 65 per centum of the Nation's gross national product, and offer the greatest potential for significantly increased industrial trade involving finished products;

(3) trade deficits contribute to the decline of the dollar on international currency markets and have an inflationary impact on the United States economy;

(4) tens of thousands of small- and medium-sized United States businesses produce exportable goods or services but do not engage in exporting;

(5) although the United States is the world's leading agricultural exporting nation, many farm products are not marketed as widely and effectively abroad as they could be through export trading companies;

(6) export trade services in the United States are fragmented into a multitude of separate functions, and companies attempting to offer export trade services lack financial leverage to reach a significant number of potential United States exporters;

(7) the United States needs well-developed export trade intermediaries which can achieve economies of scale and acquire expertise enabling them to export goods and services profitably, at low per unit cost to producers;

(8) the development of export trading companies in the United States has been hampered by business attitudes and by Government regulations;

(9) those activities of State and local governmental authorities which initiate, facilitate, or expand exports of goods and serv-

ices can be an important source for expansion of total United States exports, as well as for experimentation in the development of innovative export programs keyed to local, State, and regional economic needs;

(10) if United States trading companies are to be successful in promoting United States exports and in competing with foreign trading companies, they should be able to draw on the resources, expertise, and knowledge of the United States banking system, both in the United States and abroad; and

(11) the Department of Commerce is responsible for the development and promotion of United States exports, and especially for facilitating the export of finished products by United States manufacturers.

(b) It is the purpose of this Act to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by establishing an office within the Department of Commerce to promote the formation of export trade associations and export trading companies, by permitting bank holding companies, bankers' banks, and Edge Act corporations and agreement corporations that are subsidiaries of bank holding companies to invest in export trading companies, by reducing restrictions on trade financing provided by financial institutions, and by modifying the application of the antitrust laws to certain export trade.

12 USC 181 note.

DEFINITIONS

15 USC 4002.

SEC. 103. (a) For purposes of this title—

(1) the term "export trade" means trade or commerce in goods or services produced in the United States which are exported, or in the course of being exported, from the United States to any other country;

(2) the term "services" includes, but is not limited to, accounting, amusement, architectural, automatic data processing, business, communications, construction franchising and licensing, consulting, engineering, financial, insurance, legal, management, repair, tourism, training, and transportation services;

(3) the term "export trade services" includes, but is not limited to, consulting, international market research, advertising, marketing, insurance, product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when provided in order to facilitate the export of goods or services produced in the United States;

(4) the term "export trading company" means a person, partnership, association, or similar organization, whether operated for profit or as a nonprofit organization, which does business under the laws of the United States or any State and which is organized and operated principally for purposes of—

(A) exporting goods or services produced in the United States; or

(B) facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services;

(5) the term "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(6) the term "United States" means the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands; and

(7) the term "antitrust laws" means the antitrust laws as defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that section 5 applies to unfair methods of competition, and any State antitrust or unfair competition law.

(b) The Secretary of Commerce may by regulation further define any term defined in subsection (a), in order to carry out this title.

OFFICE OF EXPORT TRADE IN DEPARTMENT OF COMMERCE

SEC. 104. The Secretary of Commerce shall establish within the Department of Commerce an office to promote and encourage to the greatest extent feasible the formation of export trade associations and export trading companies. Such office shall provide information and advice to interested persons and shall provide a referral service to facilitate contact between producers of exportable goods and services and firms offering export trade services. 15 USC 4003.

TITLE II—BANK EXPORT SERVICES

Bank Export Services Act.

SHORT TITLE

SEC. 201. This title may be cited as the "Bank Export Services Act". 12 USC 1841 note.

SEC. 202. The Congress hereby declares that it is the purpose of this title to provide for meaningful and effective participation by bank holding companies, bankers' banks, and Edge Act corporations, in the financing and development of export trading companies in the United States. In furtherance of such purpose, the Congress intends that, in implementing its authority under section 4(c)(14) of the Bank Holding Company Act of 1956, the Board of Governors of the Federal Reserve System should pursue regulatory policies that— 12 USC 1843 note. 30 USC 181 note. *Post*, p. 1236. 12 USC 1843.

(1) provide for the establishment of export trading companies with powers sufficiently broad to enable them to compete with similar foreign-owned institutions in the United States and abroad;

(2) afford to United States commerce, industry, and agriculture, especially small- and medium-size firms, a means of exporting at all times;

(3) foster the participation by regional and smaller banks in the development of export trading companies; and

(4) facilitate the formation of joint venture export trading companies between bank holding companies and nonbank firms that provide for the efficient combination of complementary

trade and financing services designed to create export trading companies that can handle all of an exporting company's needs.

INVESTMENTS IN EXPORT TRADING COMPANIES

SEC. 203. Section 4(c) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)) is amended—

(1) in paragraph (12)(B), by striking out "or" at the end thereof;

(2) in paragraph (13), by striking out the period at the end thereof and inserting in lieu thereof "; or"; and

(3) by inserting after paragraph (13) the following:

"(14) shares of any company which is an export trading company whose acquisition (including each acquisition of shares) or formation by a bank holding company has not been disapproved by the Board pursuant to this paragraph, except that such investments, whether direct or indirect, in such shares shall not exceed 5 per centum of the bank holding company's consolidated capital and surplus.

"(A)(i) No bank holding company shall invest in an export trading company under this paragraph unless the Board has been given sixty days' prior written notice of such proposed investment and within such period has not issued a notice disapproving the proposed investment or extending for up to another thirty days the period during which such disapproval may be issued.

"(ii) The period for disapproval may be extended for such additional thirty-day period only if the Board determines that a bank holding company proposing to invest in an export trading company has not furnished all the information required to be submitted or that in the Board's judgment any material information submitted is substantially inaccurate.

"(iii) The notice required to be filed by a bank holding company shall contain such relevant information as the Board shall require by regulation or by specific request in connection with any particular notice.

"(iv) The Board may disapprove any proposed investment only if—

"(I) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;

"(II) the Board finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company, or

"(III) the bank holding company fails to furnish the information required under clause (iii).

"(v) Within three days after a decision to disapprove an investment, the Board shall notify the bank holding company in writing of the disapproval and shall provide a written statement of the basis for the disapproval.

"(vi) A proposed investment may be made prior to the expiration of the disapproval period if the Board issues

written notice of its intent not to disapprove the investment.

"(B)(i) The total amount of extensions of credit by a bank holding company which invests in an export trading company, when combined with all such extensions of credit by all the subsidiaries of such bank holding company, to an export trading company shall not exceed at any one time 10 per centum of the bank holding company's consolidated capital and surplus. For purposes of the preceding sentence, an extension of credit shall not be deemed to include any amount invested by a bank holding company in the shares of an export trading company.

"(ii) No provision of any other Federal law in effect on October 1, 1982, relating specifically to collateral requirements shall apply with respect to any such extension of credit.

"(iii) No bank holding company or subsidiary of such company which invests in an export trading company may extend credit to such export trading company or to customers of such export trading company on terms more favorable than those afforded similar borrowers in similar circumstances, and such extension of credit shall not involve more than the normal risk of repayment or present other unfavorable features.

"(C) For purposes of this paragraph, an export trading company—

"(i) may engage in or hold shares of a company engaged in the business of underwriting, selling, or distributing securities in the United States only to the extent that any bank holding company which invests in such export trading company may do so under applicable Federal and State banking laws and regulations; and

"(ii) may not engage in agricultural production activities or in manufacturing, except for such incidental product modification including repackaging, reassembling or extracting byproducts, as is necessary to enable United States goods or services to conform with requirements of a foreign country and to facilitate their sale in foreign countries.

"(D) A bank holding company which invests in an export trading company may be required, by the Board, to terminate its investment or may be made subject to such limitations or conditions as may be imposed by the Board, if the Board determines that the export trading company has taken positions in commodities or commodity contracts, in securities, or in foreign exchange, other than as may be necessary in the course of the export trading company's business operations.

"(E) Notwithstanding any other provision of law, an Edge Act corporation, organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611-631), which is a subsidiary of a bank holding company, or an agreement corporation, operating subject to section 25 of the Federal Reserve Act (12 U.S.C. 601-604(a)), which is a subsidiary of a bank holding company, may invest directly and indirectly in the aggregate up to 5 per centum of its consolidated capital and

surplus (25 per centum in the case of a corporation not engaged in banking) in the voting stock of other evidences of ownership in one or more export trading companies.

Definitions.

"(F) For purposes of this paragraph—

"(i) the term 'export trading company' means a company which does business under the laws of the United States or any State, which is exclusively engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods or services produced in the United States or for purposes of facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services.

"(ii) the term 'export trade services' includes, but is not limited to, consulting, international market research, advertising, marketing, insurance (other than acting as principal, agent or broker in the sale of insurance on risks resident or located, or activities performed, in the United States, except for insurance covering the transportation of cargo from any point of origin in the United States to a point of final destination outside the United States), product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when provided in order to facilitate the export of goods or services produced in the United States;

"(iii) the term 'bank holding company' shall include a bank which (I) is organized solely to do business with other banks and their officers, directors, or employees; (II) is owned primarily by the banks with which it does business; and (III) does not do business with the general public. No such other bank, owning stock in a bank described in this clause that invests in an export trading company, shall extend credit to an export trading company in an amount exceeding at any one time 10 per centum of such other bank's capital and surplus; and

"(iv) the term 'extension of credit' shall have the same meaning given such term in the fourth paragraph of section 23A of the Federal Reserve Act.".

Report to congressional committees. 12 USC 1843 note.

SEC. 205. On or before two years after the date of the enactment of this Act, the Federal Reserve Board shall report to the Committee on Banking, Housing, an Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives the Board's recommendations with respect to the implementation of this section, the Board's recommendations on any changes in United States law to facilitate the financing of United States exports, especially by small, medium-size, and minority business concerns, and the Board's recommendations on the effects of ownership of United States banks by foreign banking organizations affiliated with trading companies doing business in the United States.

GUARANTEES FOR EXPORT ACCOUNTS RECEIVABLE AND INVENTORY

SEC. 206. The Export-Import Bank of the United States is authorized and directed to establish a program to provide guarantees for loans extended by financial institutions or other public or private creditors to export trading companies as defined in section 4(c)(14)(F)(i) of the Bank Holding Company Act of 1956, or to other exporters, when such loans are secured by export accounts receivable or inventories of exportable goods, and when in the judgment of the Board of Directors— 12 USC 635a-4. *Ante*, p. 1236.

(1) the private credit market is not providing adequate financing to enable otherwise creditworthy export trading companies or exporters to consummate export transactions; and

(2) such guarantees would facilitate expansion of exports which would not otherwise occur.

The Board of Directors shall attempt to insure that a major share of any loan guarantees ultimately serves to promote exports from small, medium-size, and minority businesses or agricultural concerns. Guarantees provided under the authority of this section shall be subject to limitations contained in annual appropriations Acts.

BANKERS' ACCEPTANCES

SEC. 207. The seventh paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 372) is amended to read as follows: 12 USC 372 note.

"(7)(A) Any member bank and any Federal or State branch or agency of a foreign bank subject to reserve requirements under section 7 of the International Banking Act of 1978 (hereinafter in this paragraph referred to as 'institutions'), may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, exclusive of days of grace—

"(i) which grow out of transactions involving the importation or exportation of goods;

"(ii) which grow out of transactions involving the domestic shipment of goods; or

"(iii) which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples.

"(B) Except as provided in subparagraph (C), no institution shall accept such bills, or be obligated for a participation share in such bills, in an amount equal at any time in the aggregate to more than 150 per centum of its paid up and unimpaired capital stock and surplus or, in the case of a United States branch or agency of a foreign bank, its dollar equivalent as determined by the Board under subparagraph (H).

"(C) The Board, under such conditions as it may prescribe, may authorize, by regulation or order, any institution to accept such bills, or be obligated for a participation share in such bills, in an amount not exceeding at any time in the aggregate 200 per centum of its paid up and unimpaired capital stock and surplus or, in the case of a United States branch or agency of a foreign bank, its dollar equivalent as determined by the Board under subparagraph (H).

"(D) Notwithstanding subparagraphs (B) and (C), with respect to any institution, the aggregate acceptances, including obligations for a participation share in such acceptances, growing out of domestic transactions shall not exceed 50 per centum of the aggregate of all

acceptances, including obligations for a participation share in such acceptances, authorized for such institution under this paragraph.

"(E) No institution shall accept bills, or be obligated for a participation share in such bills, whether in a foreign or domestic transaction, for any one person, partnership, corporation, association or other entity in an amount equal at any time in the aggregate to more than 10 per centum of its paid up and unimpaired capital stock and surplus, or, in the case of a United States branch or agency of a foreign bank, its dollar equivalent as determined by the Board under subparagraph (H), unless the institution is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance.

"(F) With respect to an institution which issues an acceptance, the limitations contained in this paragraph shall not apply to that portion of an acceptance which is issued by such institution and which is covered by a participation agreement sold to another institution.

"(G) In order to carry out the purposes of this paragraph, the Board may define any of the terms used in this paragraph, and, with respect to institutions which do not have capital or capital stock, the Board shall define an equivalent measure to which the limitations contained in this paragraph shall apply.

"(H) Any limitation or restriction in this paragraph based on paid-up and unimpaired capital stock and surplus of an institution shall be deemed to refer, with respect to a United States branch or agency of a foreign bank, to the dollar equivalent of the paid-up capital stock and surplus of the foreign bank, as determined by the Board, and if the foreign bank has more than one United States branch or agency, the business transacted by all such branches and agencies shall be aggregated in determining compliance with the limitation or restriction.".

TITLE III—EXPORT TRADE CERTIFICATES OF REVIEW

EXPORT TRADE PROMOTION DUTIES OF SECRETARY OF COMMERCE

15 USC 4011.

SEC. 301. To promote and encourage export trade, the Secretary may issue certificates of review and advise and assist any person with respect to applying for certificates of review.

APPLICATION FOR ISSUANCE OF CERTIFICATE OF REVIEW

15 USC 4012.

SEC. 302. (a) To apply for a certificate of review, a person shall submit to the Secretary a written application which—

(1) specifies conduct limited to export trade, and

(2) is in a form and contains any information, including information pertaining to the overall market in which the applicant operates, required by rule or regulation promulgated under section 310.

Notice; publication in Federal Register.

(b)(1) Within ten days after an application submitted under subsection (a) is received by the Secretary, the Secretary shall publish in the Federal Register a notice that announces that an application for a certificate of review has been submitted, identifies each person submitting the application, and describes the conduct for which the application is submitted.

(2) Not later than seven days after an application submitted under subsection (a) is received by the Secretary, the Secretary shall transmit to the Attorney General—

(A) a copy of the application,

(B) any information submitted to the Secretary in connection with the application, and

(C) any other relevant information (as determined by the Secretary) in the possession of the Secretary, including information regarding the market share of the applicant in the line of commerce to which the conduct specified in the application relates.

ISSUANCE OF CERTIFICATE

SEC. 303. (a) A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of operation will— 15 USC 4013.

(1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,

(2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,

(3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and

(4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

(b) Within ninety days after the Secretary receives an application for a certificate of review, the Secretary shall determine whether the applicant's export trade, export trade activities, and methods of operation meet the standards of subsection (a). If the Secretary, with the concurrence of the Attorney General, determines that such standards are met, the Secretary shall issue to the applicant a certificate of review. The certificate of review shall specify—

(1) the export trade, export trade activities, and methods of operation to which the certificate applies,

(2) the person to whom the certificate of review is issued, and

(3) any terms and conditions the Secretary or the Attorney General deems necessary to assure compliance with the standards of subsection (a).

(c) If the applicant indicates a special need for prompt disposition, the Secretary and the Attorney General may expedite action on the application, except that no certificate of review may be issued within thirty days of publication of notice in the Federal Register under section 302(b)(1).

(d)(1) If the Secretary denies in whole or in part an application for a certificate, he shall notify the applicant of his determination and the reasons for it.

(2) An applicant may, within thirty days of receipt of notification that the application has been denied in whole or in part, request the Secretary to reconsider the determination. The Secretary, with the concurrence of the Attorney General, shall notify the applicant of the determination upon reconsideration within thirty days of receipt of the request.

(e) If the Secretary denies an application for the issuance of a certificate of review and thereafter receives from the applicant a request for the return of documents submitted by the applicant in connection with the application for the certificate, the Secretary and the Attorney General shall return to the applicant, not later than thirty days after receipt of the request, the documents and all copies of the documents available to the Secretary and the Attorney General, except to the extent that the information contained in a document has been made available to the public.

(f) A certificate shall be void ab initio with respect to any export trade, export trade activities, or methods of operation for which a certificate was procured by fraud.

REPORTING REQUIREMENT; AMENDMENT OF CERTIFICATE; REVOCATION OF CERTIFICATE

15 USC 4014.

SEC. 304. (a)(1) Any applicant who receives a certificate of review—

(A) shall promptly report to the Secretary any change relevant to the matters specified in the certificate, and

(B) may submit to the Secretary an application to amend the certificate to reflect the effect of the change on the conduct specified in the certificate.

(2) An application for an amendment to a certificate of review shall be treated as an application for the issuance of a certificate. The effective date of an amendment shall be the date on which the application for the amendment is submitted to the Secretary.

(b)(1) If the Secretary or the Attorney General has reason to believe that the export trade, export trade activities, or methods of operation of a person holding a certificate of review no longer comply with the standards of section 303(a), the Secretary shall request such information from such person as the Secretary or the Attorney General deems necessary to resolve the matter of compliance. Failure to comply with such request shall be grounds for revocation of the certificate under paragraph (2).

Notice.

(2) If the Secretary or the Attorney General determines that the export trade, export trade activities, or methods of operation of a person holding a certificate no longer comply with the standards of section 303(a), or that such person has failed to comply with a request made under paragraph (1), the Secretary shall give written notice of the determination to such person. The notice shall include a statement of the circumstances underlying, and the reasons in support of, the determination. In the 60-day period beginning 30 days after the notice is given, the Secretary shall revoke the certificate or modify it as the Secretary or the Attorney General deems necessary to cause the certificate to apply only to the export trade, export trade activities, or methods of operation which are in compliance with the standards of section 303(a).

Investigations.

(3) For purposes of carrying out this subsection, the Attorney General, and the Assistant Attorney General in charge of the antitrust division of the Department of Justice, may conduct investigations in the same manner as the Attorney General and the Assistant Attorney General conduct investigations under section 3 of the Antitrust Civil Process Act, except that no civil investigative demand may be issued to a person to whom a certificate of review is issued if such person is the target of such investigation.

28 USC 1927.

JUDICIAL REVIEW; ADMISSIBILITY

SEC. 305. (a) If the Secretary grants or denies, in whole or in part, an application for a certificate of review or for an amendment to a certificate, or revokes or modifies a certificate pursuant to section 304(b), any person aggrieved by such determination may, within 30 days of the determination, bring an action in any appropriate district court of the United States to set aside the determination on the ground that such determination is erroneous. 15 USC 4015.

(b) Except as provided in subsection (a), no action by the Secretary or the Attorney General pursuant to this title shall be subject to judicial review.

(c) If the Secretary denies, in whole or in part, an application for a certificate of review or for an amendment to a certificate, or revokes or amends a certificate, neither the negative determination nor the statement of reasons therefor shall be admissible in evidence, in any administrative or judicial proceeding, in support of any claim under the antitrust laws.

PROTECTION CONFERRED BY CERTIFICATE OF REVIEW

SEC. 306. (a) Except as provided in subsection (b), no criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued which is based on conduct which is specified in, and complies with the terms of, a certificate issued under section 303 which certificate was in effect when the conduct occurred. 15 USC 4016.

(b)(1) Any person who has been injured as a result of conduct engaged in under a certificate of review may bring a civil action for injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit (including a reasonable attorney's fee) for the failure to comply with the standards of section 303(a). Any action commenced under this title shall proceed as if it were an action commenced under section 4 or section 16 of the Clayton Act, except that the standards of section 303(a) of this title and the remedies provided in this paragraph shall be the exclusive standards and remedies applicable to such action. 15 USC 15, 26.

(2) Any action brought under paragraph (1) shall be filed within two years of the date the plaintiff has notice of the failure to comply with the standards of section 303(a) but in any event within four years after the cause of action accrues.

(3) In any action brought under paragraph (1), there shall be a presumption that conduct which is specified in and complies with a certificate of review does comply with the standards of section 303(a).

(4) In any action brought under paragraph (1), if the court finds that the conduct does comply with the standards of section 303(a), the court shall award to the person against whom the claim is brought the cost of suit attributable to defending against the claim (including a reasonable attorney's fee).

(5) The Attorney General may file suit pursuant to section 15 of the Clayton Act (15 U.S.C. 25) to enjoin conduct threatening clear and irreparable harm to the national interest.

GUIDELINES

15 USC 4017.

SEC. 307. (a) To promote greater certainty regarding the application of the antitrust laws to export trade, the Secretary, with the concurrence of the Attorney General, may issue guidelines—

(1) describing specific types of conduct with respect to which the Secretary, with the concurrence of the Attorney General, has made or would make, determinations under sections 303 and 304, and

(2) summarizing the factual and legal bases in support of the determinations.

(b) Section 553 of title 5, United States Code, shall not apply to the issuance of guidelines under subsection (a).

ANNUAL REPORTS

15 USC 4018.

SEC. 308. Every person to whom a certificate of review is issued shall submit to the Secretary an annual report, in such form and at such time as the Secretary may require, that updates where necessary the information required by section 302(a).

DISCLOSURE OF INFORMATION

15 USC 4019.

SEC. 309. (a) Information submitted by any person in connection with the issuance, amendment, or revocation of a certificate of review shall be exempt from disclosure under section 552 of title 5, United States Code.

(b)(1) Except as provided in paragraph (2), no officer or employee of the United States shall disclose commercial or financial information submitted in connection with the issuance, amendment, or revocation of a certificate of review if the information is privileged or confidential and if disclosure of the information would cause harm to the person who submitted the information.

(2) Paragraph (1) shall not apply with respect to information disclosed—

(A) upon a request made by the Congress or any committee of the Congress,

(B) in a judicial or administrative proceeding, subject to appropriate protective orders,

(C) with the consent of the person who submitted the information,

(D) in the course of making a determination with respect to the issuance, amendment, or revocation of a certificate of review, if the Secretary deems disclosure of the information to be necessary in connection with making the determination,

(E) in accordance with any requirement imposed by a statute of the United States, or

(F) in accordance with any rule or regulation promulgated under section 310 permitting the disclosure of the information to an agency of the United States or of a State on the condition that the agency will disclose the information only under the circumstances specified in subparagraphs (A) through (E).

RULES AND REGULATIONS

SEC. 310. The Secretary, with the concurrence of the Attorney General, shall promulgate such rules and regulations as are necessary to carry out the purposes of this Act. 15 USC 4020.

DEFINITIONS

SEC. 311. As used in this title— 15 USC 4021.

(1) the term "export trade" means trade or commerce in goods, wares, merchandise, or services exported, or in the course of being exported, from the United States or any territory thereof to any foreign nation,

(2) the term "service" means intangible economic output, including, but not limited to—

(A) business, repair, and amusement services,

(B) management, legal, engineering, architectural, and other professional services, and

(C) financial, insurance, transportation, informational and any other data-based services, and communication services,

(3) the term "export trade activities" means activities or agreements in the course of export trade,

(4) the term "methods of operation" means any method by which a person conducts or proposes to conduct export trade,

(5) the term "person" means an individual who is a resident of the United States; a partnership that is created under and exists pursuant to the laws of any State or of the United States; a State or local government entity; a corporation, whether organized as a profit or nonprofit corporation, that is created under and exists pursuant to the laws of any State or of the United States; or any association or combination, by contract or other arrangement, between or among such persons,

(6) the term "antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. 12), and section 5 of the Federal Trade Commission Act (15 U.S.C 45) (to the extent that section 5 prohibits unfair methods of competition), and any State antitrust or unfair competition law,

(7) the term "Secretary" means the Secretary of Commerce or his designee, and

(8) the term "Attorney General" means the Attorney General of the United States or his designee.

EFFECTIVE DATES

SEC. 312. (a) Except as provided in subsection (b), this title shall take effect on the date of the enactment of this Act. 15 USC 4011 note.

(b) Section 302 and section 303 shall take effect 90 days after the effective date of the rules and regulations first promulgated under section 310.

Foreign Trade Antitrust Improvements Act of 1982.

TITLE IV—FOREIGN TRADE ANTITRUST IMPROVEMENTS

SHORT TITLE

15 USC 1 note.

SEC. 401. This title may be cited as the "Foreign Trade Antitrust Improvements Act of 1982".

AMENDMENT TO SHERMAN ACT

SEC. 402. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

15 USC 6a.

"SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

"(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

"(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

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

"(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.".

AMENDMENT TO FEDERAL TRADE COMMISSION ACT

SEC. 403. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by adding at the end thereof the following new paragraph:

"(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

"(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

"(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

"(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

"(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.".

Approved October 8, 1982.

LEGISLATIVE HISTORY—S. 734 (H.R. 1799, H.R. 6016):

HOUSE REPORTS: No. 97-924 (Comm. of Conference), No. 97-637, pt. 1 accompanying H.R. 1799 (Comm. on Foreign Affairs), pt. 2 (Comm. on the Judiciary) and No. 97-629 accompanying H.R. 6016 (Comm. on Banking, Finance and Urban Affairs).

SENATE REPORTS: No. 97-27 (Comm. on Banking, Housing and Urban Affairs) and No. 97-644 (Comm. of Conference).

CONGRESSIONAL RECORD:

Vol. 127 (1981): Apr. 7, 8, considered and passed Senate.

Vol. 128 (1982): July 27, H.R. 1799 and H.R. 6016 considered and passed House; S. 734, amended, passed in lieu.

Oct. 1, Senate and House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Vol. 18, No. 41 (1982): Oct. 8, Presidential statement.

97TH CONGRESS 2d Session | SENATE | REPORT No. 97-644

EXPORT TRADING COMPANY ACT OF 1982

OCTOBER 1 (legislative day, SEPTEMBER 8), 1982.—Ordered to be printed

Mr. GARN, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 734]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 734) to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

TITLE I—GENERAL PROVISIONS

SHORT TITLE

SEC. 101. This title may be cited as the "Export Trading Company Act of 1982".

FINDINGS; DECLARATION OF PURPOSE

SEC. 102. (a) The Congress finds that—

(1) United States exports are responsible for creating and maintaining one out of every nine manufacturing jobs in the United States and for generating one out of every seven dollars of total United States goods produced;

(2) the rapidly growing service-related industries are vital to the well-being of the United States economy inasmuch as they create jobs for seven out of every ten Americans, provide 65 per-

J. 11-010 O

cent of the Nation's gross national product, and offer the greatest potential for significantly increased industrial trade involving finished products;

(3) trade deficits contribute to the decline of the dollar on international currency markets and have an inflationary impact on the United States economy;

(4) tens of thousands of small- and medium-sized United States businesses produce exportable goods or services but do not engage in exporting;

(5) although the United States is the world's leading agricultural exporting nation, many farm products are not marketed as widely and effectively abroad as they could be through export trading companies;

(6) export trade services in the United States are fragmented into a multitude of separate functions, and companies attempting to offer export trade services lack financial leverage to reach a significant number of potential United States exporters;

(7) the United States needs well-developed export trade intermediaries which can achieve economies of scale and acquire expertise enabling them to export goods and services profitably, at low per unit cost to producers;

(8) the development of export trading companies in the United States has been hampered by business attitudes and by Government regulations;

(9) those activities of State and local governmental authorities which initiate, facilitate, or expand exports of goods and services can be an important source for expansion of total United States exports, as well as for experimentation in the development of innovative export programs keyed to local, State, and regional economic needs;

(10) if United States trading companies are to be successful in promoting United States exports and in competing with foreign trading companies, they should be able to draw on the resources, expertise, and knowledge of the United States banking system, both in the United States and abroad; and

(11) the Department of Commerce is responsible for the development and promotion of United States exports, and especially for facilitating the export of finished products by United States manufacturers.

(b) It is the purpose of this Act to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by establishing an office within the Department of Commerce to promote the formation of export trade associations and export trading companies, by permitting bank holding companies, bankers' banks, and Edge Act corporations and agreement corporations that are subsidiaries of bank holding companies to invest in export trading companies, by reducing restrictions on trade financing provided by financial institutions, and by modifying the application of the antitrust laws to certain export trade.

DEFINITIONS

SEC. 103. (a) For purposes of this title—

(1) the term "export trade" means trade or commerce in goods or services produced in the United States which are exported, or in the course of being exported, from the United States to any other country;

(2) the term "services" includes, but is not limited to, accounting, amusement, architectural, automatic data processing, business, communications, construction franchising and licensing, consulting, engineering, financial, insurance, legal, management, repair, tourism, training, and transportation services;

(3) the term "export trade services" includes, but is not limited to, consulting, international market research, advertising, marketing, insurance, product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when provided in order to facilitate the export of goods or services produced in the United States;

(4) the term "export trading company" means a person, partnership, association, or similar organization, whether operated for profit or as a nonprofit organization, which does business under the laws of the United States or any State and which is organized and operated principally for purposes of—

(A) exporting goods or services produced in the United States; or

(B) facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services;

(5) the term "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(6) the term "United States" means the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands; and

(7) the term "antitrust laws" means the antitrust laws as defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that section 5 applies to unfair methods of competition, and any State antitrust or unfair competition law.

(b) The Secretary of Commerce may by regulation further define any term defined in subsection (a), in order to carry out this title.

OFFICE OF EXPORT TRADE IN DEPARTMENT OF COMMERCE

SEC. 104. The Secretary of Commerce shall establish within the Department of Commerce an office to promote and encourage to the greatest extent feasible the formation of export trade associations and export trading companies. Such office shall provide information and advice to interested persons and shall provide a referral

service to facilitate contact between producers of exportable goods and services and firms offering export trade services.

TITLE II—BANK EXPORT SERVICES

SHORT TITLE

SEC. 201. This title may be cited as the "Bank Export Services Act".

SEC. 202. The Congress hereby declares that it is the purpose of this title to provide for meaningful and effective participation by bank holding companies bankers' banks, and Edge Act corporations, in the financing and development of export trading companies in the United States. In furtherance of such purpose, the Congress intends that, in implementing its authority under section 4(c)(14) of the Bank Holding Company Act of 1956, the Board of Governors of the Federal Reserve System should pursue regulatory policies that—

(1) provide for the establishment of export trading companies with powers sufficiently broad to enable them to compete with similar foreign-owned institutions in the United States and abroad;

(2) afford to United States commerce, industry and agriculture especially small and medium-size firms, a means of exporting at all times;

(3) foster the participation by regional and smaller banks in the development of export trading companies; and

(4) facilitate the formation of joint venture export trading companies between bank holding companies and nonbank firms that provide for the efficient combination of complementary trade and financing services designed to create export trading companies that can handle all of an exporting company's needs.

INVESTMENTS IN EXPORT TRADING COMPANIES

SEC. 203. Section 4(c) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)) is amended—

(1) in paragraph (12)(B), by striking out "or" at the end thereof;

(2) in paragraph (13), by striking out the period at the end thereof and inserting in lieu thereof "; or"; and

(3) by inserting after paragraph (13) the following:

"(14) shares of any company which is an export trading company whose acquisition (including each acquisition of shares) or formation by a bank holding company has not been disapproved by the Board pursuant to this paragraph, except that such investments, whether direct or indirect, in such shares shall not exceed 5 per centum of the bank holding company's consolidated capital and surplus.

"(A)(i) No bank holding company shall invest in an export trading company under this paragraph unless the Board has been given sixty days' prior written notice of such proposed investment and within such period has not issued a notice disapproving the proposed investment or extending for up to another thirty days the period during which such disapproval may be issued.

"(ii) The period for disapproval may be extended for such additional thirty-day period only if the Board determines that a bank holding company proposing to invest in an export trading company has not furnished all the information required to be submitted or that in the Board's judgment any material information submitted is substantially inaccurate.

"(iii) The notice required to be filed by a bank holding company shall contain such relevant information as the Board shall require by regulation or by specific request in connection with any particular notice.

"(iv) The Board may disapprove any proposed investment only if—

"(I) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;

"(II) the Board finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company, or

"(III) the bank holding company fails to furnish the information required under clause (iii).

"(v) Within three days after a decision to disapprove an investment, the Board shall notify the bank holding company in writing of the disapproval and shall provide a written statement of the basis for the disapproval.

"(vi) A proposed investment may be made prior to the expiration of the disapproval period if the Board issues written notice of its intent not to disapprove the investment.

"(B)(i) The total amount of extensions of credit by a bank holding company which invests in an export trading company, when combined with all such extensions of credit by all the subsidiaries of such bank holding company, to an export trading company shall not exceed at any one time 10 per centum of the bank holding company's consolidated capital and surplus. For purposes of the preceding sentence, an extension of credit shall not be deemed to include any amount invested by a bank holding company in the shares of an export trading company.

"(ii) No provision of any other Federal law in effect on October 1, 1982, relating specifically to collateral requirements shall apply with respect to any such extension of credit.

"(iii) No bank holding company or subsidiary of such company which invests in an export trading company may extend credit to such export trading company or to customers of such export trading company on terms more favorable than those afforded similar borrowers in similar circumstances, and such extension of credit shall not involve more than the normal risk of repayment or present other unfavorable features.

"(C) For purposes of this paragraph, an export trading company—

"(i) may engage in or hold shares of a company engaged in the business of underwriting, selling, or distributing securities in the United States only to the extent that any bank holding company which invests in such export trading company may do so under applicable Federal and State banking laws and regulations; and

"(ii) may not engage in agricultural production activities or in manufacturing, except for such incidental product modification including repackaging, reassembling or extracting byproducts, as is necessary to enable United States goods or services to conform with requirements of a foreign country and to facilitate their sale in foreign countries.

"(D) A bank holding company which invests in an export trading company may be required, by the Board, to terminate its investment or may be made subject to such limitations or conditions as may be imposed by the Board, if the Board determines that the export trading company has taken positions in commodities or commodity contracts, in securities, or in foreign exchange, other than as may be necessary in the course of the export trading company's business operations.

"(E) Notwithstanding any other provision of law, an Edge Act corporation, organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611-631), which is a subsidiary of a bank holding company, or an agreement corporation, operating subject to section 25 of the Federal Reserve Act (12 U.S.C. 601-604(a)), which is a subsidiary of a bank holding company, may invest directly and indirectly in the aggregate up to 5 per centum of its consolidated capital and surplus (25 per centum in the case of a corporation not engaged in banking) in the voting stock of other evidences of ownership in one or more export trading companies.

"(F) For purposes of this paragraph—

"(i) the term 'export trading company' means a company which does business under the laws of the United States or any State, which is exclusively engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods or services produced in the United States or for purposes of facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services.

"(ii) the term 'export trade services' includes, but is not limited to, consulting, international market research, advertising, marketing, insurance (other than acting as principal, agent or broker in the sale of insurance on risks resident or located, or activities performed, in the United States, except for insurance covering the transportation of cargo from any point of

origin in the United States to a point of final destination outside the United States), product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when provided in order to facilitate the export of goods or services produced in the United States;

"(iii) the term 'bank holding company' shall include a bank which (I) is organized solely to do business with other banks and their officers, directors, or employees; (II) is owned primarily by the banks with which it does business; and (III) does not do business with the general public. No such other bank, owning stock in a bank described in this clause that invests in an export trading company, shall extend credit to an export trading company in an amount exceeding at any one time 10 per centum of such other bank's capital and surplus; and

"(iv) the term 'extension of credit' shall have the same meaning given such term in the fourth paragraph of section 23A of the Federal Reserve Act.".

SEC. 205. On or before two years after the date of the enactment of this Act, the Federal Reserve Board shall report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives the Board's recommendations with respect to the implementation of this section, the Board's recommendations on any changes in United States law to facilitate the financing of United States exports, especially by small, medium-size, and minority business concerns, and the Board's recommendations on the effects of ownership of United States banks by foreign banking organizations affiliated with trading companies doing business in the United States.

GUARANTEES FOR EXPORT ACCOUNTS RECEIVABLE AND INVENTORY

SEC. 206. The Export-Import Bank of the United States is authorized and directed to establish a program to provide guarantees for loans extended by financial institutions or other public or private creditors to export trading companies as defined in section 4(c)(14)(F)(i) of the Bank Holding Company Act of 1956, or to other exporters, when such loans are secured by export accounts receivable or inventories of exportable goods, and when in the judgment of the Board of Directors—

(1) the private credit market is not providing adequate financing to enable otherwise creditworthy export trading companies or exporters to consummate export transactions; and

(2) such grarantees would facilitate expansion of exports which would not otherwise occur.

The Board of Directors shall attempt to insure that a major share of any loan guarantees ultimately serves to promote exports from small, medium-size, and minority businesses or agricultural con-

cerns. Guarantees provided under the authority of this section shall be subject to limitations contained in annual appropriations Acts.

BANKERS' ACCEPTANCES

SEC. 207. The seventh paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 372) is amended to read as follows:

"(7)(A) Any member bank and any Federal or State branch or agency of a foreign bank subject to reserve requirements under section 7 of the International Banking Act of 1978 (hereinafter in this paragraph referred to as 'institutions'), may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, exclusive of days of grace—

"(i) which grow out of transactions involving the importation or exportation of goods;

"(ii) which grow out of transactions involving the domestic shipment of goods; or

"(iii) which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples.

"(B) Except as provided in subparagraph (C), no institution shall accept such bills, or be obligated for a participation share in such bills, in an amount equal at any time in the aggregate to more than 150 per centum of its paid up and unimpaired capital stock and surplus or, in the case of a United States branch or agency of a foreign bank, its dollar equivalent as determined by the Board under subparagraph (H).

"(C) The Board, under such conditions as it may prescribe, may authorize, by regulation or order, any institution to accept such bills, or be obligated for a participation share in such bills, in an amount not exceeding at any time in the aggregate 200 per centum of its paid up and unimpaired capital stock and surplus or, in the case of a United States branch or agency of a foreign bank, its dollar equivalent as determined by the Board under subparagraph (H).

"(D) Notwithstanding subparagraphs (B) and (C), with respect to any institution, the aggregate acceptances, including obligations for a participation share in such acceptances, growing out of domestic transactions shall not exceed 50 per centum of the aggregate of all acceptances, including obligations for a participation share in such acceptances, authorized for such institution under this paragraph.

"(E) No institution shall accept bills, or be obligated for a participation share in such bills, whether in a foreign or domestic transaction, for any one person, partnership, corporation, association or other entity in an amount equal at any time in the aggregate to more than 10 per centum of its paid up and unimpaired capital stock and surplus, or, in the case of a United States branch or agency of a foreign bank, its dollar equivalent as determined by the Board under subparagraph (H), unless the institution is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance.

"(F) With respect to an institution which issues an acceptance, the limitations contained in this paragraph shall not apply to that por-

tion of an acceptance which is issued by such institution and which is covered by a participation agreement sold to another institution.

"(G) In order to carry out the purposes of this paragraph, the Board may define any of the terms used in this paragraph, and, with respect to institutions which do not have capital or capital stock, the Board shall define an equivalent measure to which the limitations contained in this paragraph shall apply.

"(H) Any limitation or restriction in this paragraph based on paid-up and unimpaired capital stock and surplus of an institution shall be deemed to refer, with respect to a United States branch or agency of a foreign bank, to the dollar equivalent of the paid-up capital stock and surplus of the foreign bank, as determined by the Board, and if the foreign bank has more than one United States branch or agency, the business transacted by all such branches and agencies shall be aggregated in determining compliance with the limitation or restriction.".

TITLE III—EXPORT TRADE CERTIFICATES OF REVIEW

EXPORT TRADE PROMOTION DUTIES OF SECRETARY OF COMMERCE

SEC. 301. To promote and encourage export trade, the Secretary may issue certificates of review and advise and assist any person with respect to applying for certificates of review.

APPLICATION FOR ISSUANCE OF CERTIFICATE OF REVIEW

SEC. 302. (a) To apply for a certificate of review, a person shall submit to the Secretary a written application which—

(1) specifies conduct limited to export trade, and

(2) is in a form and contains any information, including information pertaining to the overall market in which the applicant operates, required by rule or regulation promulgated under section 310.

(b)(1) Within 10 days after an application submitted under subsection (a) is received by the Secretary, the Secretary shall publish in the Federal Register a notice that announces that an application for a certificate of review has been submitted, identifies each person submitting the application, and describes the conduct for which the application is submitted.

(2) Not later than 7 days after an application submitted under subsection (a) is received by the Secretary, the Secretary shall transmit to the Attorney General—

(A) a copy of the application,

(B) any information submitted to the Secretary in connection with the application, and

(C) any other relevant information (as determined by the Secretary) in the possession of the Secretary, including information regarding the market share of the applicant in the line of commerce to which the conduct specified in the application relates.

ISSUANCE OF CERTIFICATE

SEC. 303. (a) A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of operation will—

(1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,

(2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,

(3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and

(4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

(b) Within 90 days after the Secretary receives an application for a certificate of review, the Secretary shall determine whether the applicant's export trade, export trade activities, and methods of operation meet the standards of subsection (a). If the Secretary, with the concurrence of the Attorney General, determines that such standards are met, the Secretary shall issue to the applicant a certificate of review. The certificate of review shall specify—

(1) the export trade, export trade activities, and methods of operation to which the certificate applies,

(2) the person to whom the certificate of review is issued, and

(3) any terms and conditions the Secretary or the Attorney General deems necessary to assure compliance with the standards of subsection (a).

(c) If the applicant indicates a special need for prompt disposition, the Secretary and the Attorney General may expedite action on the application, except that no certificate of review may be issued within 30 days of publication of notice in the Federal Register under section 302(b)(1).

(d)(1) If the Secretary denies in whole or in part an application for a certificate, he shall notify the applicant of his determination and the reasons for it.

(2) An applicant may, within 30 days of receipt of notification that the application has been denied in whole or in part, request the Secretary to reconsider the determination. The Secretary, with the concurrence of the Attorney General, shall notify the applicant of the determination upon reconsideration within 30 days of receipt of the request.

(e) If the Secretary denies an application for the issuance of a certificate of review and thereafter receives from the applicant a request for the return of documents submitted by the applicant in connection with the application for the certificate, the Secretary and the Attorney General shall return to the applicant, not later than 30 days after receipt of the request, the documents and all copies of the documents available to the Secretary and the Attorney General, except to the extent that the information contained in a document has been made available to the public.

(f) A certificate shall be void ab initio with respect to any export trade, export trade activities, or methods of operation for which a certificate was procured by fraud.

REPORTING REQUIREMENT; AMENDMENT OF CERTIFICATE; REVOCATION OF CERTIFICATE

SEC. 304. (a)(1) Any applicant who receives a certificate of review—

(A) shall promptly report to the Secretary any change relevant to the matters specified in the certificate, and

(B) may submit to the Secretary an application to amend the certificate to reflect the effect of the change on the conduct specified in the certificate.

(2) An application for an amendment to a certificate of review shall be treated as an application for the issuance of a certificate. The effective date of an amendment shall be the date on which the application for the amendment is submitted to the Secretary.

(b)(1) If the Secretary or the Attorney General has reason to believe that the export trade, export trade activities, or methods of operation of a person holding a certificate of review no longer comply with the standards of section 303(a), the Secretary shall request such information from such person as the Secretary or the Attorney General deems necessary to resolve the matter of compliance. Failure to comply with such request shall be grounds for revocation of the certificate under paragraph (2).

(2) If the Secretary or the Attorney General determines that the export trade, export trade activities, or methods of operation of a person holding a certificate no longer comply with the standards of section 303(a), or that such person has failed to comply with a request made under paragraph (1), the Secretary shall give written notice of the determination to such person. The notice shall include a statement of the circumstances underlying, and the reasons in support of, the determination. In the 60-day period beginning 30 days after the notice is given, the Secretary shall revoke the certificate or modify it as the Secretary or the Attorney General deems necessary to cause the certificate to apply only to the export trade, export trade activities, or methods of operation which are in compliance with the standards of section 303(a).

(3) For purposes of carrying out this subsection, the Attorney General, and the Assistant Attorney General in charge of the antitrust division of the Department of Justice, may conduct investigations in the same manner as the Attorney General and the Assistant Attorney General conduct investigations under section 3 of the Antitrust Civil Process Act, except that no civil investigative demand may be issued to a person to whom a certificate of review is issued if such person is the target of such investigation.

JUDICIAL REVIEW; ADMISSIBILITY

SEC. 305. (a) If the Secretary grants or denies, in whole or in part, an application for a certificate of review or for an amendment to a certificate, or revokes or modifies a certificate pursuant to section 304(b), any person aggrieved by such determination may, within 30 days of the determination, bring an action in any appropriate district court of the United States to set aside the determination on the ground that such determination is erroneous.

(b) Except as provided in subsection (a), no action by the Secretary or the Attorney General pursuant to this title shall be subject to judicial review.

(c) If the Secretary denies, in whole or in part, an application for a certificate of review or for an amendment to a certificate, or revokes or amends a certificate, neither the negative determination nor the statement of reasons therefor shall be admissible in evidence, in any administrative or judicial proceeding, in support of any claim under the antitrust laws.

PROTECTION CONFERRED BY CERTIFICATE OF REVIEW

SEC. 306. (a) Except as provided in subsection (b), no criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued which is based on conduct which is specified in, and complies with the terms of, a certificate issued under section 303 which certificate was in effect when the conduct occurred.

(b)(1) Any person who has been injured as a result of conduct engaged in under a certificate of review may bring a civil action for injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit (including a reasonable attorney's fee) for the failure to comply with the standards of section 303(a). Any action commenced under this title shall proceed as if it were an action commenced under section 4 or section 16 of the Clayton Act, except that the standards of section 303(a) of this title and the remedies provided in this paragraph shall be the exclusive standards and remedies applicable to such action.

(2) Any action brought under paragraph (1) shall be filed within two years of the date the plaintiff has notice of the failure to comply with the standards of section 303(a) but in any event within four years after the cause of action accrues.

(3) In any action brought under paragraph (1), there shall be a presumption that conduct which is specified in and complies with a certificate of review does comply with the standards of section 303(a).

(4) In any action brought under paragraph (1), if the court finds that the conduct does comply with the standards of section 303(a), the court shall award to the person against whom the claim is brought the cost of suit attributable to defending against the claim (including a reasonable attorney's fee).

(5) The Attorney General may file suit pursuant to section 15 of the Clayton Act (15 U.S.C. 25) to enjoin conduct threatening clear and irreparable harm to the national interest.

GUIDELINES

SEC. 307. (a) To promote greater certainty regarding the application of the antitrust laws to export trade, the Secretary, with the concurrence of the Attorney General, may issue guidelines—

(1) describing specific types of conduct with respect to which the Secretary, with the concurrence of the Attorney General, has made or would make, determinations under sections 303 and 304, and

(2) summarizing the factual and legal bases in support of the determinations.

(b) Section 553 of title 5, United States Code, shall not apply to the issuance of guidelines under subsection (a).

ANNUAL REPORTS

SEC. 308. Every person to whom a certificate of review is issued shall submit to the Secretary an annual report, in such form and at such time as the Secretary may require, that updates where necessary the information required by section 302(a).

DISCLOSURE OF INFORMATION

SEC. 309. (a) Information submitted by any person in connection with the issuance, amendment, or revocation of a certificate of review shall be exempt from disclosure under section 552 of title 5, United States Code.

(b)(1) Except as provided in paragraph (2), no officer or employee of the United States shall disclose commercial or financial information submitted in connection with the issuance, amendment, or revocation of a certificate of review if the information is privileged or confidential and if disclosure of the information would cause harm to the person who submitted the information.

(2) Paragraph (1) shall not apply with respect to information disclosed—

(A) upon a request made by the Congress or any committee of the Congress,

(B) in a judicial or administrative proceeding, subject to appropriate protective orders,

(C) with the consent of the person who submitted the information,

(D) in the course of making a determination with respect to the issuance, amendment, or revocation of a certificate of review, if the Secretary deems disclosure of the information to be necessary in connection with making the determination,

(E) in accordance with any requirement imposed by a statute of the United States, or

(F) in accordance with any rule or regulation promulgated under section 310 permitting the disclosure of the information to an agency of the United States or of a State on the condition that the agency will disclose the information only under the circumstances specified in subparagraphs (A) through (E).

RULES AND REGULATIONS

SEC. 310. The Secretary, with the concurrence of the Attorney General, shall promulgate such rules and regulations as are necessary to carry out the purposes of this Act.

DEFINITIONS

SEC. 311. As used in this title—

(1) the term "export trade" means trade or commerce in goods, wares, merchandise, or services exported, or in the course of

being exported, from the United States or any territory thereof to any foreign nation,

(2) the term "service" means intangible economic output, including, but not limited to—

(A) business, repair, and amusement services,

(B) management, legal, engineering, architectural, and other professional services, and

(C) financial, insurance, transportation, informational and any other data-based services, and communication services,

(3) the term "export trade activities" means activities or agreements in the course of export trade,

(4) the term "methods of operation" means any method by which a person conducts or proposes to conduct export trade,

(5) the term "person" means an individual who is a resident of the United States; a partnership that is created under and exists pursuant to the laws of any State or of the United States; a State or local government entity; a corporation, whether organized as a profit or nonprofit corporation, that is created under and exists pursuant to the laws of any State or of the United States; or any association or combination, by contract or other arrangement, between or among such persons,

(6) the term "antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. 12), and section 5 of the Federal Trade Commission Act (15 U.S.C 45) (to the extent that section 5 prohibits unfair methods of competition), and any State antitrust or unfair competition law,

(7) the term "Secretary" means the Secretary of Commerce or his designee, and

(8) the term "Attorney General" means the Attorney General of the United States or his designee.

EFFECTIVE DATES

SEC. 312. (a) Except as provided in subsection (b), this title shall take effect on the date of the enactment of this Act.

(b) Section 302 and section 303 shall take effect 90 days after the effective date of the rules and regulations first promulgated under section 310.

TITLE IV—FOREIGN TRADE ANTITRUST IMPROVEMENTS

SHORT TITLE

SEC. 401. This title may be cited as the "Foreign Trade Antitrust Improvements Act of 1982".

AMENDMENT TO SHERMAN ACT

SEC. 402. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

"SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

"(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

"(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

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

"(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.".

AMENDMENT TO FEDERAL TRADE COMMISSION ACT

SEC. 403. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by adding at the end thereof the following new paragraph:

"(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

"(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

"(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

"(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

"(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.".

And the House agree to the same.

That the House recede from its amendment to the title of the Senate bill.

For title I of the House amendment and modifications committed to conference:

JAKE GARN,
JOHN HEINZ,
WILLIAM ARMSTRONG,
JOHN H. CHAFEE,
JOHN C. DANFORTH,
DON RIEGLE,
BILL PROXMIRE,
CHRISTOPHER J. DODD,
ALAN DIXON,
Managers on the Part of the Senate.

For title I of the House amendment and modifications committed to conference:

CLEMENT J. ZABLOCKI,
JONATHAN BINGHAM,
DENNIS E. ECKART,
DON BONKER,
HOWARD WOLPE,
WM. BROOMFIELD,
ROBERT J. LAGOMARSINO,
ARLEN ERDAHL,
BENJAMIN A. GILMAN,
MILLICENT FENWICK,

For title II of the House amendment and modifications committed to conference:

FERNAND ST GERMAIN,
FRANK ANNUNZIO,
JOE MINISH,
JOHN J. LAFALCE,
DOUG BARNARD, JR.
J. W. STANTON,
CHALMERS P. WYLIE,
STEWART B. MCKINNEY,
JIM LEACH,

For title III of the House amendment and modifications committed to conference:

PETER W. RODINO,
BILL HUGHES,
ROBERT MCCLORY,
M. CALDWELL BUTLER,
Managers on the Part of the House.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 734) to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

TITLE I

SHORT TITLE

The committee of conference agreed to the House provision: "The Export Trading Company Act of 1982".

FINDINGS

The House amendment contains Congressional findings with respect to the impact of exports on U.S. jobs, the role of service-related industries in U.S. exports, the effects of trade deficits on the value of the dollar, and the responsibilities of the Department of Commerce in export promotion, which are not contained in the Senate bill.

The Senate bill contains findings with respect to the role of the United States as an exporter of agricultural products, and the need for exporters to achieve greater economies of scale, which are not in the House amendment. Other Senate and House findings are similar or identical.

The committee of conference agreed to a combination of the House and Senate provisions, all the findings in the House amendment and an amended version of the Senate finding with respect to agricultural exports.

PURPOSE

The statement of the bill's purpose in the House amendment includes references to the creation of an export trading company promotion office in the Department of Commerce, investment by certain banks in export trading companies, and modification of antitrust laws with respect to export trade, references which are not contained in the Senate bill.

The committee of conference agreed to the House provision with an amendment adding reference to the Edge Act and Agreement corporations as being eligible to invest in trading companies if those corporations are subsidiaries of bank holding companies.

DEFINITIONS

A. The committee of conference agreed and reaffirmed that the definitions contained in title I of the bill apply only to the provisions of title I, and not to the other titles of the bill. To the extent possible, however, the definitions recommended by the committee of conference in title I confrom with the definitions recommended in other titles.

The Senate bill defines "goods produced in the United States" as those containing no more then 50% (by value) imported components or materials.

The House amendment contains no such definition.

The committee of conference deletes this definition.

Specific consideration was given to the status, under this and other definitions in the bill, of fish harvested by U.S. flag vessels within the United States fish conservation zone and sold at sea or in a foreign port without having otherwise been landed or processed in the United States. The committee of conference agreed that fish so harvested and sold should be regarded as goods produced in the United States, and their sales as constituting export trade within the meaning of this title and other titles of the bill.

B. The definition of "services produced in the United States" in the Senate bill and the definition of "services" in the House amendment are similar, except that the Senate bill includes some services not mentioned in the House provision, and contains the additional requirement that at least 50% of the value of such services be attributable to the United States.

The committee of conference agreed to the House provision with an amendment to include additional specific services contained in the Senate bill.

C. The definition of "export trade services" in the Senate bill includes "product research and design", which is not specified in the House amendment.

The committee of conference agreed to the Senate provision.

D. The definition of "export trading company" in the Senate bill includes nonprofit organizations, which is not contained in the House amendment. The definition in the House amendment requires export trading companies to be operated principally for the export of U.S. goods, or for facilitating such exports by unaffiliated persons, while the Senate bill requires both.

The committee of conference agreed to a compromise of the Senate and House provisions which includes nonprofit organiza-

tions, but permits export trading companies to perform only one of the two functions contained in both the House and Senate provisions.

E. The House amendment includes definitions of "export trade association" and "State."

The Senate bill has no such provision.

The committee of conference adopted the Senate position.

E. The Senate bill includes a definition of "Secretary", as meaning the Secretary of Commerce.

The House amendment contains no such definition.

The committee of conference agreed with the House position.

F. A definition of "company" contained in the Senate bill, but not in the House amendment, is incorporated in the definition of "export trading company" adopted by the committee of conference.

The conference substitute includes a definition of "anti-trust laws" contained in title III of the Senate bill, but not contained in the House bill, with an amendment deleting reference to section 6 of the Federal Trade Commission Act.

Issuance of Regulations

The Senate bill authorizes the Secretary of Commerce by regulation to further define terms contained in title I.

The House amendment contains no such authorization.

The committee of conference agreed to the Senate provision.

Office of Export Trade

The House amendment directs the Secretary of Commerce to establish an office in that Department to promote and assist export trade associations and export trading companies.

The Senate bill similarly directs the Secretary to promote export trading companies, but does not require the establishment of a Commerce Department office for that purpose.

The committee of conference agreed to the House provision.

TITLE II—BANK EXPORT SERVICES ACT

The Senate receded to the House insofar as the basic statutory framework within which bank-affiliated export trading companies (ETCs) will operate. By placing the ETC within the bank holding company structure rather than within the bank, as the Senate bill provided, the conferees believe that adequate safeguards will continue to exist to minimize potential risk to the bank or banks within the holding company structure and that adequate separation will exist between a bank's involvement in export trade activities and its deposit taking function. The decision to accept the bank holding company structure carried with it to a large extent the utilization of existing regulatory provisions in effect in connection with existing bank holding application practices and procedures except where modified to insure an adequate but yet a minimal regulatory presence. The House, consequently, receded to the Senate to ensure a streamlined application process with respect to basic definitional matters such as what an ETC is and what activities it can engage in, and on a number of ancillary matters such as

the authorization for Export-Import Bank loan guarantees. In addition, definitive guidance is provided to the Federal Reserve Board on how to implement this new statute in a way that will insure the rapid growth of ETCs consistent with the purposes of this Act without unnecessary regulation.

Regulatory Framework

S. 734, as a free standing statute, would have permitted a wide variety of banking institutions to invest in ETCs. Inasmuch as these institutions are regulated by a number of different governmental agencies, S. 734 required a number of general regulatory provisions. H.R. 6016, reported by the House Committee on Banking, Finance and Urban Affairs, on the other hand, elected to restrict banking institution investment in ETCs to bank holding companies and bankers' banks, and therefore constructed its version of this legislation as an amendment to the Bank Holding Company Act of 1956 (treating bankers' banks as holding companies for purposes of this Act). As a result, the various constraints on bank holding company activities already in the Bank Holding Company Act would also automatically apply to investment in ETCs, and it was not necessary to repeat them in the House version of the legislation. Similarly, the restriction on investment to bank holding companies allowed the House to dispense with much of the regulatory complexity of the Senate bill.

In conference, the managers on the part of the Senate, recognizing the House's preference for channeling risks of this kind through holding companies rather than through banks directly, agreed to recede to the House on most basic structural issues, with certain modifications.

As a result, the provisions of the House amendment relating to the amount of bank holding company capital and surplus which can be invested in or loaned to an ETC, the 60-day disapproval procedure on the part of the Federal Reserve Board for such proposed investments, including the notification provision, and the exemption from Section 23A of the Federal Reserve Act are all incorporated in the conference agreement. Similarly, the Senate provisions relating to judicial review, rulemaking authority, state banking laws, and protection of the safety and soundness of the bank, are all deleted, largely because they are covered by various sections of the Bank Holding Company Act which will now apply to investment in ETCs by virtue of the conferees' decision to accept the House approach of placing ETC within that Act. The Senate also receded to the House and agreed to eliminate the restriction on an ETC having the same name as its bank organization parent.

There were, however, several areas where the conferees made significant modifications in the approach of the House amendment.

Guidance to the Federal Reserve Board

Most important in that regard is the decision of the conferees to provide additional guidance to the Federal Reserve Board in administering this Act through the addition of a new Section 202 at the beginning of Title II. This section declares it to be the purpose of Title II to provide for meaningful and effective participation by

bank holding companies in the financing and development of export trading companies, and that, specifically, the Board should pursue regulatory policies that:

(1) provide for the establishment of export trading companies with powers sufficiently broad to enable them to compete with similar foreign-owned institutions in the United States and abroad.

(2) afford to United States commerce, industry and agriculture, especially small and medium-size firms, a means of exporting at all times;

(3) foster the participation by regional and smaller banks in the development of export trading companies, and

(4) facilitate the formation of joint venture export trading companies between bank holding companies and nonbank firms that provide for the efficient combination of complementary trade and financing services designed to create export trading companies that can handle all of an exporting company's needs.

These objectives, along with the purpose set forth in Title I of the Act, if properly pursued by the Federal Reserve Board, will guarantee the development of effective, "full-service" trading companies with bank holding company involvement that will effectively and aggressively market American products and will not be disadvantaged or limited in competing with foreign-owned export trading companies or with ETCs owned by nonbank firms.

The new section 4(c)(14)(A)(iv) of the Bank Holding Company Act created by the conference substitute provides for disapproval of proposed investments in an export trading company only if the Board determines:

(1) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;

(2) the Board finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company; or

(3) the bank holding company fails to furnish the information required by Board regulations.

The second criterion above is a modification proposed by the Senate conferees and accepted by the House. The original language of the House amendment referred only to the "financial or managerial resources of the companies involved." However, the legislative history of that amendment suggested a narrower intent, i.e., "risk to the bank".

In order to reach the intent of the amendment more closely, the conferees agreed on revised wording to clarify the expectation that the Board will focus on risk to the bank, as opposed to other affiliates, and on the specific impact the proposed investment will have on the bank.

Definition of Export Trading Company

It is clearly the purpose of both the House and Senate to stimulate the establishment of export trading companies to improve U.S. export capabilities with corresponding favorable effects on American balance of trade, economic growth and employment. The major public benefit sought by enactment of export trading company legislation is jobs for Americans through the promotion of exports.

The necessity of export expansion has never been more obvious. The House amendment to S. 734 would require that a bank-affiliated export trading company be operated "exclusively" for purposes of exporting goods and services produced in the United States and would have permitted importing that was incidental to export activities—that is an import agreement that enhanced export activities would be acceptable. The use of the term "exclusively" was designed to ensure the export promotion and job creation character of the legislation.

The House, however, receded to the Senate by adopting the Senate's use of the term "principally" in defining the purposes of a bank-affiliated export trading company. This is no way implies a reduced commitment to the bill's purpose: U.S. export promotion. On the contrary, while it is understood that ETCs will periodically have to engage in importing, barter, third party trade, and related activities, the managers intend that such activity be conducted only to further the purposes of the Act. The managers do not expect the preponderance of ETC activity to involve importing.

ETC affiliation with banks represents a breach of the traditional separation of banking and commerce and has necessitated provision for a minimal but adequate regulatory presence. It is the intent of the managers that the regulatory authority, in addition to facilitating bank-related investments in ETCs, examine, supervise, and regulate ETCs in such a way as to assure that bank-affiliated ETCs operate in a manner consistent with the Congressional intent: that ETCs promote, increase, and maximize U.S. exports.

Product Modification

The conferees retained the prohibitions on manufacturing and agricultural production that were included in both the Senate bill and the House amendment. The export trading company is intended to be a service-providing organization and not the producer of the products it is exporting. The Senate, however, receded to the House amendment permitting the ETC to undertake incidental product modification, including repackaging, reassembling or extracting byproducts, as is necessary to enable U.S. goods or services to conform with foreign country requirements or to facilitate their sale in foreign countries. The ETC would also be permitted to provide any service deemed necessary to protect it from the additional risk incurred by such product modification.

Joint Ventures

The conferees intend that this title not affect the ability of individuals and organizations to form ETCs. State and local government entities, including port authorities, industrial development

corporations, and other non-profit organizations, could be an important source of overall export expansion and of the development of innovative export programs keyed to local, state, and regional needs. In addition, other organizations, for example, agricultural cooperatives, have similar experience and needs. This title in no way affects the ability of such organizations to continue these efforts including their ability to organize, own, participate in or support ETCs. This title addresses only the question of whether banking organizations should be authorized to invest in ETCs and, if so, the restrictions which would be placed on ETCs sponsored by such banking organizations.

The conferees stress that this title does not preclude a banking organization that is authorized to invest in an ETC from engaging in a joint venture, partnership or other cooperative arrangement with other authorized banking organizations or other nonbanking firms to organize an ETC. Such cooperative arrangements are in fact to be encouraged. There are numerous firms and organizations which may want to form an ETC but feel that they lack either investment capital or expertise. A banking organization may well be able to provide such assistance through a joint venture or partnership arrangement with these other firms. The ETC so supported, however, would be subject to the restrictions contained in this legislation inasmuch as a banking organization is investing in that ETC.

Permitted Services

Both the Senate bill and the House amendment contained a list of services which a bank-affiliated export trading company is permitted to provide. Those lists were identical except for three elements: (1) the Senate bill used the phrase "including, but not limited to" to make clear the list is a non-exclusive one; (2) the House amendment contained an explicit reference to "taking title"; and (3) the Senate bill's list included "insurance".

The House by receding to the Senate on the first issue, insured that the list of permitted services is a non-exclusive one. With regard to the second issue, "taking of title", the Senate receded to the House. The Senate bill would have implicitly permitted such an activity. To eliminate any possible ambiguity, the explicit authority contained in the House version was adopted.

Regarding "insurance", the House receded to the Senate with an amendment. The conferees determined it to be appropriate to permit bank holding companies to provide insurance on risks resident or located, or activities performed, outside of the United States. Since a large proportion of cargos moving overseas originate at a point that is located away from the port of shipment, it has become customary for insurance carriers providing insurance for such cargos to endorse their policies to cover cargos for export from the point of their origin in final transit to their destination, including ordinary delay and storage. Such ocean cargo "warehouse to warehouse" coverages provide insurance protection for all risks related to the land, air, or water transportation of the cargo in the United States as well as during the overseas transportation. In addition to permitting export trading companies to provide insurance

on risks outside of the United States, therefore, the conferees determined that it would facilitate the provision of export trade services for export trading companies to provide ocean cargo "warehouse to warehouse" insurance as well, and accordingly amended the definition of insurance activities permitted in support of export trade services, reflecting the conferees' decision.

Other Structural Changes

The conferees also considered the possibility of expanding the range of institutions eligible to invest in ETCs to include Edge Act Corporations. This proposal was included in the Senate bill because the expertise and experience of Edge Act Corporations in international trade matters made it logical to encourage their involvement in ETCs. On the other hand, the conferees were also concerned about the added potential risk to a bank if an ETC were formed by an Edge Act Corporation that was a subsidiary of a bank. It was the strong view of the House that the best protection for the bank and its depositors was to channel all trading company activity through the bankers' bank and bank holding company structures. Accordingly, the conferees agreed that Edge Act Corporations that are subsidiaries of bank holding companies are eligible to invest in ETCs. The inclusion of bankers' banks as eligible investors—a provision of both the Senate bill and the House amendment, will also facilitate the involvement of smaller banks in ETCs.

The conferees also discussed whether the mechanism for Board approval of a proposed investment should apply only to investments that would give the holding company control of the ETC, as in the Senate bill, or whether the standard in the Bank Holding Company Act requiring Board consideration of any investment constituting over 5 percent of an export trading company should apply.

In this case, the conferees, recognizing the newness of this concept, opted for the stricter House approach contained in the Bank Holding Company Act. In doing so, however, the conferees stressed their intent that the Board, as soon as possible, both decentralize this review process to the level of the Federal Reserve District Banks and consider providing guidelines for smaller investments (those that would not result in a controlling interest for the holding company) that would minimize the review process and reduce the regulatory burden on the Board.

Section 23A

The Senate receded to the House on the exemption of bank-affiliated export trading companies from the provisions of Section 23A of the Federal Reserve Act. During the start-up phase in an effort to encourage maximum bank participation in export trading company activities, the conferees believe that the overall limitation of ten percent of the consolidated capital and surplus of the bank holding company, on extensions of credit to an affiliated export trading company, would adequately protect affiliated banks from excessive risks, and that the exemption from the collateral requirement of existing law is necessary in view of the type of assets most ETCs. would have. The conferees, however, intend to review the de-

cision in connection with an imminent major revision of 23A either as part of a possible conference on legislation separately passed by the Senate or at such time as revisions to 23A receive final consideration by the Congress.

REPORTS

Section 205 of the substitute contains the Senate bill's provision calling for a report by the Federal Reserve two years after the enactment of this Act on the implementation of the banking provisions, recommendations for further changes in U.S. law to facilitate the financing of U.S. exports, and recommendations on the effects of ownership of U.S. banks by foreign banking organizations affiliated with trading companies doing business in the United States.

EXPORT-IMPORT BANK

The House receded with an amendment to the Senate on the latter's provision establishing a program of Export-Import Bank guarantees for loans extended by financial institutions or other creditors to ETCs or other exporters, where such loans are secured by export accounts receivable or inventories of exportable goods. The House amendment to the Senate provision clarifies the eligibility of public creditors (port authorities, agencies of state and local governments, and governmental instrumentalities) as well as private creditors for Export-Import bank guarantees.

BANKERS' ACCEPTANCES

The conferees want to emphasize strongly that the adoption of this long overdue liberalization of the present limits on bankers' acceptance in one way is intended to impinge upon or restrict the inherent powers of the Federal Reserve Board to issue appropriate regulations to prevent circumvention of the new liberalized limits through the imprudent use of participation agreements. The conferees have been advised of an ongoing analysis by the Federal Financial Institutions Examination Council on the proper treatment of participation of bankers' acceptances, preparatory to the development of a proposed united policy approach by each Federal regulatory agency. The conferees encourage this action to the extent it is consistent with and in furtherance of the language, history, and purposes of this legislation or demonstrable safety and soundness concerns. In this regard, the conferees require that the Council report to the respective Committees of jurisdiction within 18 months after the date of enactment, the results of its analysis, a summary of any individual regulatory agency action viewed as needed, and any legislative recommendations relating to safety and soundness considerations. In the meantime, however, the conferees stress that no action should be taken, either by regulation or other requirement to preclude the use of bankers' acceptances through the use of participations, as contemplated by this legislation, by the widest number of American banks.

TITLE III—EXPORT TRADE CERTIFICATES OF REVIEW

The House and Senate Conferees agreed upon a substitute amendment for Title III of S. 734 which incorporates elements from both S. 734 and the House Amendment to S. 734.

Section 301 is a statement that the purpose of this Title is to promote U.S. export trade by affording U.S. business an export trade certificate of review process.

Section 302 provides the procedures a person must follow to apply for a certificate of review. To obtain a certificate of review, any individual, firm, partnership, association, public or private corporation, or other legal entity, including a public or private body, submits a written application to the Secretary of Commerce. The Secretary of Commerce shall forward applications and other specified information to the Attorney General within 7 days of receipt. All applications must be in a form and contain all information required by regulation.

Within 10 days of receiving the application, the Secretary of Commerce shall publish in the Federal Register a notice identifying the applicant and describing the conduct for which certification is sought.

Section 303(a) provides that a certificate shall be issued to a person who establishes that its proposed conduct will (1) result in neither a substantial lessening of competition or substantial restraint of trade within the United States nor constitute a substantial restraint of the export trade of any competitor of the applicant; (2) not unreasonably enhance, stabilize, or depress prices within the United States; (3) not constitute unfair methods of competition against competitors engaged in the export trade of goods or services exported by the applicant; and (4) not reasonably be expected to result in the consumption or resale in the United States of goods or services exported by the applicant. The Conferees intend that the standards set forth in this subsection encompass the full range of the antitrust laws.

Section 303(b) provides that within 90 days, the Secretary must determine whether the applicant's export trade, export trade activities, and methods of operation meet the standards of Section 303(a). The Secretary shall not issue the certificate without the concurrence of the Attorney General that the standards of Section 303 are met. The certificate must specify the export trade, export trade activities, and methods of operation certified, the person to whom the certificate is issued, and any terms and conditions deemed necessary by the Secretary or the Attorney General to assure compliance with the standards of subsection (a).

Section 303(c) provides for expedited certification where necessary; however, no certificate may issue before 30 days from the date of publication of the Federal Register notice, whether or not the application is expedited.

Section 303(d)(1) provides that the Secretary shall notify the applicant of an adverse determination and the reasons therefore.

Section 303(d) permits an applicant to request reconsideration of the Secretary's decision. The Secretary, with the concurrence of the Attorney General, shall respond within 30 days.

Section 303(e) provides for the return of documents submitted in connection with an application upon written request of an applicant whose certificate of review has been denied.

Section 303(f) provides that any aspect of a certificate procured by fraud is void ab initio.

Section 304(a) provides that the holder of any certificate of review is obligated to report to the Secretary changes relevant to the matters contained in the certificate and may seek an amendment to the certificate to reflect any necessary change. An application for amendment is to be treated as an application for the issuance of a certificate.

Section 304(b)(1) provides that the Secretary shall, at his own initiative or at the request of the Attorney General, seek information from a certificate-holder to resolve any uncertainty concerning compliance. Failure to comply with such a request is grounds for modification or revocation of the certificate pursuant to subsection (b)(a).

Section 304(b)(2) provides that the Secretary of Commerce, at his own initiative or at the request of the Attorney General, may seek revocation of the certificate.

Section 304(b)(3) is intended to assure that the Attorney General investigate persons other than the certificate-holder through use of the civil investigative demand as set forth in the Antitrust Civil Process Act as amended (15 U.S.C. 1311 et seq.) regarding activities which may not be in compliance with the standards in section 303(a). If, upon an investigation, the Attorney General determines that the export trade activities or methods of operation of the certificate-holder no longer comply with section 303(a) standards, he shall advise the Secretary who then must initiate a revocation or modification proceeding under subsection (b)(2).

Section 305(a) provides that a review of a grant or denial of an application for a certificate or an amendment thereto or revocation or modification thereof of any person aggrieved by such determination if such suit is brought within 30 days of the determination. Normally, the administrative record shall be adequate so that it will not be necessary to supplement it with additional evidence.

The Senate bill required, prior to revocation or modification of a certificate, a hearing as appropriate under the circumstances. The House bill did not require a hearing. In following the House approach, the Conferees understood that, should the Secretary nevertheless establish a hearing procedure, S. 734 would not require use of the procedures of the Administrative Procedures Act.

Section 305(b) provides that no action by the Secretary or Attorney General under this title, except for an action under Subsection 305(a), is subject to judicial review.

Section 305(c) makes explicit that any denial by the Secretary, in whole or in part, of a proposal for issuance of a certificate, or amendment thereto, or any determination by the Secretary to revoke the application, or reasons therefor, is not admissible in evidence in any administrative or judicial proceeding in support of a claim under the antitrust laws as defined in this title.

Subsection 306(a) protects a certificate-holder from criminal and civil antitrust actions, under both federal and state laws, whenever the conduct that forms the basis of the action is specified in, and

complies with, the terms of the certificate. Conduct which falls outside the scope of, or violates the terms of, the certificate is ultra vires and would not be protected. Such conduct would remain fully subject to criminal sanctions as well as both private and governmental civil enforcement suits under the antitrust laws.

The Conferees agreed that the protections conferred by a certificate extend to all members of a certified entity provided that each member is listed on the certificate.

Section 306(b)(1) permits persons injured by the conduct of a certificate-holder to bring suit for injunctive relief and single damages for a violation of the standards set forth in Section 303(a). Pursuant to section 306(b)(2), any such suit must be brought within two years of the date the plaintiff has notice of the violation. Section 306(b)(3) accords a presumption of legality to persons operating within the terms of conduct specified in a certificate. Subsection (b)(4) permits a certificate holder to recover the cost of defending the suit (including reasonable attorneys fees) if the claimant fails to establish that the standards of section 303(a) have been violated.

Section 306(b)(1) provides that all procedures applicable to antitrust litigation, including laws and rules to expedite a proceeding or to prevent dilatory tactics, apply to actions brought under this title. The standards under section 303(a), the remedies under this subsection, as well as the provisions concerning the statute of limitations, a presumption of validity, and the awarding of costs to the certificate holder, including attorneys fees, remain the exclusive provision governing actions under this Act. Moreover, section 16 of the Clayton Act, so far as it pertains to injunctive actions for threatened (as opposed to actual) injury or to violations of the antitrust laws such as sections 2, 3, 7, and 8 of the Clayton Act, are inapplicable to actions authorized by section 306 of this Act.

Section 306(b)(5) permits the Attorney General, notwithstnding the limitations in section 306(a)(1), to bring suit pursuant to Section 15 of the Clayton Act (15 U.S.C. 25) to enjoin conduct threatening clear and irreparable harm to the national interest.

Both the House and Senate versions contemplated the promulgation of guidelines to assist applicants, potential applicants, and the public in understanding the issuing authority's interpretation of the certification criteria. The Conferees agreed upon section 307, which is similar to the House version, except that the Secretary issues the guidelines. Under section 307, the Secretary, with the concurrence of the Attorney General, may publish guidelines that describe conduct with respect to which determinations have been made or might be made, with a summary of the factual and legal bases underlying the determinations. The guidelines may be based upon real or hypothetical cases. Because the purpose of this section is to disseminate information, the Secretary is not required to use rulemaking procedures, although he may if he so chooses.

The Conferees agreed upon section 308, which tracks the Senate version of a similar provision. Under section 307, every person to whom a certificate has been issued shall submit to the Secretary an annual report, in such form and at such time that he may require, that updates, where necessary, the information required by section 302(a).

The Conferees agreed upon section 309, which tracks version in the House. Under subsection 309(a), all information submitted by a person in connection with the issuance, amendment, or revocation of a certificate of review is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. § 552. In addition, under subsection (b)(1), no officer or employee of the United States shall disclose commercial or financial information submitted in connection with the issuance, amendment or revocation of a certificate of review if the information is privileged or confidential and if disclosure of the information would cause harm to the person who submitted the information. This limitation is subject to six exceptions, contained in subparagraph 309(b)(2). The first exception in subsection 309(b)(2)(A), covers requests of Congress or a committee of Congress. This provision would not authorize release to an individual Member of Congress, but would authorize release to a Chair acting for the Committee or Subcommittee. The Conferees understand that Committees will exercise appropriate care to protect confidential information. The second exception, subparagraph 309(b)(2)(B), permits disclosure in a judicial or administrative proceeding subject to an appropriate protective order; the third exception, subparagraph 309(b)(2)(C), permits disclosure with the consent of the submitting party; the forth exception, subparagraph 309(b)(2)(D), permits necessary disclosures in making determinations on applications; the fifth exception, subparagraph 309(b)(2)(E), permits disclosure in accordance with statute; and the final exception, subparagraph 309(b)(2)(F), permits disclosure to agencies of the United States and the States if the receiving agency will agree to the limitations contained in subparagraphs (A) through (E).

Both the House and Senate versions contemplated the issuance of implementing rules. The Conferees agreed on section 310, which directs the Secretary, with the concurrence of the Attorney General, to promulgate rules and regulations necessary to carry out the purposes of the Act.

Both the Senate and the House versions defined important terms. The Conferees agreed to include, in section 311, a definition section which adopts elements from both versions as well as certain additional definitions necessary to ensure proper interpretation of Title III.

The Conferees agreed upon section 312, which is similar to the effective date provision in the House version. Under subsection 312(a), all provisions except sections 302 and 303 take effect immediately upon enactment of the legislation. Under subsection 312(b), sections 302 and 303 the application and issuance provisions, take effect 90 days after the rules are promulgated under section 310.

TITLE IV—FOREIGN TRADE ANTITRUST IMPROVEMENTS

The House and Senate Conferees agreed upon a new Title IV which supplements the antitrust certification provisions (Title III).

The new title incorporates two sections from H.R. 5235, passed by the House on August 3, 1982. These sections modify the Sherman Act and Section 5 of the Federal Trade Commission Act to require a "direct, substantial, and reasonable foreseeable" effect on commerce in the United States, or on the export commerce of a

U.S. resident, as a jurisdictional threshold for enforcement actions.,,1

For title I of the House amendment and modifications committed to conference:

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JOHN HEINZ,
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JOHN H. CHAFEE,
JOHN C. DANFORTH,
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○

9th Circuit Case Number(s) 13-17408, 13-17618

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I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/Katherine S. Barrett Wiik

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CERTIFICATE OF SERVICE
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Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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