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Export Financing by Cooperatives Through the Banks for Cooperatives: The Farm Credit Act Amendments of 1980*

by Allen C. Hoberg**

On December 24, 1980, Congress passed amendments to the "Farm Credit Act of 1971."¹ This was one of the last pieces of legislation of the Carter Administration, and it allows the banks for cooperatives, under the supervision of the Farm Credit Administration, to facilitate increased financing of agricultural cooperatives' exports and imports. The highlights of the new amendments are the limited authority for deposits in foreign banks, the investment authority for obtaining credit information and facilitating other trade services, authority for fund transfer assistance and exchange of deposits as part of correspondent bank relations, currency exchange authority, and authority to make loans and commitments or to provide financial and technical assistance to eligible cooperatives' trading partners or owned interests. The regulations implementing the amendments allow for the provision of letters of credit, advances against collections, foreign exchange services, bankers' acceptance financing, and other international trade financing methods, which, if properly utilized, could entice even greater foreign demand for U.S. agricultural products and provide cooperatives with alternative sources of financing trade transactions.

These amendments may have a profound effect on the financing of export and import transactions by American cooperatives in the near future. The emphasis of the legislation and regulations, however, is undoubtedly on exports. It is the purpose of this paper to discuss these amendments in light of the flurry of international agricultural trade activity preceding and following their passage.

This paper is divided into three parts. The first part is a discussion

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¹ Farm Credit Act Amendment of 1980, Pub. L. No. 96-592, 94 Stat. 3437 (codified as amended at 12 U.S.C. §§ 2001-2260 (1982)). In text, sections of the amendments will be referred to by their original 1971 session law section number, followed parenthetically by the 1980 amendment section number. See *infra* note 65 and accompanying text for the origin of the legislation.

of cooperative exports in this country, including methods of exporting, cooperative participation in the export market, the market for U.S. cooperatives, and the expertise necessary to export successfully. The second part is an analysis of the law. It includes a section by section discussion of the amendments, statutory interpretation, a review and analysis of the regulations, and policies and procedures of the agencies, institutions, and organizations involved. The third part is an examination of some of the likely effects of the amendments, concentrating on the increased competition in international export and international export financing activity.

I. Exporting by Cooperatives

A 1976 United States Department of Agriculture publication stated that the most viable alternative for improving deficiencies in the present cooperative marketing system was to increase the marketing emphasis on direct grain exports.² In direct exporting, the cooperative, through its employees or foreign-based representatives, deals directly with a foreign buyer or his foreign-based agent. The commodity is delivered to a point designated by the buyer (a U.S. loading port or a foreign port of destination). Direct exporting includes sales made through a U.S. export broker, a cooperative's foreign sales representative or agent, or a foreign import broker or agent. The sales can be made to a number of entities, such as a foreign distributor, a foreign retailer, a foreign end user (raw products manufacturer), a trading company, or a foreign government purchasing agency or its agent.³

Indirect exporting occurs when a cooperative works through an intermediary—either another American firm, a U.S.-based agent of a foreign firm, or an international trading company. The commodity is delivered to a point designated by the buyer, usually a U.S. loading port. Indirect exporting includes sales made through a U.S. agent, a U.S. export management company (acting as seller's export sales department), or a U.S. export commission agent (representing the buyer). It also includes sales made to a number of entities, such as a U.S. export merchant who buys the commodity for resale, an international grain trading company, a foreign government with its own purchasing office or agent in the U.S., or a trading company.⁴

² S. Thurston, M. Phillips, J. Haskell, & D. Volkin, Farmer Coop. Serv. Research Report 34, U.S. Dep't of Agriculture, *Improving the Export Capacity of Grain Cooperatives* 70, (1976) [hereinafter cited as *Improving Export Capability*]. There are basically two categories of international sales by co-ops: direct exporting (selling directly to foreign buyers located and doing business in the consuming areas of the world) or indirect exporting (sales made to another exporter who makes the direct sale). *Id.* at 42. Although cooperatives have exported or originated for export a large percentage of total U.S. grain export sales, cooperative direct export sales represented only a small proportion of the grains export market. *Id.*

³ D. Hirsch, Econs, Stats., and Coops., Service, Farmer Coop. Research Report 5, U.S. Dep't of Agriculture, *Agricultural Exports by Cooperatives* 3 (1979) [hereinafter cited as *Agricultural Exports*].

⁴ *Id.* at 5-6.

There may be a fine line between the marketing channels of direct and indirect exporting. Usually, if the cooperative does not provide the necessary export marketing expertise in terms of actual administration of the sale from beginning to end, the sale is an indirect export.⁵

Most cooperatives rely on their own sales staffs to initiate and complete direct export sales, and to prepare the necessary documentation. In a number of cases, however, the services of export brokers and freight forwarders, as well as exclusive sales representatives or sales agents located in principal markets, are being used. Sales agents are largely responsible for making contacts, initiating credit checks and reports, and arranging the terms of sales.⁶ Several co-ops maintain representative offices overseas, and some sell products in bulk to overseas licensees who process and package them.⁷

A cooperative may arrange with a selected foreign firm to act as its overseas representative and to provide a range of specified services. A cooperative may have several agents, but usually not more than one in each major foreign market. An overseas representative may serve a cooperative merely as a resident salesman or as a foreign import broker with special ties to the co-op. A representative's services may include estimating sales costs, locating foreign buyers or brokers, chartering vessels, surveillance of chartered vessel movements, arranging for discharge of grain at the foreign port and receipt by the buyer, assisting in collection of payments, accounting for sales expenses, and providing vital market information. A representative may, in effect, be a cooperative's export sales department, headquartered in a foreign port.⁸

A cooperative that can make a delivered export sale, which involves deliveries to foreign destinations, has greater sales opportunities than a cooperative that does not have that ability. Delivered export sales, however, require more expertise and involve greater risks. Although many co-ops have performed poorly in this aspect of export sales, cooperatives marketing fresh citrus, dried beans, peas and lentils, and poultry products, sell more than fifty percent of their commodities as delivered direct exports.⁹

There are several reasons why cooperatives choose to export indirectly. These reasons include lack of access to export facilities (especially port facilities), less risk, better price (*e.g.*, when the buyer can make up profits in other areas or when the buyer has more market information), economies of size (most co-ops cannot afford market expertise and information intelligence systems), lack of expertise, unwillingness of coopera-

⁵ *Id.* at 4.

⁶ Banks for Cooperatives, Farm Credit System, *Report of the Banks for Cooperatives System Export Services Study Group 2* (1976) [hereinafter cited as *Report*].

⁷ *Id.* at 7.

⁸ D. Hirsch, Farmer Coop. Serv. Info. Report 104, U.S. Dep't of Agriculture, *Export Techniques of Grain Cooperatives* 13-14 (1976) [hereinafter cited as *Export Techniques*].

⁹ *Agricultural Exports*, *supra* note 3, at 69.

tives to coordinate, and fear of the unknown.¹⁰

A. Cooperative Participation

Cooperatives exported agricultural products to approximately 100 countries in 1976.¹¹ These sales, however, were made primarily in established foreign markets, and co-ops appear somewhat reluctant to bear the higher delivery and payment risks of new markets, especially markets in developing nations.¹² In 1976, seventy-three cooperatives in twenty-three states engaged in direct exporting of agricultural commodities,¹³ but nearly all direct exporting was in the hands of eighteen cooperatives.¹⁴ In 1980, sixty-three cooperatives reported direct export sales.¹⁵

Some cooperative exporters depend on export markets for nearly all of their sales volume. A number are in transitional status in terms of their ability to export, lacking only in information, familiarity, and certainty as to timeliness of payment.¹⁶ More cooperatives are involved in direct fruit exports than in any other commodity, followed by grain exports and vegetable exports.¹⁷

The majority of direct exports by cooperative borrowers from the banks for cooperatives were destined for Western Europe and Japan, but co-ops sell to virtually all nations of the world.¹⁸ Markets for co-op direct exports remained about the same from 1976 until 1980. The European Community (EC), Japan, and the rest of Asia are the big markets. Canada, Latin America, Africa, Oceania, and the rest of Europe are still small markets for most U.S. co-ops.¹⁹

¹⁰ *Improving Export Capability*, *supra* note 2, at 42, 44. Several co-op managers believe the direct export alternative is often a less profitable method of trade than indirect export because of the resource restraints it requires. Reynolds, *Substantial Grain Commitment Crucial to Direct Co-op Exports*, Farmer Cooperatives, Jan. 1982, at 4.

¹¹ *Agricultural Exports*, *supra* note 3, at 71.

¹² *Id.* at 71-72.

¹³ Approximately 30% were located in California. *See id.* at 4-7. A district bank for cooperatives survey found a majority of its borrowers exported on a direct basis even though a number were exporting on an indirect basis. *See Report*, *supra* note 6, at 2.

¹⁴ *Agricultural Exports*, *supra* note 3, at 6.

¹⁵ Kennedy, *Co-op Share of Direct U.S. Exports Down to \$3.2 Billion by 1980*, Farmer Cooperatives, June 1982, at 4 [hereinafter cited as *Co-op Share of Exports*].

¹⁶ *Report*, *supra* note 6, at 5.

¹⁷ *Co-op Share of Exports*, *supra* note 15, at 4. As a group, fruit exporters are well-established, have extensive contacts and experience in many parts of the world, and possess a large reservoir of expertise. In 1974, 70% of the fresh citrus and 28% of the processed fruit exported from this country was exported by co-ops, mostly to Western Europe. *See* D. Hirsch, Agric. Coop. Serv. Research Report 4, U.S. Dep't of Agriculture, *Marketing Strategies for Cooperatives Exporting Fruit to Western Europe* 1 (1981) [hereinafter cited as *Exporting Fruit*].

¹⁸ *Report*, *supra* note 6, at 2.

¹⁹ *Agricultural Exports*, *supra* note 3, at 11-15. Asia was the largest market for co-ops in 1980, with \$1.58 billion of purchases. Japan alone imported \$884 million of products, making it the largest single-country market for cooperative exports. Europe was second, with \$882 million of co-op purchases. Canada purchased \$215 million of products—mostly animals and animal products. *See Co-op Share of Exports*, *supra* note 15, at 5. In 1970, exports of agricultural products to Less Developed Countries totalled \$2 billion, or 28% of U.S. agricultural exports. By 1980, these exports were at \$14.6 billion, or 35% of the total. Cleavage, *Less Developed Countries May*

In 1976, cooperatives in fourteen commodity groups each had direct exports valued in excess of \$10 million.²⁰ The largest direct exporters were eleven grain co-ops, which had exports valued at \$932 million. This value was at least twice as much as the value of the next highest commodity group (oilseeds, oilnuts, and derivative products), which had exports valued at \$427 million.²¹ The sales volume of the sixteen primary regional grain co-ops showed a marked increase from 1.8 billion bushels in 1977 to 2.5 billion bushels in 1979,²² reaching a record high of 25.3 percent of the total U.S. volume.²³ Major facility improvements and a streamlining of organizational structure have spurred this growth.²⁴ A system-wide survey of the district bank for cooperatives found a range of annual exports among its borrowers from several thousand dollars to several hundred million dollars.²⁵

In 1976, cooperatives' direct exports were \$2 billion and represented 9.2% of the total U.S. agricultural exports.²⁶ In 1980, ten fewer direct exporters reported \$3.2 billion in direct co-op exports, accounting for only 7.8% of the total U.S. agricultural exports—a significant percentage decrease. Co-ops that made direct exports in 1980, however, did report \$3.1 billion in indirect sales. Although there is no accurate way to measure the total flow of commodities that eventually enters the export market, 1980 statistics show that except for animal products, the cooperatives' share of U.S. exports declined for all commodity groups, despite increases in the actual dollar volume of exports. This means that total U.S. agricultural exports have grown faster than cooperative exports.²⁷

Offer Opportunities for Export Business, Farmer Cooperatives, February 1982, at 12 [hereinafter cited as *Cleveng*]. If this is so, support from the banks for cooperatives is probably more important as these markets develop, because of the economic and political risks.

²⁰ *Cleveng*, *supra* note 19, at 68.

²¹ *Id.* at 7.

²² S. Thurston & B. Reynolds, *Agric. Coop. Serv. Research Report 3*, U.S. Dep't of Agriculture, *Regional Grain Cooperatives, 1978 and 1979* 8 (1981). Since 1974, grain shipments originated by co-ops for export have risen dramatically, increasing to over 30% of U.S. exports. The 16 primary cooperatives are composed of 2,568 member local co-ops, with 2.1 billion bushels of storage capacity, 362 line elevators, 101 subterminal and terminal elevators, 115 owned and 6,068 leased hopper cars, and a barge company (owned by five regionals and CF Industries). In 1979, 20 grain regionals disposed of 62% of their commodities in the export market. *Id.* at iii.

²³ *Id.* at 10.

²⁴ *Id.* at iii. In 1980, the most important commodity group for direct exports was again grains and preparations valued at \$1.3 billion, or 41% of the total value of direct co-op exports. *Co-op Share of Exports*, *supra* note 15, at 4. Even though grains and oilseeds are the most important co-op exports in terms of dollar volume, they still represent only a small portion (about 7%) of all U.S. grain and oilseed exports. *Id.* at 5.

²⁵ *Report*, *supra* note 6, at 2. Another publication shows that less than 10% of the direct exporting co-ops have individual export volumes of less than \$100,000, 10% have volumes greater than \$100 million, and 1/3 have volumes less than \$1 million. *Agricultural Exports*, *supra* note 3, at 5-6.

²⁶ *Agricultural Exports*, *supra* note 3, at 9. The value of indirect exports for direct exporters was \$1.3 billion. *Id.* at 7.

²⁷ *Co-op Share of Exports*, *supra* note 15, at 5.

B. Marketing Cooperative Exports

Five multinational trading companies dominate the grain export industry in this country.²⁸ Compared to the multinational trading companies, cooperatives have a much smaller share of the U.S. and world grain market. Even regional direct exporting cooperatives do not compare favorably with these major exporting firms. The regional direct exporting cooperatives lack market intelligence systems and rely on commission agents. They also lack diversification for cross-subsidization and spreading of risk, and they lack multiple grain sources. The large firms have flexibility because of their product-mix, their variety of delivery terms, their good port location and transportation coordination, their overseas facilities and sales offices, and the secrecy of their operations. The operations of the large firms help facilitate the large one-time sales that tremendously increase volume.²⁹

On the other hand, cooperatives have quality commodities and uniform ship loading; distinct advantages that could be utilized if cooperatives could expand their direct exports.³⁰ Expansion of direct export markets would give cooperatives a wider variety of buyers; increase worldwide presence, thereby increasing market intelligence; and allow cooperatives to capitalize on their reputation for quality products. Direct selling may increase profits and make further direct trading arrangements possible.³¹

The term "marketing channel" (also called "first export handler") is sometimes used to identify the first export marketing firm in the sequence of firms between a cooperative seller and an ultimate consumer in a foreign country. Based on 1976 figures, foreign sales representatives were the most popular channel used by direct exporting co-ops for marketing, followed by foreign distributors, U.S. export brokers, foreign end-users, and Japanese trading companies. When cooperative direct exporters made indirect exports, a U.S. export merchant was by far the most popular channel.³²

A 1976 USDA report concluded that most direct exporting co-ops do not have foreign sales offices and rely to a significant degree on foreign sales representatives to act as agents to develop overseas sales. The direct exporting co-ops that do have foreign sales offices rely heavily on their overseas employees to develop and process export sales. The kind of

²⁸ The firms are Cargill, Inc., Continental Grain Co., Bunge, Inc., Louis Dreyfus, Inc., and Garnac (a subsidiary of Andre). Regional grain cooperatives and other private companies such as Peavey and Archer-Daniels-Midland control the remainder. Cargill and Continental each handle about 25% of the U.S. grain exports. *Improving Export Capability*, *supra* note 2, at 17.

²⁹ *Id.* at 45-50.

³⁰ *Id.* at 46.

³¹ J. Dunn, B. Reynolds, E. Eversall, R. Skinner & S. Thurston, *Agric. Coop. Serv. Research Report 13*, U.S. Dep't of Agriculture, *Cooperative Involvement and Opportunities in Oilseeds* 39 (1982) [hereinafter cited as *Oilseed Involvement*].

³² *Agricultural Exports*, *supra* note 3, at 18-19.

market structure established in a foreign country will usually determine the kind and degree of market penetration.³³

Market strategy refers to development and use of carefully constructed plans designed to attain specific objectives that will enable the exporter to increase the scale or efficiency of his export program. The plans are tailored to the expertise, commodity mix, and other resources of the exporter, and are based on market intelligence.³⁴ Strategy may involve sales authority, sales coordination, sales to importers, special sales opportunities, promotional activities, and joint programs (e.g., groups of co-ops forming centralized export-service cooperatives or centralized export-marketing cooperatives).³⁵

Another USDA report focusing on methods of improving co-op capability suggested that the general sales policy of cooperatives should: 1) emphasize co-op strengths; 2) encourage co-op to co-op sales; 3) provide flexible terms of delivery; and 4) provide personalized service to foreign buyers.³⁶ According to the report, cooperatives need to establish aggressive worldwide market intelligence systems which include foreign sales offices.³⁷ The report also suggested that more coordination is needed at local, regional, and inter-regional levels in order to encourage increased participation by members, better inter-regional relationships, and better producer-cooperative relationships.³⁸

Exporting firms can operate in the open market, the public tender market, and the private tender market. Most cooperative direct export grain sales are in the open market, selling mainly feed-grains and soybeans to private traders and processors in Western Europe. With more foreign governments becoming involved in centralized buying for their countries, however, more exports are likely to be marketed on both a public and private tender basis. Thus, it is likely that forward buying on a tender basis will involve longer commitments,³⁹ and co-ops will need committed and flexible financing. Participation in increasing tender markets will require co-ops to assume more risk than they assumed in the past.⁴⁰

³³ *Id.* at 16. Sixty-one of seventy-three co-ops involved in direct exporting had no sales offices in foreign countries staffed by employees of the co-op. Ten had from 1 to 27 offices. Twenty-five reported no foreign sales representatives in foreign countries, but most have large numbers of representatives. Cooperatives have foreign sales representatives in an estimated 65 countries. *Id.* at 15-16.

³⁴ *Exporting Fruit*, *supra* note 17, at 2.

³⁵ *Id.* at 15. The USDA says there is a need for pooling resources in some manner. *Agricultural Exports*, *supra* note 3, at 74.

³⁶ *Improving Export Capability*, *supra* note 2, at 71.

³⁷ *Id.* at 71-72.

³⁸ *Id.* at 53-54.

³⁹ *Id.* at 23.

⁴⁰ *Id.* at 50-51. Reasons for lack of co-op participation in the private tender market include lack of throughput capability, inability to quote a price, and inability to smoothly and quickly place a grain in an export position. *Id.* at 51. Cooperatives also find it difficult to bid successfully on foreign government tenders. See *Export Techniques*, *supra* note 8, at 3.

According to the Central Bank for Cooperatives (Central Bank), banks for cooperatives will follow co-op exporters and importers to the logical extension of marketing channels in order to facilitate financing, but will remain within the limits of the new amendments.⁴¹ Although this policy may involve considerable risk, it is the type of commitment and flexibility co-ops will require to enable them to compete in agricultural export markets.

C. Necessary Expertise for Marketing Exports

When compared with indirect exporting, direct exporting requires a great deal of additional expertise in making sales, meeting foreign buyers' product specifications, developing specialized delivery and payment arrangements, arranging for financing, and coordinating sales and deliveries. It also involves assumption of larger risks and the possibility of greater gains or losses.⁴² Obstacles faced in exporting can include lack of export facilities, difficulties in vessel chartering, limited supply of product, foreign government restrictions, tariff preferences, unfavorable transportation rate schedules on domestic rails, difficulties in origination of documents, dollar exchange shortages, and margin calls for hedging on distant future contracts to cover distant future sales.⁴³

Two concepts are important in discussing the planning of export sales—"logistics" and "position." "Logistics" covers all aspects of planned coordination of key export activities. Essential elements include procurement of the commodity, transportation of the commodity to port storage facilities, selling the commodity to one or more reputable foreign buyers, and coordinating the export operation. The export operation includes scheduling, holding in storage, meeting inspections, transferring to and from different modes of transportation, matching volume and commodity specifications, minimizing handling costs, and assuring the availability of supplies.⁴⁴ "Position" refers to an export firm's current situation with respect to total sales commitments, supply commitments, domestic transportation and storage arrangements, loading schedules for future export shipments, and involvement in the futures and ocean freight markets. The more active its position, the more flexible an export firm is in commodity switching and ship loading under various sales contracts to maximize its overall net margin.⁴⁵

To compete with large international grain trading companies, co-

⁴¹ Interview with Roy Becker and Wayne Andersen, International Department, Central Bank for Cooperatives, in Denver (March 22, 1982) [hereinafter cited as March Interview].

⁴² D. Hirsch, Agric. Coop. Serv. Research Report 2, U.S. Dep't of Agriculture, *Ship Chartering Alternatives for Grain-Exporting Cooperatives* 1 (1981) [hereinafter cited as *Ship Chartering Alternatives*].

⁴³ *Report*, *supra* note 6, at 13-14.

⁴⁴ *Ship Chartering Alternatives*, *supra* note 42, at 3.

⁴⁵ *Id.* at 5. Often, poor coordination in an export operation results in high operating costs that reduce or eliminate handling margins. *Id.* at 4.

ops need to become increasingly proficient in the basic elements of growth in export sales. They need a low average fixed cost per unit of volume handled. This can be accomplished by increasing volume; reducing unit costs of handling, assembling, storing, shipping and distributing; obtaining financing at low interest rates; and handling foreign exchange transactions efficiently. Co-ops need to attain a high degree of operating flexibility, including flexibility in shipping and other modes of transportation, sales representation, loading and storage facilities, and utilizing alternative methods of financing sales. Besides being concerned about logistics and position, they also need significant bargaining power in negotiating sales and charters for large volume shipping; a worldwide marketing system, with more facilities, programs, and experienced personnel; and increased market intelligence information.⁴⁶

Risks in export trade raise the transaction costs. Risks can include commodity price fluctuation, transportation rate fluctuation, exchange rate fluctuation, delay, buyer rejection, and governmental actions.⁴⁷ Market intelligence and credit risk information can help reduce some of the risks. This type of information can be obtained from a variety of sources, including overseas employees, bank channels, financial statements, overseas representatives and agents, government employees, and trade sources.⁴⁸

Cooperatives should have an advantage over large private firms in the procurement of commodities because of ties with their member growers. A significant development in the procurement of grain from farmers, however, is the sudden expansion of subterminal facilities by larger grain exporting companies, which infringes on the traditional domain of cooperatives. Large private firms already have an advantage with their wider variety of commodity sources. The trend toward origination at local levels by private firms may mean that large firms will no longer buy from co-ops for indirect sales. It may also affect a co-op's ability to acquire quantities for direct sales. A cooperative's ability to compete, therefore, may depend on its ability to develop additional sources of supply, or on its ability to tighten control over the disposition of member production.⁴⁹

Only a few cooperatives operate port facilities. A 1981 report stated that nine cooperatives operate eleven port elevators that load grain into vessels engaged in the international grain trade.⁵⁰ U.S. co-ops, however, do not own and operate elevators at foreign ports, and very few are in-

⁴⁶ *Export Techniques*, *supra* note 8, at 14-15.

⁴⁷ *Oilseed Involvement*, *supra* note 31, at 39-40.

⁴⁸ *Report*, *supra* note 6, at 5. One of the report's surveys suggested the need for more complete and possibly more centralized credit information sources. *Id.* Two ways that credit risk can be dealt with are letters of credit and insurance. *Id.* at 10. Cooperatives see getting credit information as a problem. *Id.* at 11.

⁴⁹ *Improving Export Capability*, *supra* note 2, at 39-41.

⁵⁰ *Ship Chartering Alternatives*, *supra* note 42, at 40. In terms of supply capabilities, however, cooperatives can significantly increase their direct exports and their shipments in chartered vessels with existing facilities. *Id.* at 42.

volved in storing or processing operations in foreign countries. There may be opportunities for multi-effort processing and storing facilities, both at home and in foreign countries, to enhance efficiency and continue market growth.⁵¹

In 1976, fifty-one of the seventy-three direct exporting cooperatives made shipping arrangements for one or more commodities. Two-thirds of the export volume of these co-ops, however, involved delivery to the U.S. port (f.a.s. or f.o.b.), with the buyer arranging for international shipment. In 1976, eighty-five percent of total cooperative exports moved out of this country by ship, six percent by plane, two percent by rail, and seven percent by truck.⁵²

The major problems in moving commodities from inland elevators to the vessel or port elevators are: 1) the adequacy, condition, and capabilities of the rail or waterway system; 2) high energy costs; 3) strikes by labor; 4) the availability and supply of vessels; and 5) the adequacy, condition, and capabilities of port elevator facilities.⁵³

An export program, especially grain exports, consists of a series of separate but integrated sale and shipment operations. In most cases, grain is sold to foreign buyers several months before it is actually loaded into an ocean-going vessel. The concept of selling full cargoes directly to foreign buyers is attractive because of cost savings, but most users prefer frequent deliveries in small quantities in order to reduce storage costs.⁵⁴ Although ship chartering is a challenging and risky business, successful management of export shipping arrangements can increase the net margins arising from small export sales operations.⁵⁵

The preparation and handling of documents is an important part of export marketing. It is a highly specialized operation in which relatively few people are involved. Some of the required documents include a shipper's export declaration, a destination control statement, a bill of lading and invoice, a charter party, a checklist of information to the cooperative's agent, a contract of sale, and financial instruments (letters of credit or drafts).⁵⁶

Besides financial and other expertise required for export operations, legal expertise is essential. Some of the institutions, programs, and laws that should be considered before exporting include: 1) The Overseas Private Investment Corporation (OPIC); 2) The Foreign Corrupt Practices

⁵¹ *Agricultural Exports*, *supra* note 4, at 72.

⁵² *Id.* at 25. The terms "f.a.s." and "f.o.b." are delivery terms. The former, "free alongside," means the seller is responsible for placing the commodity alongside the vessel or aircraft at a U.S. loading port. The buyer takes possession and pays all expenses incurred thereafter, including loading. The latter, "free on board," means the commodity is placed on a vessel or aircraft at a U.S. port. The buyer takes possession and pays all subsequent expenses. *Id.* at 21.

⁵³ *Improving Export Capability*, *supra* note 2, at 38-39.

⁵⁴ *Export Techniques*, *supra* note 9, at 12.

⁵⁵ *Ship Chartering Alternatives*, *supra* note 40, at 3. This publication is an excellent primer in the intricacies of ship chartering, a topic beyond the scope of this paper.

⁵⁶ *Export Techniques*, *supra* note 8, at 11.

Act; 3) The Export-Import Bank of the United States (Eximbank); 4) The Private Export Funding Corporation (PEFCO); 5) The Foreign Credit Insurance Association (FCIA); 6) Export Administration Regulations; and 7) The Webb-Pomerene Act.⁵⁷

The preceding discussion demonstrates that although cooperatives have considerable strength in originating, processing, and delivering commodities to port facilities, they face several barriers to export expansion. Cooperatives need better coordination, and financial and legal assistance in transportation and logistics, market intelligence, and risk management.⁵⁸ It is towards this goal, perhaps, that the 1980 Farm Credit Amendments were aimed, to allow the banks for cooperatives to help cooperatives, and to avoid duplication of effort.

II. Legislative History

The Farm Credit System (FCS) consists of a series of banks and associations that are chartered under federal law, but are owned by their borrower-members and operated on a cooperative basis. Their function is to serve the unique credit needs of farmers, ranchers, and aquatic producers and harvesters. Three separate types of institutions make up the system: 1) the federal land banks and the local federal land bank associations; 2) the federal intermediate credit banks and the local production credit associations; and 3) the banks for cooperatives. The FCS is supervised by the Farm Credit Administration (FCA), an independent agency in the executive branch of the government, that acts as the policy-making and regulatory body through the Federal Farm Credit Board. The expenses of the FCA are paid by the system through assessments.⁵⁹

There are twelve banks for cooperatives in the United States; one in each of twelve farm districts. District banks operate under the policy direction of a seven-member district farm credit board of directors. The Central Bank for Cooperatives, located in Denver, Colorado, participates with district banks in loans to large co-ops and provides a means of spreading the risk of sizeable loans throughout the banks for cooperatives system.⁶⁰

Although the Federal Government provided most of the capital

⁵⁷ See generally Bishop & Reynolds, *An Export Primer: Legal Aspects of Exporting from the United States*, 2 HOUS. INT'L L.J. 333, 341-344, 349-359 (1980). This article details the risks and the assistance available for those engaged in the export trade. Much of it is applicable to agricultural exports by co-ops.

⁵⁸ *Oilseed Involvement*, *supra* note 31, at 38.

⁵⁹ H.R. REP. NO. 1287, 96th Cong., 2d Sess. 15, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 7095, 7098 [hereinafter cited as HOUSE REPORT, giving both page numbers].

⁶⁰ *Id.* at 16, U.S. CODE CONG. at 7099. Banks for cooperatives have made loans for such purposes as construction, remodeling or expanding of facilities, and current or seasonal operating expenses. *Id.* In 1979, the whole Farm Credit System provided approximately \$50 billion, or roughly 1/3 of the nation's farm credit. See *Federal Conservation and Farm Credit Act Amendments: Hearings on H.R. 4782 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 96th Cong., 1st Sess. 672 (1979) (statement of Don E. Hayes) [hereinafter cited as 1979 House Hearings].

needed to establish the institutions of the FCS, the last of the government seed money was repaid in 1968, and the system is now exclusively capitalized by its members. Co-ops must buy stock in the district bank for cooperatives in order to borrow from that bank, and loan funds for the institutions of the FCS are obtained through the sale of bonds and discount notes in the nation's money markets by the system's fiscal agency⁶¹ in New York City.⁶²

In early November 1975, the presidents of each of the thirteen banks for cooperatives appointed representatives to serve on a study group. The study group was directed to determine the extent of present and potential exporting activity by U.S. agricultural co-ops, to evaluate the degree to which the co-ops' needs for export financing for international banking services are met by commercial banks and other institutions, and to explore ways in which the banks for cooperatives might effectively meet the specific requirements of system members who are currently or prospectively dependent upon export sales.⁶³ The result was the 1976 Report of the Banks for Cooperatives, System Export Services Study Group, issued on October 13, 1976.

In 1978, the Federal Farm Credit Board requested that each district farm credit board submit recommended changes to the Farm Credit Act of 1971,⁶⁴ which it deemed necessary to meet the agricultural credit needs of the 1980's, and which it believed would result in greater efficiency in the internal operation of the FCS. From proposals made by the twelve district boards came a legislative package that was approved by the district boards and the board of directors of the Central Bank. The Federal Farm Credit Board then gave its unanimous support to the proposals and instructed that they be recommended to Congress. Upon request, Representative Jones introduced a bill containing the proposals in July 1979.⁶⁵

After extensive hearings in the field and in Washington, D.C., Representatives Jones and Madigan introduced a new bill. H.R. 7548 contained many of the original proposals and some of the modifications made by the subcommittees and the full committee.⁶⁶ The Senate version of the bill was passed in lieu of the House bill, however, after its language was amended to contain the text of the House bill.⁶⁷

⁶¹ The fiscal agency is the private organization through which the farm credit system interacts with the financial community to market or issue its system-wide obligations. The fiscal agency acts under the direction and supervision of the appropriate finance committees of the FCA. 12 C.F.R. § 615.5010 (1983).

⁶² *Id.* at 16-17, U.S. CODE CONG. at 7100. Each cooperative borrower must hold at least one share of voting stock and may be required to purchase additional stock up to an amount equal to 10% of the face value of the loan. *See* 12 U.S.C. § 2130 (1982).

⁶³ *Report, supra* note 6, at i.

⁶⁴ Pub. L. No. 92-181, § 1.1(a), 85 Stat. 583 (1971) (codified at 12 U.S.C. §§ 2001-2260 (1976)) [hereinafter cited as Farm Credit Act of 1971].

⁶⁵ HOUSE REPORT, *supra* note 59, at 17, U.S. CODE CONG. at 7100.

⁶⁶ *Id.* at 18, U.S. CODE CONG. at 7101.

⁶⁷ *Id.* at 1, U.S. CODE CONG. at 7095.

The House Report lists seven reasons for the passage of the export financing legislation: 1) the important role of co-ops in returning more of the margin from export transactions to farmers; 2) the increased supply of U.S. agricultural commodities in both developing foreign markets and in established markets where competition from other agricultural exporting countries is increasing; 3) the ability of previous banks for co-operatives to lend only to domestic cooperatives and the requirement that financing be only for that portion of the export transaction up to the domestic point of export; 4) the financing of international transactions through the seller's bank and the financing of international sales by co-ops through other financial institutions;⁶⁸ 5) the need to improve farm income and not impose unreasonable risks to the banks for cooperatives; 6) the need to allow co-ops which would otherwise be unable to do so to enter the export market; and 7) the need for updating the services of the banks for cooperatives system to meet the changing needs of agriculture and agricultural co-ops.⁶⁹

The Farm Credit Act of 1971 declared it a policy of the FCS to improve the income and well-being of farmers by furnishing "sound, adequate, and constructive credit" and by furnishing related services to farmers and their cooperatives.⁷⁰ It also gave the boards of directors of the banks for cooperatives "all such incidental powers as may be necessary or expedient to carry on the business of the bank."⁷¹ In the lending powers section of the Act, however, no mention was made of the types of services required of banks operating in the international sphere.⁷² Although the Act called for the modernization of authorizations and the means of furnishing credit, and responsiveness to the credit needs of eligible borrowers,⁷³ a bank incorporated under a legislative charter possesses only those powers that are either expressly conferred by statute or are necessarily implied from its specific grant of power. Every power that is not expressly granted is to be withheld, and the specific enumeration of powers implies the exclusion of all others.⁷⁴ Further authority, therefore,

⁶⁸ Many co-ops have had to invest millions of dollars in order to provide the means to service their credit needs within their own institution.

⁶⁹ *Id.* at 19-20; 52-54, U.S. CODE CONG. at 7102-7103; 7135-7137.

⁷⁰ Farm Credit Act of 1971, § 1.1(a), 12 U.S.C. 2001(a).

⁷¹ *Id.* at § 3.1(17), 12 U.S.C. § 2122(17).

⁷² *Id.* at § 3.7, 12 U.S.C. § 2128. This section mentions several powers but says it is not limited to those mentioned.

⁷³ *Id.* at § 1.1(b), 12 U.S.C. § 2001(b).

⁷⁴ *Report, supra* note 6, at 57 (citing *Knass v. Madison & Kedsie State Bank*, 188 N.E. 836, 839-840 (Ill. 1933)). It is interesting to note that there are no statutes authorizing national banks to issue letters of credit, to establish relationships with other banks, or to collect and disseminate credit information. *Id.* at 58. Much export financing, however, is handled by subsidiary corporations of commercial banks (Edge Act Corporations), which are principally engaged in international or foreign banking and chartered by the Federal Reserve System. *Id.* at 63; *see* 12 U.S.C. § 611 (1982). There is no authority for banks for cooperatives to operate their export financing through Edge Act type corporations because the FCA does not allow it. *Report, supra* note 6, at 64.

was needed to modernize and improve the banks for cooperatives' services, including services for international transactions.

A. *Explanation of the Law*

The new legislation contains several essential international transaction provisions that need to be discussed. The best way to accomplish this is to make a section-by-section review and analysis.

Section 3.1(12) (amended § 301) of the Act allows the banks for cooperatives to deposit securities and current funds with any other financial institutions, domestic or foreign, as may be authorized by its board and approved by the FCA, but only to the extent necessary to facilitate export and import transactions of eligible cooperatives that may be financed by the bank. Previously, deposits could be made only with member banks of the federal reserve system.⁷⁵

Section 3.1(13)(A) (amended § 301) originally contained provisions authorizing banks to buy and sell obligations, such as acceptances, that arose from transactions financed by the banks. Amendments by the Subcommittee on Conservation and Credit deleted this specific authority because the authority to do so was supposedly in the 1971 Act.⁷⁶ Subsequently, because of the language of Section 3.7(d) (amended § 304), FCA staff members expressed concern about the restriction of acceptance financing to the export and import of agricultural products only. Interestingly, Section 3.7(d) (amended § 304) of the Amendments states, "[T]he regulations . . . may not confer upon the banks for cooperatives power and authorities greater than those specified in this title." This would seem to be a specific prohibition of the FCA's power to enlarge the banks' acceptance financing authorities under Section 3.7(b) (amended § 304), the section giving lending powers for international transactions, and no authority other than Section 3.7(b) provides clear authorization.⁷⁷

⁷⁵ HOUSE REPORT, *supra* note 59, at 36, U.S. CODE CONG. at 7119, 12 U.S.C. § 2122(12) (1982). These deposits would be nominal in amount, and limited to open accounts which are essential to making payments and collections in an expeditious, efficient manner. The banks for cooperatives system will rely for much of its interbank needs in international banking on U.S. banks that have effective worldwide networks of branches and offices. In some areas of the world, however, correspondent relationships with foreign banks would offer the most cost efficient method of accomplishing collections and payments. See *Farm Credit Act Amendments of 1979: Hearings on S. 1465 Before the Subcomm. on Agriculture Credit and Rural Electrification of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 96th Cong., 1st Sess. 197 (1979) (statement of W. M. Harding) [hereinafter cited as 1979 *Senate Hearings*].

⁷⁶ HOUSE REPORT, *supra* note 59, at 36-37, U.S. CODE CONG. at 7119-7120. See H.R. 4782, 96th Cong., 1st Sess. § 301 (1980). An FCA committee stated that it believed the authority was already present in existing legislation. HOUSE REPORT, *supra* note 59, at 37, U.S. CODE CONG. at 7120. See also B. Zimmer, *The Limitations of H.R. 7548 on Foreign Exchange in Participation in the Eurocurrency Markets* in Federal Credit Ad. Inter-office Memo 1 (Aug. 28, 1980) [hereinafter cited as Memo]. Committee counsel suggested the FCA could allow such authority for the banks.

⁷⁷ Memo, *supra* note 76, at R. Ireton and B. Zimmer, Talking Paper, H.R. 7548 2-3 (Sept. 30, 1980). The sufficiency of legal grounds to create acceptances was questioned even though

Section 3.1(13)(C) (amended § 301) allows banks for cooperatives to make investments for the purpose of obtaining services needed to facilitate the export and import transactions of eligible cooperatives that may be financed by the banks. It authorizes them to invest in ownership interests in business entities, domestic or foreign, "that are principally engaged in providing credit information to and performing such servicing functions for their members in connection with the members' international transactions."⁷⁸ The language of this section was changed from the original language, which allowed the banks for cooperatives to make investments in business entities, foreign and domestic, that obtain credit information and perform loan and financial services related to international transactions. Although there was some indication that this change from the original language might preclude investment in merchant banks, the FCA decided it would not preclude such investments. It seems, however, to present the problem of finding business entities that are "principally engaged" in such activities.⁷⁹

Section 3.1(18) (amended § 301) authorizes the banks to "maintain credit balances and pay or receive fees or interest thereon, for the purpose of assisting in the transfer of funds to or from parties to transactions that may be financed under Section 3.7(b) (amended § 304) of this Act."⁸⁰ To transfer funds most efficiently, the banks for cooperatives must accept funds from borrowers and financial institutions. This authority would be used to transfer funds efficiently for international trans-

the FCA's legal counsel said the authority was within the 1971 Act, based on Section 3.1(13)(C). The funding of international trade transactions, however, can hardly be considered an investment under the authority of that section. Concern was also expressed about the access of these acceptances to the Open Market Committee of the Federal Reserve System. *Id.* at D. Archer, Meeting of Committee to Review Differences between House and Senate Versions of Amendments to the 1971 Act (Sept. 19, 1980). Although the 1971 Act apparently authorized the banks for cooperatives to utilize bankers' acceptances as an investment vehicle there was not utilization until 1980. *Id.* at B. Zimmer, Legal Constraints on the Creation, Purchase, and Sale of Acceptances by National Banks 3-4 (July 28, 1980). The FCA had later decided not to push for access into the Eurobound market but rather concentrated on allowing creation of bankers' acceptances. *Id.* at R. Ireton, Banks for Cooperatives Access to the Eurobound Market (Oct. 14, 1980).

⁷⁸ HOUSE REPORT, *supra* note 59, at 36, U.S. CODE CONG. at 7119 (codified at 12 U.S.C. § 2122(c) (1982)).

⁷⁹ Memo, *supra* note 76, at R. Ireton, Merchant Banking—Making Investments to Obtain Credit Information and Other Services 1 (Aug. 26, 1980). General credit information is available from several sources, but generally this type of information is not in enough detail, or critical enough, to be of much help, especially in international trade transactions. Merchant banks, operating primarily in London because of liberal banking laws, can provide this detailed information. This information, however, is not for sale on an individual basis, for the most part, but only to borrowers of the bank. Merchant banks perform a wide variety of services. *See id.* at 1-2. An FCA committee, meeting in September 1980, agreed that the wording of an amendment, as passed, would not preclude the banks for cooperatives from investing in merchant banks even though the information was only one of many services. Apparently, the bank for cooperatives would be a member of the merchant bank, rather than the cooperative, but receive only informational services. *Id.* at D. Archer, Meeting of Committee to Review Differences between House and Senate Versions of Amendments to the 1971 Act 3 (Sept. 19, 1980).

⁸⁰ 12 U.S.C. § 2122(18) (1982); *see also* HOUSE REPORT, *supra* note 59, at 37, U.S. CODE CONG. at 7120.

actions of farmer cooperatives, but would not permit the banks to accept deposits from the public or from other unrelated sources. Holding deposits of foreign banks is the second part of establishing correspondent relations with foreign banks. The authority would permit the exchange of deposits to open reciprocal accounts that are the normal basis of establishing correspondent relations between banks in different countries.⁸¹

Section 3.1(19) (amended § 301) authorizes the banks for cooperatives to enter into agreements with other banks in the system to share losses of any nature.⁸² Apparently, this provision was designed to help protect banks that may experience losses in financing international transactions.

The 1971 Farm Credit Act contains three important provisions that were not substantially changed by the 1980 Amendments. Section 3.1(11) authorizes the banks to participate in loans with other banks for cooperatives, commercial banks, and financial institutions.⁸³ Section 3.1(17) authorizes "all such incidental powers as may be necessary or expedient to carry on the business of the bank."⁸⁴ Section 3.1(6) authorizes "loans and commitments for credit" and provides for "services and other assistance as authorized in this Act," as well as charging fees for those services.⁸⁵

Section 3.7(a) (amended § 304) of the Act was amended by adding the words "currency exchange necessary to service individual transactions which may be financed under subsection (b)."⁸⁶ Subsection (a) also enumerates other technical and financial assistance that may be offered by the banks for cooperatives to eligible co-ops under the banks' lending powers. Included services are note discounts, guarantees, collateral cus-

⁸¹ See 1979 Senate Hearings, *supra* note 75, at 197 (statement of W. M. Harding). The purpose of the power to hold credit balances of both foreign banks and cooperatives is to minimize the time and cost of transferring funds in international transactions by reducing transaction costs. *Id.* One FCA inter-office memo recommended elimination of references to 12 U.S.C. § 2128(b), FCA § 3.7(b) in subsections 2122(13)(C) and (18), FCA § 3.1(18). The memo stated that under the current wording of 12 U.S.C. § 2122(13)(C) and (18) (which passed), it was not possible to maintain or hold deposits of foreign currencies for a short period of time for future cooperative transactions, which will not be the direct result of authorized export financed transactions, even though this is often a necessary part of financing international trade. This is because under FCA § 3.1(18), credit balances and deposits with other banks must be linked to individual transactions financed under FCA § 3.7(b). Memo, *supra* note 76, at R. Ireton and B. Zimmer, Talking Paper, H.R. 7548 3 (Aug. 30, 1980); see 12 U.S.C. §§ 2128(b), 2122(18) (1982). It has been suggested that the cooperative or the bank for the cooperative would have to go through a commercial bank to set up accounts in foreign currency. See *id.* at R. Ireton, Maintaining Credit Balances and Deposits with other Banks 1 (Aug. 28, 1980). This could effectively restrict the banks for cooperatives from managing the money denominated in foreign currencies that U.S. co-ops will have from time to time. *Id.* at R. Ireton and B. Zimmer, Talking Paper, H.R. 7548 3 (Aug. 30, 1980).

⁸² See 12 U.S.C. § 2122(19) (1982).

⁸³ *Id.* at § 2122(11).

⁸⁴ See *id.* at § 2122(17).

⁸⁵ *Id.* at § 2122(16).

⁸⁶ HOUSE REPORT, *supra* note 59, at 37, U.S. CODE CONG. at 7120, 12 U.S.C. § 2128 (1982).

tody, and participation with other banks, including commercial banks, in making loans to eligible co-ops. The new language would allow the banks to engage in the currency exchange necessary to meet the needs of co-ops in international transactions.⁸⁷ In addition, the banks would be able to counsel and guide the exporting co-op in minimizing its currency exchange risk exposure.⁸⁸

Subsections (b), (c), and (d) of Section 3.7 (amended § 304) were added to the Act to expand the authority of the banks to serve the needs of eligible co-ops. Subsection (b) authorizes the banks to make or participate in loans and commitments, and to extend other technical or financial assistance to (1) a foreign or domestic party with respect to a transaction with a stockholder co-op for the export or import of agricultural commodities, aquatic commodities, or farm supplies through purchases, sales, or exchanges, and (2) a domestic or foreign party in which an eligible co-op has at least the minimum ownership interest approved under FCA regulations if the loan, commitment, or assistance is for the purpose of facilitating the co-op's export or import transactions.⁸⁹

For loans of type (1) or (2) to be extended, the stockholder co-op must substantially benefit as a result of the loan, commitment, or assistance.⁹⁰ It is important to remember that these two types of loans differ from the loans or commitments made to eligible cooperatives that are authorized under subsection (a) of Section 3.7. Nowhere does the lending power authorize direct loans to eligible cooperatives for international transactions. Subsection (a) authorizes direct domestic loans, as did the 1971 Act. Subsections (b)(1) and (2) contemplate a party with whom the co-op is dealing, or with whom the co-op has a relationship, such as a subsidiary or larger umbrella group in which the co-op has a minimum interest. The new amendments, then, are designed to facilitate third party loans, not to directly finance international operations of cooperatives.⁹¹

It is expected that services provided to non-cooperatives in export transactions will involve primarily interim financing of the foreign purchaser. The House Committee envisioned that financing of a domestic non-cooperative party would be confined to very limited circumstances,

⁸⁷ *Id.*

⁸⁸ See 1979 Senate Hearings, *supra* note 75, at 197 (statement of W.M. Harding).

⁸⁹ HOUSE REPORT, *supra* note 59, at 38, U.S. CODE CONG. at 7121.

⁹⁰ *Id.* The words "benefit substantially" (or "substantially benefit" or other similar words) are used in the U.S. Code in 15 different sections. The words are used at least 115 times in federal regulations. Nowhere are the words defined. To this author's knowledge, no case discusses the meaning of those words, certainly not in this context anyway.

⁹¹ Although FCA § 3.7 does not specifically allow bank for cooperative loans directly to co-ops for international transactions, these banks have been financing cooperatives' receivables for years, in effect, mixing domestic and export operations. Under the new legislation a bank for cooperatives could not finance a port facility built by a co-op outside the U.S. It can, and has, financed a domestic port facility for export operations, however. Telephone interview with Roy Becker, International Department, Central Bank for Cooperatives (July 16, 1982) [herein after cited as July Interview].

when such a party forms an integral link in accomplishing a co-op's export or import transaction.⁹²

Subsection (c) of Section 3.7 (amended § 304) requires loans, commitments, and assistance to be extended only in accordance with policies adopted by the bank's board of directors pursuant to regulations of the FCA.⁹³ To ensure conformity to national banking policies, objectives, and limitations, subsection (d) requires close, continual consultation with the Federal Reserve Board in formulating regulations. Subsection (d) limits the regulatory authority of the FCA over subsection (b), and other provisions relating to the authority in (b), to powers and authorities not greater than those specified in the title.⁹⁴

Under no circumstances are the banks to engage in activities that would constitute speculation in futures transactions in currencies, or in the financing of such speculation. It may be appropriate, however, to "hedge."⁹⁵ The House Committee directed that the FCA regulations implementing this authority reflect the relevant definitions of "hedging" and "speculation" found in the regulations issued by the Commodity Futures Trade Commission (CFTC).⁹⁶

To be an "eligible cooperative" under the Act, a cooperative must be an association of farmers, producers, or harvesters of aquatic products, or any federation of associations; be operated on a cooperative basis; have certain cooperative operating functions; and conform to either of "two requirements:"⁹⁷ 1) one-man, one-vote; 2) dividend payment; 3) member business greater than nonmember business; or 4) voting control.⁹⁸ The voting control requirement for utility and service co-ops was

⁹² HOUSE REPORT, *supra* note 59, at 39, U.S. CODE CONG. at 7122. The committee envisioned strict limits to bona-fide export or import transactions where a non-cooperative is involved. It said it does not intend there to be an extension of bank for cooperative financing, under the new authority, to export or import transactions which are not essentially and substantially those of cooperative stockholders-members of the banks. An example was given of a non-cooperative marketing agency assisting a co-op in export sales as the type of domestic non-cooperative contemplated by the Act. The committee said "finders fee" systems by non-cooperatives would not be authorized. *Id.*

⁹³ *Id.* at 38, U.S. CODE CONG. at 7121, 12 U.S.C. § 2128(c) (1982).

⁹⁴ 12 U.S.C. § 2128(d) (1982).

⁹⁵ HOUSE REPORT, *supra* note 59, at 39, U.S. CODE CONG. at 7127. *See* 12 U.S.C. § 2128(e) (1982). An amendment by Representative Panetta would have eliminated some as authority for expanded services in export-import transactions. A provision, however, to prohibit banks for cooperatives from financing margins in connection with futures transactions in foreign currency was omitted from the Panetta Amendment because it might hamper bona fide hedging transactions entered into by borrowers seeking to protect their position relative to currency exchange fluctuations. Language was included in the original amendment, however, to prohibit financing of speculative futures transactions in currencies which would be defined in FCA regulations using Commodity Futures Trade Commission (CFTC) guidelines. *See infra* note 128. The language modifications were designed to allow for adequate authority to service international transactions. HOUSE REPORT, *supra* note 59, at 60, U.S. CODE CONG. at 7143.

⁹⁶ HOUSE REPORT, *supra* note 59, at 60, U.S. CODE CONG. at 7143.

⁹⁷ 12 U.S.C. § 2129 (1982). This section, especially the part about conformity to "either of the two following requirements" when there are four requirements listed, is not well-written or conceived.

⁹⁸ *Id.*

changed from seventy to sixty percent. Included in the amendments in the new sixty percent category were local farm supply co-ops experiencing reduction in farm membership beyond their control, and local farm supply co-ops in competition with other local farm supply co-ops, but providing needed services in the community.⁹⁹

The reason for the change in eligibility requirements was to ensure that farmer-controlled co-ops borrowing from their banks would be able to continue to borrow.¹⁰⁰ The change reflects changing demographic patterns and changing circumstances in rural America, such as increased nonfarmer population in some rural areas.¹⁰¹ The Central Bank for Cooperatives is required to determine the legal eligibility of a direct loan borrower or potential direct loan borrower under the Act before establishing a loan commitment. Eligibility is to be evidenced by certificates and other documents.¹⁰²

Pursuant to Section 3.10 (amended § 307), interest rates are determined by each bank's board of directors, subject to approval by the FCA. In setting rates and charges it shall be the objective of the board of directors to provide the credit needed by eligible borrowers at the lowest reasonable cost, taking into account the net cost of money to the bank, necessary reserves and expenses of the bank, and services provided.¹⁰³

The House passed an amendment to the original bill for incorporation of a mechanism for congressional review, and possible veto, of regulations promulgated by the FCA under the Act.¹⁰⁴ Subsection (b)(1) of Section 5.18 (amended § 507) requires regulations to be transmitted to congressional committees. Subsection (c)(1) requires that any unresolved differences between the FCA and the Federal Reserve System over Section 3.7(b) (amended § 304) of the Act (international lending powers) can be resolved by Congress. Subsections (b)(2) and (c)(2) provide for regulations going into effect automatically if there is no congressional

⁹⁹ *Id.* The section also allows each Farm Credit district board to establish higher voting requirements for all types of co-ops.

¹⁰⁰ HOUSE REPORT, *supra* note 59, at 18, U.S. CODE CONG. at 7101. The change was offered by the Baldus Amendment. *Id.* at 59, U.S. CODE CONG. at 7142.

¹⁰¹ *Id.* at 18, U.S. CODE CONG. at 7101. One FCA memo indicated that there might be an error in the Baldus Amendment because competition from other co-ops is probably a reason for the reduction in farmer membership in the first place. Memo, *supra* note 76, at Archer, Differences Between H.R. 7548 and S. 1465 (Oct. 22, 1980). Another memo describes the amendment as "hopelessly ambiguous" in attempting to take one further step in acknowledging the adverse impact of urbanization on the ability of bona fide farmer co-ops to meet the stringent eligibility requirements dealing with farmer voting control. It also said it was "specious in concept and therefore not equitable because of its restrictive aspects." According to the memo, fair and practical administration would be a nightmare. *See id.* at D. Nettles, Baldus Amendment to Cooperative Eligibility Provisions of H.R. 7548 I (Oct. 6, 1980).

¹⁰² CENTRAL BANK FOR COOPERATIVES, POLICIES AND PROCEDURES MANUAL, Vol. II, No. 4-5 (Dec. 2, 1981) (codified at 12 C.F.R. §§ 614.4080 & 4120 (1983)) [hereinafter cited as MANUAL].

¹⁰³ 12 U.S.C. § 2131 (1982).

¹⁰⁴ HOUSE REPORT, *supra* note 59, at 59, U.S. CODE CONG. at 7142. *See* 12 U.S.C. § 2252 (1982).

action. The Justice Department, however, questioned the constitutionality of this legislative disapproval device which ignores the President's right of review.¹⁰⁵

The Comptroller General of the General Accounting Office is to conduct an evaluation of the programs and activities authorized under the 1980 Amendments and make an interim report to Congress in 1982, and a final report to Congress in 1984. The report is to include an analysis of the effect that the new amendments will have on agricultural credit services provided by the FCS, federal agencies, and other entities.¹⁰⁶

Section 3.7(a) (amended § 304) authorizes the banks for cooperatives to lend money and make other services available to domestic parties who are not cooperative stockholders of the banks, for the purpose of acquiring equipment and facilities to lease to cooperative stockholders of the bank for use in their operations in the United States.¹⁰⁷ Leveraged leasing, however, is not to be a part of the activities of the International Department of the Central Bank for Cooperatives.¹⁰⁸

B. Regulations

The regulations correspond to the statutory provisions and may be found in the Code of Federal Regulations. Policies and procedures implementing the regulations are contained in various banks for cooperative manuals. A review and analysis of the regulations and policies and procedures is helpful in showing what will be accomplished pursuant to statutory authority.

¹⁰⁵ Letter from Department of Justice, Office of Legislative Affairs, Alan A. Parker, Asst. Atty. Gen., to Thomas S. Foley, Chairman, Committee on Agriculture (Aug. 22, 1980). The letter explained that the President has a constitutionally mandated role in the review of legislation. It said Congress could, under this provision, legislate with respect to the regulatory authority of the FCA without permitting the President his prerogatives of veto. Although it stressed the power of Congress for ordinary and proper legislative oversight, it said any joint resolution of Congress conditioning approval of regulations would have to be presented to the President.

¹⁰⁶ 12 U.S.C. § 2260 (1982). This provision was made part of the amendments to replace an earlier "sunset" provision introduced by Representative Glicksman. Those provisions would have meant automatic expiration of the 1980 Amendments on Sept. 30, 1985, unless extended by Congress. See Memo, *supra* note 76, at R. Ireton and D. Clark, Potential Impact of Sunset Legislation on OFI Discount Authority and Export Financing (Oct. 20, 1980).

¹⁰⁷ HOUSE REPORT, *supra* note 59, at 38, U.S. CODE CONG. at 7121, 12 U.S.C. § 2128(a) (1982).

¹⁰⁸ July Interview, *supra* note 91. The provisions for "leveraged leasing" could be used at least indirectly to assist a cooperative's international trade efforts, however. See HOUSE REPORT, *supra* note 59, at 38, U.S. CODE CONG. at 7121; 1979 Senate Hearings, *supra* note 75, at 172, 176 (statement of Donald E. Wilkinson). Leveraged leasing has considerable benefit, especially for marketing co-ops, particularly in providing transport and storage facilities. Memo, *supra* note 76, at R. Ireton, Reasons for the Bank for Cooperatives to Request the Legislative Authority to Finance Leveraged Leasing by Cooperatives 1 (Oct. 21, 1980). One FCA committee felt that the banks for cooperatives should be, and need to become, involved in leveraged leases in international transactions. They felt, however, that the bill's language completely eliminated the possibility of financing lease transactions overseas for U.S. co-ops. Memo, *supra* note 76, at D. Archer, Meeting of Committee to Review Differences between House and Senate Versions of Amendments to the 1971 Act 2 (Sept. 19, 1980).

The international activities of the banks for cooperatives under the 1980 Farm Credit Act amendments will be under the direct supervision of the Federal Credit Administration (FCA), which will apply new regulations and enforce the declared purposes of the FCS.¹⁰⁹ Before passage of the amendments, the FCA began to develop and assemble the staff and management capability to accomplish the necessary supervision. It prepared model policies and procedures for international lending programs and began staff work on international regulations to implement the amendments.¹¹⁰

1. *Correspondent Bank Relations*

A key element in international banking is establishing correspondent relations with banks in foreign countries. Pursuant to FCA regulations, the Central Bank for Cooperatives may establish correspondent relationships with foreign and U.S. banks in order to accept and place deposits and otherwise support the international credit and service requirements of eligible co-ops and third parties. The basis of the correspondent relationship is anticipated trade volume, credit opportunities, and perceived co-op benefits. The Central Bank may place deposits with foreign and U.S. banks for its own account and for other banks for cooperatives provided the sum of the deposits placed does not exceed ten percent of the aggregate of the banks' total net worth for a period of thirty calendar days.¹¹¹

2. *Credit Information*

The banks for cooperatives are allowed to make "ownership" investments in foreign business entities solely for the purpose of obtaining credit information and other services needed to facilitate export and import transactions. The investment may not exceed the level required to obtain access to credit and other services of the entity and must not be made for earnings purposes. The business entity is deemed to be "principally engaged" in providing credit information and servicing functions "for its members where such activities constitute a materially important line of business to its members." Investment must be made to the banks' account and not for its members. The banks may, however, use only those services provided by the business entity that are necessary to facilitate export or import transactions.¹¹²

¹⁰⁹ Memo, *supra*, note 76, at B. Zimmer, Response to Legislative Questions (July 7, 1980). The FCA proposes rigorous enforcement. *See, e.g.*, 12 U.S.C. § 2252(a)(16) (1982).

¹¹⁰ Memo, *supra*, note 76. The FCA also has staff specialists in international financial risk, export credit risk, and export risk insurance.

¹¹¹ MANUAL, *supra* note 102, no. 4-14 (codified at 12 C.F.R. § 615.5190(G) (1983)). The policy is based on FCA regulation 5190. Correspondent relationships are confined to approved countries and to financial institutions within those countries which are credit-worthy international or agricultural banks. *Id.*

¹¹² *See* 12 C.F.R. § 615.5143 (1983). Buying ownership in a foreign credit reporting agency or loan servicing facility is often a much less expensive method of establishing a minimum

3. Risk Management

The party which receives the financing usually bears the transaction risk on loans. If a foreign buyer receives direct financing from the banks for cooperatives, the bank will bear the risk. If a cooperative receives financing, it bears the risk and responsibility.¹¹³ The banks for cooperatives are required to place dollar limits, by country, on the amounts for financing foreign trade receivables, and maximum percentage limits on the amount of a draft drawn on a foreign party against which the bank may advance funds. Foreign trade receivables financing is direct financing to a foreign or domestic party for amounts owed to eligible co-ops for trade transactions. In setting these two limits, the bank is to consider the following factors: 1) reputation and strength of the foreign importer; 2) reputation and payment record, as a class, of importer; 3) quality of the supporting documents; 4) ease of foreign exchange or hedging possibilities; and 5) reputation and financial strength of the exporter.¹¹⁴

When financing foreign trade receivables, the banks must make certain that all parties to the transaction being financed are reputable and capable of performing their responsibilities under the contract of sale.¹¹⁵ Credit decisions are the responsibility of the loan committee of the Central Bank, and must be based on accurate, complete, and up-to-date information that thoroughly and objectively analyzes relevant business, credit, and country risk factors. Loan account officers are responsible for assuring that recommendations to the loan committee concerning credit analysis conform with credit and security standards for international lending and banking policy.¹¹⁶

Country risk analysis deals with how well a nation is managed financially. The analysis is to be performed systematically, on a central-

overseas presence than establishing foreign branches. A number of U.S. bank holding companies have acquired custom house brokerage firms to handle these matters for domestic and overseas trading activities. The banks for cooperatives now have an option to join in common ownership of overseas trade expediting firms and credit reporting services within the limits of the regulation. See *Federal Conservation and Farm Credit Act Amendments: Hearings on H.R. 4782 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 96th Cong., 2d Sess. 36-37 (1980) [hereinafter cited as *1980 Hearings*].

¹¹³ March Interview, *supra* note 41. However, 12 C.F.R. § 614.4700(c) (1983) admonishes the banks for cooperatives to retain recourse to the exporter when financing a foreign importer's draft, unless it seems unnecessary. In the committee hearings, the governor of the FCA downplayed the role of risk in financing international transactions. See *1979 Senate Hearings*, *supra* note 75, at 176 (statement of Donald E. Wilkinson).

¹¹⁴ 12 C.F.R. § 614.4700(d) (1983); see MANUAL, *supra* note 102, no. 4-7 (codified at 12 C.F.R. § 614.4700(d) (1983)). The law requires a foreign third party to meet overall country limits before receiving credit approval. One commentator on the rules suggested a provision of system-wide policies limiting the amount that the system would lend in each country. The suggestion was rejected, thus allowing the individual banks to set limits. The FCA did not want the burden of system-wide limits looking like official U.S. foreign policy. 46 Fed. Reg. 51,876 (1981).

¹¹⁵ 12 C.F.R. § 614.4700(f) (1983). Subsection (g) requires all shipments on the high seas to have maritime insurance. *Id.*

¹¹⁶ MANUAL, *supra* note 102, at 4-6.

ized basis, and disseminated to all banks for cooperatives for use in credit granting decisions.¹¹⁷ In credit analysis, substantial consideration is given to country risk factors in determining the amount of the loan, the length of the term, the repayment method, loan guarantees, and the necessity of collateral.¹¹⁸ The banks for cooperatives have contracted with a private consulting firm to perform country risk analysis. The firm has proposed a recommended international policy criteria manual, which is an analysis of what is needed by the banks for cooperatives, and has proposed a structure for a foreign or domestic borrower control and servicing mechanism.¹¹⁹ The decisions concerning country risks and country limits will be made by the Capital and Credit Committee of the FCA, which is made up of the thirteen banks for cooperatives presidents. The International Department of the Central Bank for Cooperatives is also involved in implementing those decisions, but the input will be made by the department's consultant to avoid accusations of bias.¹²⁰

In lending to indigenous companies, it is necessary to consider both country risk and company risk, and to examine the structure of each in relation to the proposed structure of overall risk.¹²¹ Country exposure involves two basic risks: 1) political risk, which is the risk of financial loss associated with adverse political developments (*e.g.*, expropriation or crippling legal restrictions); and 2) financial risk, which is the risk of financial loss often associated with cross-currency problems (*e.g.*, devaluation, inconvertibility, or rescheduling of external debt).¹²² Exposure limits for a country, at any point in time, are premised on: 1) size and wealth of the country; 2) ability and willingness to service external debt; 3) composition of lending within the country as it relates to portfolio quality; 4) relative levels of profitability derived from cross-border lending; 5) special FCS opportunity factors; and 6) portfolio diversification.¹²³

The proposed country risk and foreign or domestic borrower control and servicing mechanism (hereinafter referred to as the system), will enable the thirteen banks for cooperatives and the FCA to know at any time how individual countries are evaluated, how borrowers within the countries are assessed, and whether the borrowers are eligible for specific types and amounts of credit. The system will also enable the banks to know the status of system-wide exposure to countries, the status of for-

¹¹⁷ 12 C.F.R. § 614.4700(h) (1983).

¹¹⁸ MANUAL, *supra* note 102, no. 4-6 (codified at 12 C.F.R. §§ 614.4140, .4150, .4220, .4260, .4261 (1983)).

¹¹⁹ March Interview, *supra* note 41.

¹²⁰ *Id.* See also MANUAL, *supra* note 102, no. 4-2, FCA Regs. §§ 4700, 4354, 4210, which gives guidelines for approval of overall country limits by the Capital and Credit Committee. Reports on individual countries are to be kept.

¹²¹ Jack Zwick Associates, Inc., *A Country Risk and Foreign or Domestic Borrower Control and Servicing Mechanism for the Farm Credit System* 2 (Aug. 1981).

¹²² *Id.*

¹²³ *Id.* at 1.

eign or domestic borrowers, and the status allocations in relation to ceilings. The system is composed of the following: a country risk analysis unit; the Capital and Credit Committee; a foreign credit department that reports to the Central Bank but serves all the banks; the Central Bank, which performs foreign credit functions and establishes lending standards; and the district banks. The country risk analysis unit works with the Capital and Credit Committee to prepare country studies.¹²⁴ The system will provide managerial assistance to the banks by establishing appropriate boundaries for foreign lending and providing evidence that the perceptions of risk are soundly based.¹²⁵

In a 1976 report, the banks for cooperatives recommended that credit information be provided under a contract that limits the banks' liability to instances of bad faith or gross lack of care, and that clarifies the position of the banks for cooperatives in not guaranteeing the credit information. It also recommends that foreign buyers have liability insurance coverage for suits by third parties for bad credit information.¹²⁶

4. *Currency Exchange*

The banks for cooperatives may engage in transactions that transport monetary instruments to and from the United States. The FCA must approve the banks' policies and procedures governing these transactions.¹²⁷ Under approved policies, a bank may engage in currency exchange activities to service *individual* international transactions that may be financed under the regulations. Currency exchange activities may not include loans or commitments to eligible borrowers intended to finance speculative futures transactions in foreign currencies. The bank may engage in bona fide hedging transactions and positions on behalf of its eligible borrowers, or on its own behalf when the transactions or positions reduce risks in the conduct and management of international financial activities.¹²⁸ The banks' policies are to include guidelines for operating

¹²⁴ *Id.* at 4. The country risk unit basically obtains and interprets information. The Capital and Credit Committee meets quarterly to review country risk reports, set foreign lending policies, and supervise the country risk analysis. The foreign credit department of the Central Bank obtains and interprets credit information, approves accommodations for foreign entities, assists banks in structuring credit, disseminates recommendations, and maintains a communications system. The Central Bank performs credit assessments, loan structuring, inter-bank relationships and credit administration for the whole system. The district banks set standards for foreign credit functions for participation and investment, and for credit assessments for direct loan structures and credit administration. *Id.* at 27, 28, 34, 35.

¹²⁵ *Id.* 1-2.

¹²⁶ *Report, supra* note 6, at 75-76. At the time of the report, the Foreign Credit Insurance Association had accumulated files on over 50,000 foreign buyers. *Id.* at 75. It is not known whether the banks for cooperatives have liability insurance coverage for suits by third parties for bad credit information because the Central Bank classifies such information. Letter from Roy Becker, International Department, Central Bank for Cooperatives (June 6, 1983) [hereinafter cited as June Letter].

¹²⁷ 12 C.F.R. § 4900(a) (1983).

¹²⁸ *Id.* at § 614.4900(b). 12 U.S.C. § 2128(e) (1983), forbids "financing speculative futures transactions." This does not mean that all but perfect hedges are forbidden. Hedges in cur-

in these types of transactions.

The banks' reporting policies must comply with the reporting laws of the U.S. Treasury Department.¹²⁹ The banks' guideline policies are to include reporting procedures to insure proper management of trading activities and detection of noncompliance with policy directives.¹³⁰ The bank is required to have written policies describing the scope of authorized trading activity, delegation of authority, types of services offered, trading limits, reporting requirements, and internal accounting controls.¹³¹ It is also required to establish limits for foreign exchange delivery for each eligible customer and to review the delivery exposure of each individual customer.¹³² The bank's personnel policies must include written standards of conduct for those involved with foreign exchange activities,¹³³ and the banks are required to use their fiscal agency for foreign exchange trading.¹³⁴ A bank may sell foreign exchange through a commercial bank without meeting most of the policy and procedural requirements under the regulations if it does not have foreign exchange risk.¹³⁵ Central Bank policies and procedures allow it to purchase foreign exchange for its own account as needed to offset amounts payable in a foreign currency. The bank will not, however, carry an inventory of foreign currency beyond the regulation requirements, except for minimum deposits required for normal correspondent account relationships.¹³⁶

The anti-speculation clause of the amendments, and the language of Section 3.7(a) (amended § 304), may preclude the operation of a regular money desk in foreign exchange. Considerable freedom to operate in Eurocurrency and Eurobond markets, as well as in regular foreign exchange markets, is necessary to operate effectively in world markets. The foreign exchange market place is a complex, fluid, and efficient arena of operation. A foreign exchange operation lends currency routinely in the Euro-market when conversion is inappropriate. Strict compliance with the amendments as passed, however, would call into question this activ-

rency are rarely perfect. CFTC regulations define hedging to include positions taken "where they are economically appropriate to the reduction of risks in the conduct of a commercial enterprise." See 17 C.F.R. §1.3(z)(1) (1981).

Most international financing transactions, however, require hedge positions that will not match the repayment terms. Whether this type of hedge will be available to co-ops may depend on which maturity positions constitute speculation. Also, it may become necessary to take foreign exchange positions that have nothing to do with individual transactions (*e.g.*, to ensure competitive pricing for exchange transactions). It is open to question whether a bank for cooperatives should be able to hedge like any other bank. See Memo, *supra* note 76, at D. Archer, Meeting of the Committee 3 (Sept. 19, 1980); R. Ireton and B. Zimmer, Talking Paper, H.R. 7548 4 (Aug. 30, 1980).

¹²⁹ 12 C.F.R. § 614.4900(c) (1983).

¹³⁰ *Id.* at § 614.4900(e).

¹³¹ *Id.* at § 614.4900(d).

¹³² *Id.* at § 614.4900(f).

¹³³ *Id.* at § 614.4900(g).

¹³⁴ *Id.* at § 614.4900(i).

¹³⁵ *Id.* at § 614.4900(j).

¹³⁶ MANUAL, *supra* note 102, no. 4-13 (codified at 12 C.F.R. §§ 614.4900, 615.5190 (1983)).

ity. Neither do the amendments give clear authority to buy as a hedge foreign obligations denominated in foreign currencies. They do, however, give authority to buy them only as an investment. Eurocurrency markets are also an important source of funds, and a means to invest in or generate major foreign currencies for trade transactions.¹³⁷

5. *Substantial Benefits*

The regulations state, as do the amendments, that an eligible cooperative must "substantially benefit" as a result of the loan, commitment, or assistance given for facilitating the eligible co-op's export or import operations.¹³⁸ There is no indication from the statute or the regulations whether the benefit must be direct. According to the Central Bank, the "substantial benefits" test has greater application when the loan is for the purchase or lease of a fixed asset. The Central Bank sees no problem with the test, and maintains that the assumption will be that the co-op will receive some benefit from most activities. Apparently, the nature of the transaction itself implies this assumption. The Central Bank will monitor the co-ops to make certain that there is a "substantial benefit," but there will be no definite rules concerning the test.¹³⁹ Central Bank policies and procedures state that the "substantial benefits" test will consider both ownership percentage and usage by the eligible cooperative as a percentage of the borrowing entity's business volume.¹⁴⁰ "Eligible third party," for the purposes of extending financial or other assistance, is defined as "a domestic or foreign party with respect to its transactions with an eligible cooperative or in which an eligible cooperative has at least a minimum ownership interest . . . wherein the eligible cooperative substantially benefits as a result of such loan commitment or assistance."¹⁴¹

¹³⁷ See *supra* note 76, at B. Zimmer, The Limitations of H.R. 7548 on Foreign Exchange in Participation in the Eurocurrency Markets 1-3 (Aug. 28, 1980). Mr. Zimmer also called continuing Eurocurrency market participants "winners," because of their continuing real application of foreign currency to actual business. He also distinguished between hedging in foreign exchange (where all contracts are delivered and there are no "losers") and hedging in commodities where the reverse is true. *Id.* at 4. Mr. Zimmer did not believe an FCA regulation, 5140, which would allow the FCS "investment instruments to support its financial operations, to manage its liquidity portfolios, and to invest its excess funds," was sufficient. He thought the actions of a cooperative bank in placing funds abroad on behalf of its customers seeking to maximize the use of those funds seemed far removed from the purposes of 5140. Nevertheless, even though the specific authority for banks for cooperatives to buy and sell drafts, checks, loans, acceptances, accounts, currencies, or obligations payable in recognized currencies was eliminated from the house bill, see H.R. 4782, 96th Cong., 2d Sess. § 301(c)(iii) (1980), an FCA committee agreed that this type of investment in Eurocurrency bonds could be allowed under the investment authority of the Act. Memo, *supra* note 76, at D. Archer, Meeting of the Committee 4 (Sept. 19, 1980). See 12 U.S.C. § 2122(13)(C) (1983).

¹³⁸ See 12 C.F.R. § 614.4210 (1982).

¹³⁹ March Interview, *supra* note 41. Apparently, the time frame is also important for determining whether the substantial benefits test is met. Determinations will probably be made on a case-by-case basis. *Id.*

¹⁴⁰ MANUAL, *supra* note 102, no. 4-1, FCA Reg. § 4120.

¹⁴¹ *Id.* at no. 4-2, FCA Regs. §§ 4700, 4354, 4210 (codified at 12 C.F.R. §§ 614.4210 &

6. Lending Limits

A district bank limits loans made to an individual borrower based on the percentage of the net worth of the district bank; one borrower may have only a restricted percentage of the bank's net worth outstanding at any one time.¹⁴² The percentage limitations for district banks are set forth in the regulations.¹⁴³ Loans secured by notes must be current, and must carry a full recourse endorsement or unconditional guarantee. The loans must be supported by documents of credit reporting, certification by a bank officer of financial responsibility, and other credit information supporting the loan as being justified.¹⁴⁴

The limits for the total system are based on the combined net worth of all the thirteen banks for cooperatives; loans to an individual borrower at any one time from one or more district banks and the Central Bank cannot exceed the prescribed percentage limitations for the system, which are the same as the prescribed percentage limitations for individual district banks.¹⁴⁵ Likewise, the Central Bank limits loans made to an individual borrower based on the percentage of the net worth of the Central Bank. The percentage limitations for the Central Bank are the same as the prescribed percentage limitations for the district banks.¹⁴⁶ There are also lending limits required for the purpose of purchasing participation in loans of another bank for cooperatives.¹⁴⁷

.4700 (1983)). This definition seems to combine the two separate categories of eligible third parties. One commentator suggested defining "minimum ownership interest" in the regulation, however, the Farm Credit Board felt that the term was effectively addressed in the regulations. 46 Fed. Reg. 51,876 (1981).

¹⁴² 12 C.F.R. § 614.4354(a) (1983). A suggestion to define "net worth" in the regulations was not followed because the term has been defined in the FCA Uniform Chart and Descriptions Account. 46 Fed. Reg. 51,877 (1982).

¹⁴³ 12 C.F.R. § 614.4354(a)(1) (1983). Term loans to any foreign and domestic parties who are not eligible cooperatives cannot exceed 10% of the bank's net worth. The sum of all loans made by the bank to any one borrower, pursuant to the lending power of the Amendments, must not exceed 50% of the bank's net worth. The regulations also place limits on term loans to eligible cooperatives (25%), lease loans (25%), standby letters of credit (35%), seasonal loans (35%), foreign trade receivables (50%), bankers' acceptances (50%), and letters of credit (50%).

¹⁴⁴ *Id.* at § 614.4354(a)(2). Policy and Procedure no. 4-6 defines secured loans. *See* MANUAL, *supra* note 102, at no. 4-6(3.f) FCA Regs. §§ 4140, 4150, 4220, 4260, 4261. One commentator on the regulations suggested that the banks for cooperatives be required to be responsible for assuring presentation of proper documents. The suggestion was rejected because of the common banking practice of structuring a letter of credit to be paid upon satisfaction of its terms and conditions. Typically, the terms and conditions of documents direct payment upon presentation of those documents. Some problems may arise, however, because FCA regulations forbid the banks to determine questions of fact or law involving the underlying transaction. *See* 46 Fed. Reg. 51,877 (1981). *See also infra* text accompanying notes 172-173.

¹⁴⁵ 12 C.F.R. § 614.4354(b) (1983). One commentator suggested limiting all third party loans by the banks to 10% of net worth and limiting direct leases to eligible co-ops to 25% of net worth. The suggestion was rejected as being too restrictive. 46 Fed. Reg. 55,086 (1981). *See supra* note 143.

¹⁴⁶ 12 C.F.R. § 614.4354(c) (1983). *See supra* note 143.

¹⁴⁷ 12 C.F.R. § 614.4354(d) (1983). *See also* MANUAL, *supra* note 102, at no. 4-15, FCA Reg. § 4120. The Central Bank is to cooperate and work with other sources of funding for international trade to provide additional sources of funding and services. *See id.* no. 4-16, FCA Reg. § 4120.

The regulations allow for setting interest rates individually, and for changing interest rates either on a case-by-case basis or pursuant to a rate plan. A rate plan, however, must be based on certain policies, objectives, and guidelines.¹⁴⁸ Central Bank interest rates for international financing are based on competitive commercial rates for comparable terms and risks and may be fixed, floating, or variable.¹⁴⁹

Term loans may be hedged,¹⁵⁰ and may be utilized to finance eligible third parties. Term loans require both a loan agreement and documents that evidence the loan and set forth its terms and conditions. Term loans must be denominated in a currency that eliminates foreign exchange risk on repayment. The borrower's obligation must be guaranteed or insured against default unless the borrower has a high credit rating or a longstanding relationship with the co-op. There must be limits on the financing to the foreign borrower when the co-op has less than a majority interest in ownership, and each individual loan must have prior approval by the FCA.¹⁵¹

7. *International Financing Methods*

To understand the financing regulations, it is useful to understand the various transaction methods used in financing international agricultural trade. The four methods of payment or financing in international trade are as follows: 1) cash in advance, which is utilized when the buyer is unknown or when there is uncertainty of payment; 2) open account, which is utilized when the seller finances the buyer; 3) payment on a collection basis, which requires the seller to forward documents, including the draft, to the buyer through the buyer's overseas bank; and 4) documentary letters of credit.¹⁵²

A comprehensive survey of twenty-one major cooperative exporters demonstrated that open accounts accounted for over one-half of the total number of export transactions, payments on a collection basis accounted

¹⁴⁸ 12 C.F.R. § 614.4280 (1983).

¹⁴⁹ MANUAL, *supra* note 102, at no. 4-3, FCA Reg. § 4280.

¹⁵⁰ MANUAL, *supra* note 102, no. 4-8.

¹⁵¹ 12 C.F.R. § 614.4280 (1983). Loan agreements must be pursuant to a credit analysis. *See* MANUAL, *supra* note 102, no. 4-8, FCA Reg. § 4210. Credit may be extended by term loans for capital improvements, fixed asset acquisition, specific project financing, etc. There are specific guidelines for amount, length of term repayment, and collateral. Term loans must make use of available guarantee or insurance programs. Credit may be extended for more than 12 months for financing specific trade transactions under a U.S. Government agency guarantee or insurance program. *See id.* at nos. 4-6, 4-8.

¹⁵² FINANCIAL SERVICES DEPT., CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO, COMMERCIAL LETTERS OF CREDIT, *reprinted in* ALI-ABA COMMITTEE ON CONTINUING EDUCATION, INTERNATIONAL TRADE FOR THE NONSPECIALIST: RESOURCE MATERIALS 15-16 (1979) [hereinafter cited as INT'L. TRADE RESOURCE MATERIALS]. Collections are effected by banks through correspondent banking channels. *Report, supra* note 6, at 4. The banks for cooperatives can assist co-ops in importing and exporting on a collection basis by helping with documents and drafts. *See* BANKS FOR COOPERATIVES, INTERNATIONAL BANKING SERVICES (a brochure on offered services under the new amendments) [hereinafter cited as BROCHURE].

for over one-third; and letters of credit accounted for approximately one-fifth.¹⁵³

The banks for cooperatives are authorized to finance the following foreign trade receivables on behalf of eligible cooperatives: 1) advances against collections of monies pursuant to the transaction; 2) trade acceptances, which are drafts in which the buyer acknowledges responsibility to pay; 3) loans to a factor when another party handles the exporter's accounts, taking full title to the exporter's accounts receivable, thereby relieving the exporter of the risk and facilitating sales; and 4) open account.¹⁵⁴

Foreign trade receivable financing programs through the banks for cooperatives are allowed. In these programs, parties pledge collections and borrow on them up to a stated maximum percentage of the total amount of receivables pledged at any one time.¹⁵⁵ The Central Bank for Cooperatives may make loans to finance advances against collections or trade acceptances, or may purchase trade receivables of eligible co-ops for its own account. It may also purchase or advance against specific collections of payables of eligible cooperatives if the co-op will benefit substantially.¹⁵⁶ The banks for cooperatives may discount or rediscount notes, drafts, acceptances, and other negotiable paper at approved rates.¹⁵⁷ The banks may also rediscount with other purchasers the acceptances they have created.¹⁵⁸

8. *Banker's Acceptances*

Under the new regulations the lending limits apply to banker's acceptances. Banks for cooperatives can purchase participation in discounted acceptances of other banks in the system, hold their own

¹⁵³ *Report, supra* note 6 at 8.

¹⁵⁴ 12 C.F.R. § 614.4700(a) (1983).

¹⁵⁵ *Id.* at § 416.4700(e).

¹⁵⁶ *MANUAL, supra* note 102, at no. 4-9, FCA Reg. § 4700 (codified at 12 C.F.R. § 614.4700 (1983)).

¹⁵⁷ 12 C.F.R. § 614.4281 (1983). Reasonable fees and charges may be made for loans and services. *Id.* at § 614.4300.

¹⁵⁸ *Id.* at § 615.5550. An acceptance is a promise made by the drawee of a draft or bill of exchange that the instrument will be honored at maturity. The draft or bill is merely an order by the drawer to the drawee. No rights are created unless the drawee acknowledges his obligation to the drawer. An instrument acknowledged by the drawee is described as an "acceptance" and is fully negotiable. When the drawee is a merchant, the instrument is known as a "trade acceptance;" when the drawee is a bank, the instrument is known as a "bank acceptance" or "banker's acceptance." W. WARD & H. HARFIELD, *BANK CREDITS AND ACCEPTANCES*, 118 (1974). A bankers' acceptance is a short-term financing tool that has several uses and benefits. An acceptance credit (time draft) is frequently cheaper than a sight draft credit. The buyer's engagement of the bank is to pay upon maturity of the acceptance. No money changes hands at the time the seller delivers the merchandise, but the seller has the commitment of the bank to pay. There is a market for such paper and the seller can therefore obtain actual money by selling (discounting) the acceptance. *Id.* at 222. A discounting bank can rely on the acceptor's credit but the seller remains liable on the bill as maker. Lowenfield & Ehrlich, *The Letter of Credit Transaction*, in 2 *INTERNATIONAL PRIVATE TRADE INTERNATIONAL ECONOMIC LAW* § 5.22(d) (A. Lowenfield ed. 1975).

acceptance or discount bills and drafts, or sell participation to investors. In selling participation to investors, the co-op receives financing under the draft and, in effect, enters a market similar to the commercial paper market by using the bank's name. Investors are usually willing to buy the drafts because the drafts carry the obligation of the bank to pay at maturity. At maturity the bank pays the investor, and the co-op pays the bank the amount equal to the face amount of the draft.¹⁵⁹

The fiscal agency is authorized to accept drafts or bills of exchange drawn upon banks for cooperatives.¹⁶⁰ According to the regulations, banker's acceptances must not have maturities of more than 180 days, and must be derived from international trade transactions or domestic shipment or storage of agricultural commodities, farm supplies, or aquatic products involving eligible co-ops. The transactions must involve at least \$100,000 in amount.¹⁶¹

Banks for cooperatives may want to create banker's acceptances for three reasons: 1) to provide liquidity to the bank's loan portfolio;¹⁶² 2) to meet the competition from commercial banks by providing cheaper financing; and 3) to facilitate export-import trade financing. Banker's acceptances are a universally desired instrument because of their credit worthiness, their appropriateness for hedging, and their flexibility and liquidity.¹⁶³

Eligibility for borrowing is determined by reference to the party that benefits from the acceptance. If, for example, a U.S. co-op benefited from an acceptance but was not the maker of the acceptance, it would still be the eligible borrower. At the point when the bank for cooperatives sells the acceptance, the acceptance is no longer a loan to the co-op, but is an investment by the bank.¹⁶⁴

¹⁵⁹ See BROCHURE, *supra* note 152. The bank must determine if it is willing to undertake the credit exposure risk of obligating itself to pay at a future date. It may, however, discount the note and sell it. See CENTRAL BANK FOR COOPERATIVES, BANKERS' ACCEPTANCES, INTERNATIONAL SERVICES MANUAL, proc. nos. BA-5, BA-6 (1981) [hereinafter cited as INT'L SER. MANUAL].

¹⁶⁰ 12 C.F.R. § 614.4710 (1983). Acceptance financing must be within approved limits. See INT'L SER. MANUAL, *supra* note 159, proc. no. BA-4.

¹⁶¹ MANUAL, *supra* note 102, no. 4-10; FCA Regs. §§ 4710, 5550.

¹⁶² The resale of acceptances on the money market is a source of funds. The market for bankers' acceptances is an over-the-counter market made by perhaps ten to fifteen New York dealers. The Federal Open Market Committee of the Federal Reserve Bank has established rules and guidelines for drafts it will buy. See INT'L SER. MANUAL, *supra* note 159, at proc. no. BA-3; Cacy, *Is the Federal Reserve Hitting Its Money Supply Targets*, Monthly Review 3 (Feb. 1976).

¹⁶³ Memo, *supra* note 76, at B. Zimmer, Del Banner's Request for Justification for Creation of Bankers' Acceptances by the BC's (Sept. 15, 1980).

¹⁶⁴ Memo, *supra* note 76, at D. Archer, Meeting of Committee to Review Differences between House and Senate Versions of Amendments to the 1971 Act I (Sept. 19, 1980). See 12 U.S.C. §§ 82, 84 (1982) and 12 C.F.R. §§ 7.7420, 7.1510, 7.1530, 7.1550 (1983) for the limits on national banks regarding acceptances. The determination of eligibility for purchase by the Open Market Committee is based on 12 U.S.C. §§ 372, 373 (1982) and a series of regulations and interpretive rulings. Memo, *supra* note 76, at B. Zimmer, Legal Constraint on the Creation, Purchase, and Sale of Acceptances by National Banks 1-2 (July 28, 1980).

9. *Letters of Credit*¹⁶⁵

The banks for cooperatives are authorized to issue, advise, or confirm import or export letters of credit, to or on behalf of, their customers in accordance with the Uniform Commercial Code¹⁶⁶ or the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce.¹⁶⁷ The Central Bank may issue or confirm letters of credit to, or on behalf of, either domestic and foreign parties and cooperatives or district banks.¹⁶⁸ The regulations require that the letter of credit contain the following: an identification as a letter of credit; a specific expiration date; a sum certain; a named customer with a qualified obligation to reimburse the bank for letter of credit payments; a term stating that the letter of credit is irrevocable,¹⁶⁹ and a term stating the appropriate fees for services.¹⁷⁰ Letter of credit transactions must also be in compliance with the Export Administration Regulations, and Treasury Department Guidelines regarding restrictive trade practices or boycotts.¹⁷¹

It is the bank for cooperative's obligation to examine documents against the terms of the letter of credit, and if there is compliance, to pay the beneficiary and collect funds from the customer.¹⁷² The regulations require, however, that a bank's obligation arise only upon fulfillment of certain conditions. The bank, for instance, must not be called upon to determine questions of fact or law at issue between the account party and the beneficiary. It is unclear whether this means that the bank will require strict compliance with the terms of the letter of credit in all

¹⁶⁵ A letter of credit is a legal arrangement whereby an issuing bank undertakes either revocably or irrevocably to reimburse or cause to be reimbursed a third-party beneficiary in accordance with instructions from its customer. INT. TRADE RESOURCE MATERIALS, *supra* note 152, at 17. A documentary letter of credit will usually cover the importation of merchandise. When issued by the Central Bank, the bank is obligated to pay on behalf of the borrowing co-op, based on the terms dictated by the co-op in the application. INT'L. SER. MANUAL, *supra* note 159, at proc. no. I(1).

¹⁶⁶ U.C.C. § 5-101 (1972).

¹⁶⁷ The same rules apply to international and domestic letters of credit except where state laws are considered applicable. See MANUAL, *supra* note 102, no. 4-11 (codified at 12 C.F.R. §§ 614.4720-4810). Most letters of credit are expressly made subject to the *Uniform Customs and Practice of Documentary Credits*, INT'L. CHAMBER OF COMMERCE BROCHURE NO. 290 (1974). Bishop & Reynolds, *An Export Primer: Legal Aspects of Exporting from the United States*, 2 HOUS. J. INT'L. LAW 333, 341 (1980).

¹⁶⁸ See MANUAL, *supra* note 102, at no. 4. See also INT'L. SER. MANUAL, *supra* note 159, at proc. no. E(1). The banks require reimbursement for occasional out-of-pocket costs. See *id.* proc. no. M(9).

¹⁶⁹ Once an irrevocable letter of credit has been issued, its terms and conditions may be changed only by amendment agreed upon by all parties. See Letters of Credit, INT'L. SER. MANUAL, *supra* note 159, at proc. no. I(2).

¹⁷⁰ 12 C.F.R. § 614.4720 (1983).

¹⁷¹ INT'L SER. MANUAL, *supra* note 159, at proc. no. E(6). These regulations require compliance with specified boycott restrictions. Hence, the banks for cooperatives must be responsible for detecting prohibited boycott requests. Reports of such requests must be filed with the U.S. Treasury Department. *Id.*

¹⁷² See *id.* at proc. no. I(3).

cases.¹⁷³

The payment arrangements under a letter of credit are similar to those used with payment on a collection basis. In both cases, the seller obtains payment for the merchandise by presenting documents that include proof of shipping documents and the draft for the amount of sale. The documents in the payment by collection case, however, represent the liability of the buyer to the seller alone, while the letter of credit obligates the issuing bank to pay either the seller or any legitimate holder of the documents upon presentation of the documents. By issuing the letter, the bank adds its undertaking of payment to the transaction and gives assurance to both the seller and the buyer.¹⁷⁴

The banks for cooperatives are authorized to issue standby letters of credit for financing that represent an obligation to the beneficiary on the part of the issuer to repay money borrowed by, advanced to, or for the account of the account party, to make payment on account of any indebtedness undertaken by the account party, or to make payment on account of any default by the account party in performance of an obligation.¹⁷⁵ A standby letter of credit represents a bank's commitment to pay if an event such as failure of performance occurs. The documents must certify that the event did occur.¹⁷⁶ The standby letter of credit serves as an assurance that the applicant will fulfill the obligations under a contract, and the beneficiary draws under the standby letter of credit only when the applicant fails to meet his obligations.¹⁷⁷

To reduce credit and political risks associated with foreign trade receivable financing, the banks for cooperatives must avail themselves of

¹⁷³ For cases dealing with fraud in the documents (or nonconformance or falsity of documents) and the bank's duty or interest in guarding against breach of warranty for quality (non-conformance) see *Maurice O'Meara Co. v. National Bank of New York*, 146 N.E. 636 (Ct. App. 1925), and *Sztejn v. J. Henry Schroder Banking Corp.*, 31 N.Y.S.2d 631 (1941). Generally, compliance with the terms of a letter of credit means strict compliance, and a bank is not bound to honor drafts presented to it unless those drafts, with the accompanying documents, are in strict accord with the credit as opened. See, e.g., *R.H. Rayner and Company, Ltd. v. Hambro's Bank Ltd.*, 1 K.B. 36 (1943). But see *Dixon, Iramds & Cia. Ltd. v. Chase National Bank of New York*, 144 F.2d 759 (2d Cir. 1944), where deviations were allowed on the basis of custom and usage when the deviation was immaterial (or a slight inconvenience), or there was no real distinction between methods.

¹⁷⁴ INT'L. TRADE RESOURCE MATERIALS, *supra* note 152, at 17. Banks for cooperatives will issue "back-to-back" and revolving letters of credit. They will also issue letters of credit in foreign currency. See INT'L. SER. MANUAL, *supra* note 159, at proc. no. M(5), M(6), M(8). The Central Bank will issue deferred payment and "red clause" letters of credit. A "red clause" letter enables the seller to receive an advance from the advising bank to purchase goods or raw materials. *Id.* at proc. no. E(5), I(5).

¹⁷⁵ 12 C.F.R. § 614.4810 (1983). See also MANUAL, *supra* note 102, at no. 4-11.

¹⁷⁶ INT'L SERV. MANUAL, *supra* note 159, at proc. no. S(1). Some standby letters of credit are renewed automatically on expiration date (this is called an "evergreen clause"). This type of letter of credit is used for transactions of more than a year in length when a bank would not be willing to issue an ordinary letter of credit. The banks for cooperatives will issue these. *Id.* at proc. no. S(2).

¹⁷⁷ INT'L TRADE RESOURCES MATERIALS, *supra* note 152, at 49. Standby letters of credit are used primarily to assure payment on open account sales, to assure performance on a contract, or to assure payment of funds borrowed. *Id.* at 50.

guarantee and assurance programs, and of plans available in the United States and other countries, such as those offered by the Foreign Credit Insurance Association and the Export-Import Bank of the United States.¹⁷⁸

10. *Other Aspects of Financing*

Banks for cooperatives can lend credit, indemnify, or otherwise become a guarantor to a domestic or foreign trade partner or another eligible cooperative if the eligible cooperative substantially benefits from the performance in the transaction involved. The agreement must specify a maximum monetary liability. Guarantees can be secured or unsecured and can be for nonpayment of taxes, rentals, cost of transport, customs duties, loss, or non-conformance of shipping documents.¹⁷⁹

C. *Logistics*

The Farm Credit Administration has expressed concern about the banks for cooperatives' lack of expertise and lack of experience in export-import financing. It initially sought to have a central authority for most functions and operations. It will be at least three years before the district banks will be able to operate in the areas of letters of credit, foreign correspondent banking, and credit availability to eligible third parties. In the meantime, the Central Bank will handle all the third party loans and the district banks will handle most of the loans made directly to eligible cooperatives. The Central Bank will be the umbrella under which all of the international activities of the banks for cooperatives will be transacted, providing coordination and assistance when they do not have primary responsibility.¹⁸⁰

¹⁷⁸ 12 C.F.R. § 614.4700(b) (1983). Exceptions for the requirement may be made for borrowers with high credit ratings or with long-standing business relationships with eligible co-ops. *Id.* One commentator on the regulations suggested identifying some of the guarantee or insurance plans to be used, 46 Fed. Reg. 51,376 (1981). This suggestion was followed in part. Others, such as the World Bank, Overseas Private Investment Corporation, and the U.S. Dept. of Agriculture's various programs (CCC, GSM, Pub. L. 480), not mentioned in the regulations, are mentioned in policies and procedures. See MANUAL, *supra* note 102, at no. 46(3.E). Guarantees also include credit extended under a prime commercial bank, confirmation, endorsement, or standby letters of credit. See *id.*

¹⁷⁹ 12 C.F.R. § 614.4800 (1983). The loan commitment must be approved before the bank becomes a party to the guarantee or suretyship. *Id.*; MANUAL, *supra* note 102, at no. 4-12. Domestic guarantees and contracts of suretyship must be in accordance with state law. International guarantee contracts must be in accordance with the Uniform Rules for Contract Guarantees of the International Chamber of Commerce. *Id.* The Central Bank may also issue bills of lading guarantees. See INT'L SER. MANUAL, *supra* note 159, at proc. no. M(4).

¹⁸⁰ March Interview, *supra* note 41. This policy is based on informal FCA policy. Ever since this paper's initial completion in August, 1982, and for a considerable time thereafter, the banks for cooperatives have talked about the passage of a three year period before the district banks will be able to engage in expanded international activities. Presumably, the actual date for full district bank involvement is rather indefinite. Nevertheless, the Central Bank claims that all the district banks have progressed in the area of international services, including involvement in the International Services Committee, joint calling efforts on cooperatives with

The Central Bank has the technical expertise for providing international services; most district banks do not.¹⁸¹ The Central Bank will always handle country risk analysis either directly or through consultants. The Central Bank will also handle most of the necessary documentation. Even though the Central Bank has had an International Services Committee for about three and one-half years, it has had formal policies and procedures for only a few months.¹⁸² Actual experience in implementing the amendments, therefore, is lacking.

According to the Central Bank, the real focus of international trade activities will be through correspondent banks working with foreign banks, not through buyers and sellers.¹⁸³ The law, however, will not allow the Central Bank to become a trader in foreign exchange.¹⁸⁴

An International Departmental Practices Manual is to be adopted for the presentation and approval of all credit extended to eligible third parties.¹⁸⁵ Each credit approval request must be supported by a determination of borrower eligibility, proper documentation, and an analysis of the risks to the Central Bank.¹⁸⁶

In keeping with accepted banking standards for international trade, the Central Bank staff must endeavor to find suitable credit bases to extend direct loans to domestic and foreign parties.¹⁸⁷ A loan committee actually makes decisions on what constitutes a suitable credit basis. A loan account officer reports to the committee and explains eligibility, reputation, and country risk.¹⁸⁸ The loan committee must ensure that appropriate provisions for loan servicing are in place for each loan account.¹⁸⁹

Financial statements must support all loans and commitments.¹⁹⁰ Regular monthly reports to the board of directors of the bank must be made for all new direct loans, significant deviations from the board-ap-

Central Bank officers, and training and educational programs for bank staff involved in marketing and processing of transactions. June Letter, *supra* note 126.

¹⁸¹ March Interview, *supra* note 41. The Sacramento Bank for Cooperatives has a director of export marketing service activities (V.P., International Services) who has been employed since November, 1981. At this writing, it is the only bank for cooperatives that has progressed that far.

¹⁸² *Id.*

¹⁸³ *Id.* The Central Bank says there will be some direct financing of foreign exporters and importers.

¹⁸⁴ *Id.* The Central Bank will probably keep only small balances of various currencies in bank accounts. It will hold large amounts only for the brief time money is actually passing between parties as part of the transaction.

¹⁸⁵ See MANUAL, *supra* note 102, at no. 4-6(5A). The loan committee is to be responsible for all appropriate standards. *Id.* at no. 4-6(5B). Credit services are to be provided in accordance with the International Services Business Plan. *Id.* at no. 4-1.

¹⁸⁶ *Id.* at no. 4-6(5D).

¹⁸⁷ *Id.* at no. 4-6(1). The International Services Department is required to be knowledgeable, maintain expertise, and develop and maintain standards for credit and security. *Id.*

¹⁸⁸ *Id.* at no. 4-6(2).

¹⁸⁹ *Id.* at no. 4-18 (FCA Reg. § 4510). Plans must be established for each "problem account loan". *Id.*

¹⁹⁰ *Id.* at no. 4-19.

proved financial plan, and credit extended for each foreign country.¹⁹¹ The maturity distribution, by currency, of foreign currency assets, liabilities, and foreign exchange contracts, as well as the individual and total value of outstanding foreign exchange with each individual country, must be reported daily to the senior vice president and manager of the International Services Department.¹⁹²

Although the Central Bank will do most of the background work on loans and other methods of financing, the district banks are to be the providers of services in most cases, and most loans will be made through them.¹⁹³ Promotion for the new services provided under the international trade financing amendments has been done mostly by the Central Bank, although some has been done by the district banks alone or jointly with the Central Bank. Most promotion has been done on a one-on-one basis with proven export cooperatives, and some seminars have been held. Basically, the banks for cooperatives are attempting to identify specific international transactions where there is a role for them to play. The banks are not yet in a position to make an all out effort at promotion because they are not physically prepared to handle a large number of borrowers.¹⁹⁴

One problem not addressed by the statute or regulation policies and procedures, is the considerable amount of legal work that will be required as the international services of the banks for cooperatives develop. Although much law exists in many of the areas addressed by the statutes and regulations, considerable legal work will be necessary to assure proper documentation, and to solve problems arising from making and collecting loans in the international arena.¹⁹⁵

III. Effects of the law

All U.S. commercial banks that are active internationally utilize foreign branches, Edge Act Corporations, and Bank Holding Company investment vehicles. These "banks" are capable of providing the full range of about fifty international services.¹⁹⁶ In the new legislation, the banks for cooperatives sought only twenty-eight of these services, and some only

¹⁹¹ *Id.* at no. 4-3(1).

¹⁹² *Id.* at 4-13(2B), (2C).

¹⁹³ March Interview, *supra* note 41. The Central Bank will give assistance in providing services, including technical services to enhance engagement in international trade. *See* MANUAL, *supra* note 102, at no. 4-1. The district banks are responsible for the origination of all letters of credit in their servicing area. The Central Bank is to provide assistance as needed. *See* INT'L SER. MANUAL, *supra* note 159, at Suggested District Bank Desk Procedures/Guidelines for Issuing Import L/C's for Cooperative, Exhibits B and E. The Central Bank is responsible for marketing international noncooperative acceptances to third parties. The district banks are responsible for marketing these services through eligible co-ops in their servicing areas, however. *Id.* at Exhibit G.

¹⁹⁴ March Interview, *supra* note 41.

¹⁹⁵ *See Report*, *supra* note 6, at 54.

¹⁹⁶ Memo, *supra* note 76, at J. Zwick, The Objective of the BC Export Finance Legislation and the Relationship Between the Sought-After Authorities and Commercial Banks' Interna-

in limited form.¹⁹⁷ According to the FCA, the international banking aspirations of the Farm Credit System are quite limited. Their aspirations relate exclusively to the trade financing requirements of cooperative members. Thus, commercial banks will continue to enjoy far greater latitude in the conduct of international finance than the banks for cooperatives. It is even envisioned that much of the contemplated cooperative activity will be conducted in concert with commercial banks. This could occur when the banks for cooperatives could not legally participate in activities, such as underwriting of Eurocurrency loans, portfolio management, brokering, making loans to foreign governments, or providing depository facilities.¹⁹⁸ In congressional hearings, the president of the Central Bank reaffirmed this notion saying, "We would, in large measure, use the facilities of commercial banks in implementation."¹⁹⁹

Although the new business for cooperatives may enhance opportunities in international banking for commercial banks, each banking service to be provided by the banks for cooperatives is already provided by commercial banks and related entities.²⁰⁰ Eventually, the commercial banks will lose some old business. Yet, in the provision of domestic credit required by agricultural co-ops, the commercial banks have worked in partnership with the banks for cooperatives. The banks for cooperatives have even relied on the commercial banks for credit analysis and loan decisions.²⁰¹

The President of Bankers Trust Company of New York stated that commercial banks could benefit in three ways from the expansion of agricultural trade that will result from the banks for cooperatives helping new exporters and entering new markets: 1) commercial banks will participate in a larger pool of funds as depository banks; 2) commercial banks will be asked to participate in cooperative loans; and 3) commercial banks will still play a major role in transactional activities because of their network of foreign branches and affiliates.²⁰²

Despite past relations with commercial banks, the banks for cooperatives envision a "system facility representing or controlling thousands of transactions and commanding far more attention and effectiveness of service than can any single borrower."²⁰³ Their 1976 report stated that it would be "advantageous to establish relationships with the international

tional Financing Operations 1 (Apr. 3, 1980). The 1976 Report also listed commercial bank activities. *Report, supra* note 6, at 22-27.

¹⁹⁷ Memo, *supra* note 76, at J. Zwick. Another FCA memo listed only 25 "specific services" sought by the banks for cooperatives in the original bills. *See Id.* at The International Banking Authorities Sought by the Banks for Cooperatives: Rationale and Form of Usage.

¹⁹⁸ *Id.* at 2.

¹⁹⁹ 1979 Senate Hearings, *supra* note 75, at 26 (statement of Malcolm Harding).

²⁰⁰ *See* Memo, *supra* note 76, at The International Banking Authorities Sought by the Banks for Cooperatives: Rationale and Form of Usage.

²⁰¹ *Id.* at B. Zimmer, Response to Legislative Question 1-2 (July 7, 1980).

²⁰² John Hannon, Speech to Banks for Cooperatives (Mar. 6, 1980).

²⁰³ *See Report, supra* note 6, at 41.

departments of one or two major domestic banks," and that the use of them will be restricted to a "relatively few special needs."²⁰⁴ It also stated, "Direct correspondent relationships with U.S. offices or affiliates of foreign banks hold much greater significance."²⁰⁵

Farm Credit System supporters raise three issues concerning competition among commercial banks and banks for cooperatives: 1) whether commercial banks are helpful in maximizing farm profits by encouraging direct export sales; 2) whether agricultural exports are being funneled through the large private international firms because of their access to good financing from U.S. and foreign money center banks; and 3) whether commercial banks are providing cooperatives with the necessary financial services to facilitate their export sales.²⁰⁶

It is the goal of the new Farm Credit Act Amendments to move cooperative ownership and control of agricultural commodities further along in the marketing channels leading from U.S. farms to foreign users.²⁰⁷ The amendments, however, do place certain restrictions on the banks for cooperatives in lending and other activities. The FCA states that the projected financing authorized by the new provisions is not great because the banks can only lend to a cooperative's customers or to the cooperatives themselves.²⁰⁸ The FCA also states that the investment and lending powers of the banks for cooperatives are not as great as those that the commercial bank holding companies enjoy, and are far less expansive than those sought by commercial banks under a variety of pending bills associated with integrated export trading companies.²⁰⁹

Concern about commercial banks attracting larger cooperatives

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Memo, *supra* note 76, at B. Zimmer, Response to Legislative Question 3 (July 7, 1980).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at B. Zimmer, Response to the Amendment and Remarks Offered by Congresswoman Heckler of Massachusetts 5. Large money center commercial banks continue to draw hundreds of billions of dollars to support international project financing and loans to the high-risk, less developed countries. The total U.S. Farm Credit System has only drawn some \$60 billion. *Id.*

²⁰⁹ *Id.* at 1-2; *see, e.g.*, The Export Trading Company Act of 1980, S. 2718, 96th Cong., 2d Sess. (1980). Since the original completion of this article, Congress has passed the Export Trading Company Act of 1982, which basically gives export trading companies greater access to financial resources and marketing information with which to export U.S. goods and services, by enabling certain banking organizations (bank holding companies, bankers' banks, Edge Act corporations, and agreement corporations that are subsidiaries of bank holding companies) to invest a limited proportion of their capital and surplus in export trading companies, and to lend to these companies for the purposes of financing exports. These new associations, formed for the purpose of exporting services, will also enjoy exemption from U.S. antitrust legislation under the Webb-Pomerene Act. *See* 96 Stat. 1233 (1982), 15 U.S.C. §§ 4001-4003 (1983). Before this new legislation, commercial banks were prohibited from acquiring for their own account "any shares of stock of any corporation." The Export Trading Company Act of 1980, S. 2718, 96th Cong., 2d Sess. 288 (citing The Glass-Steagall Act (codified at 12 U.S.C. § 24 (1982))). Certain ownership activity by bank holding companies was also prohibited. The Bank Holding Company Act of 1956 (codified at 12 U.S.C. § 1843(a) (1982)). *See also, e.g.*, 12 U.S.C. § 1843(c) (1982). Edge Act corporations were also prohibited from making certain investments. The Export Trading Company Act of 1980 at 287-288 (citing 12 U.S.C. § 615(a), (c) (1982)).

was, perhaps, a motivating reason behind the introduction of the 1980 amendments. The 1976 Report states that the banks for cooperatives have "seen a few instances in which important borrowers arranged lines of credit with major commercial banks solely or primarily to obtain better access to those banks' international activities."²¹⁰ The banks for cooperatives wanted to strengthen district banks' relationships with present borrowers and create or enhance opportunities for additional financing, but deny a possible "toehold" to commercial banks.²¹¹

The Central Bank states that it will be cost-competitive with commercial banks, but it does not expect to corner all of the export servicing market for cooperatives.²¹² It believes, however, that it is reasonable to expect a significant percentage of this activity to accrue to the bank's new international department.²¹³

According to the FCA, cooperatives do not foresee the new authorities as having an immediate effect on agricultural export levels. Rather, they believe that knowledge of access to international financing by farmer cooperative-owned banks will allow them more flexibility to negotiate future export arrangements with foreign buyers.²¹⁴ As cooperatives are able to provide alternative financing arrangements, perhaps there will be a gradual increase in demand for cooperative agricultural exports.

IV. Conclusion

Although the Farm Credit Act Amendments of 1980 may eventually have a profound effect on the export and import of agricultural commodities in this country, particularly by cooperatives, it will be quite some time before a determination can be made as to the magnitude of that effect.

First, the banks for cooperatives, the Central Bank, and especially the district banks are just now getting their feet wet. This area of financing is not something to move into with blinders on. It will take time for the banks for cooperatives to be able to offer the kind of service, expertise, contacts, and efficiency that the large international commercial banks can offer. In fact, under the present legislation, the banks for cooperatives will never be able to offer the complete range of services that commercial banks can offer. Second, in recent years, many cooperatives expanded their export capabilities and built up relationships with commercial banks, or found other satisfactory ways to market their export commodities. These relationships and export techniques will not be discarded hastily. Cooperatives will probably not rush to their primary do-

²¹⁰ Report, *supra* note 6, at 90-91.

²¹¹ *Id.*

²¹² March Interview, *supra* note 41.

²¹³ Report, *supra* note 6, at 49.

²¹⁴ Memo, *supra* note 76, at Response to the Amendment and Remarks Offered by Congresswoman Heckler of Massachusetts 5.

mestic lender for assistance under the new authority. The process of change-over, if it ever occurs in large numbers, will probably take several years. Certainly, some cooperatives, especially those new to the export scene and the smaller exporters, will turn immediately to the banks for cooperatives. Some veteran exporters will doubtless do likewise. It seems likely, however, that most of the old hands will do so, if at all, only after carefully weighing all of the options.

Finally, the future for international financing by the banks for cooperatives, and the future for cooperative exporting, probably lies with the new markets, which are the less developed countries. As the less developed countries and some of the developed countries begin turning to more government control of their trading activities, as tender offers become more prevalent, and as more long-term commodity agreements are used, cooperatives which find themselves losing out in the competitive market to the large multinational or private firms will turn more and more to the cooperative financial support that that they can receive under the programs now available through the banks for cooperatives.

Certainly, the new amendments provide an important alternative to commercial bank financing of international transactions for all eligible cooperatives and their trading partners. The amendments, however, are probably not the immediate answer to furthering significantly the agricultural exports of this country, at least not by themselves. It is hoped, however, that over the next few years, they will prove to be a part of the answer.

