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## Establishment of a Banking Presence in the United States by Foreign Banks

*Saturnino E. Lucio, II\**

There are numerous ways in which a foreign bank can establish a banking presence in the United States. The organizational options range from the formation or acquisition of a full service domestic bank to the establishment of a representative office acting only as a liaison between the foreign bank and its U.S. customers and correspondent banks. Which option is most appropriate in a given instance depends on the business objectives of a foreign bank and the powers which may be exercised by each type of banking organization under applicable law.

The alternatives available to a foreign bank can generally be grouped into four categories. First are organizations permitting a foreign bank to conduct a wide spectrum of international and domestic banking activities in this country. This category includes federal and state commercial banks, and international bank branches. Second are organizations largely restricted to conducting international banking business. This category encompasses federal and state international banking agencies, federal Edge Act Corporations ("Edges"), and state Agreement Corporations.<sup>1</sup> Third are organizations engaging in very limited banking functions. These organizations include federal and state representative offices, state commercial lending subsidiaries, and federal private banks.<sup>2</sup> Finally,

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<sup>1</sup> An Edge is an international banking corporation chartered by the U.S. Federal Reserve Board to engage in activities related to international and foreign banking and finance. 12 U.S.C. § 611 (1982). An agreement corporation is a state corporation which enters into an agreement with the Federal Reserve Board by which it may exercise the same powers of an Edge, subject to the same restrictions. 12 U.S.C. §§ 601-604 (1982); 12 C.F.R. § 211.4(f) (1986). An agreement corporation can be used to avoid specific restrictions applicable to Edges, such as limitations on foreign bank participation in the ownership and management of the corporation. See Note, *The International Banking Act of 1978: Federal Regulation of Foreign Banks in the United States*, 8 GA. J. INT. & COMP. L. 145, 161 n.118 (1978).

<sup>2</sup> A federal private bank does not make loans but simply holds and invests its customers' deposits (usually for foreign clients) and provides personalized banking services such as investment advice and other commercial "concierge" type financial services. Since this type of institution does not make loans, it is not a "bank" under the traditional defini-

more exotic options, such as state international bank administrative offices and state investment corporations are available.<sup>3</sup>

Many of these alternatives exist at both the federal and state levels of government. This is characteristic of the dual nature of the U.S. banking system, under which financial institutions can be chartered by the federal government<sup>4</sup> and by the various state governments.<sup>5</sup>

Laws governing state chartered banks vary significantly in the range of powers that they permit foreign banks to exercise within their borders. This diversity reflects varying concerns about the treatment of domestic customers by foreign banks and a protectionist desire to reserve certain types of banking business, such as domestic deposit-taking and trust business for local banks. Federal law encourages the diversity by permitting states to override certain aspects of federal banking law regarding the powers of foreign banks in the United States.<sup>6</sup>

Federal law did not provide for a foreign banking presence until fairly recently. Prior to 1978, foreign banks seeking to establish themselves in this country had to do so under state law. Several states, such as New York, California, Illinois, and Florida, permitted foreign banks a fairly wide range of organizational options.<sup>7</sup> A few states denied entry to all foreign banks.<sup>8</sup> The vast majority of states, however, simply made no provision for allowing foreign banks to operate within their borders.<sup>9</sup> Despite these limitations, as of 1978 there were well over 500 foreign banking subsidiaries, branches, agencies, and representative offices operating in the United States.<sup>10</sup>

The federal International Bank Act of 1978<sup>11</sup> revolutionized and

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tion. See 12 U.S.C. § 1841(c) (1982). There is no comparable state chartered option under Florida banking law.

<sup>3</sup> An "investment corporation" may be established in New York to conduct international banking business as well as to deal in securities. See N.Y. BANKING LAW, §§ 507, 508(5) (McKinney 1982). As of 1984, there were 10 investment companies chartered in New York. *American Banker Ranks the Foreign Banks In the United States*, AM. BANKER, February 21, 1985, at 37.

<sup>4</sup> The office of the Comptroller of the Currency (OCC) grants bank charters on behalf of the federal government.

<sup>5</sup> See generally Hablutzel & Lutz, *Foreign Banks in the United States After the International Banking Act of 1978: The New Dual System*, 96 BANKING L.J. 133 (1978).

<sup>6</sup> 12 U.S.C. §§ 3102, 3103 (1982). The purpose of these laws is to respect any state law prohibition on the entry of out-of-state banks into a state's banking business. See also 12 U.S.C. § 1842(d) (1982).

<sup>7</sup> See generally Hablutzel & Lutz, *supra* note 5, at 141-44.

<sup>8</sup> These states included Minnesota, Ohio, Iowa, Missouri, South Carolina, and Vermont. See Hablutzel & Lutz, *supra* note 5, at 141.

<sup>9</sup> *Id.*

<sup>10</sup> See Note, *supra* note 1, at 154. By contrast, as of June 30, 1984 there were over 906 foreign banking organizations in the United States with 813 of these concentrated in 10 major cities such as New York, Los Angeles, and Miami. See *American Banker Ranks the Foreign Banks In the United States*, AM. BANKER, February 21, 1985, at 37.

<sup>11</sup> 12 U.S.C. §§ 3101-3108 (1982).

largely "federalized" foreign banking operations in the United States. First, the Act permitted foreign banks to establish a direct banking presence, in the form of an international branch or agency, in states not purporting to bar the entry of foreign banks.<sup>12</sup> Thus, a federal chartering opportunity was created in states making no provision for foreign bank entry and in states already allowing foreign bank operations. This option has produced a healthy tension between federal and state bank regulation and has led to greater flexibility in the treatment of foreign banks in some states.<sup>13</sup>

Second, the Act relaxed the rules regarding foreign banking ownership and control of Edges and national banks. Prior law required that all members of the board of directors of each such institution be U.S. citizens.<sup>14</sup> The Act altered this requirement to allow a majority of the board of directors of a foreign-controlled Edge to consist of non-U.S. citizens, and to allow, with special regulatory approval, a minority of the board of a national bank to be composed of non-U.S. citizens.<sup>15</sup> This permitted foreign banks to exert direct control and management of their U.S. subsidiaries. In addition, the Act expanded the powers of Edges and permitted these institutions to establish branches outside the United States.<sup>16</sup>

Third, the Act established a layer of federal regulation over certain aspects of foreign bank operation in the United States. For instance, all branches and agencies of foreign banks that were part of a financial group having worldwide consolidated assets in excess of one billion dollars were required to observe certain federal reserve

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<sup>12</sup> *Id.* § 3102.

<sup>13</sup> An example of this can be found in Florida. Florida law, like federal law, prohibited foreign banks from all deposit-taking activities. In 1980, however, the OCC allowed federal international banking agencies to accept deposits from nonresidents. 12 C.F.R. § 28.2(b) (1980). *Cf.* Conference of State Bank Supervisors v. Conover, 715 F.2d 604 (D.C. Cir.), *cert. denied*, 466 U.S. 927 (1983) (court struck down the federal agencies' power to accept deposits from nonresidents).

The Florida banking authorities reacted to the *Conover* decision by sponsoring new state legislation providing that state international banking agencies could accept non-U.S. deposits. FLA. STAT. § 663.06(5)(A)-.06(5)(C) (1985). *See* Lewis, *Recent Legal Developments Affecting International Banking in Florida*, 3 INT. L.Q. 1-3 (1984) (Mr. Lewis is the Florida Comptroller who directs the Florida Department of Banking (FDB), i.e., the state equivalent of the OCC). This legislation also modified the reciprocity requirement of FLA. STAT. § 663.04(2)(a) by providing that the FDB need not consider reciprocity as a factor in granting a bank license to a foreign bank if the OCC "could issue a license" to the foreign bank regardless of reciprocity. *Id.* § 663.04(2)(b). The OCC's general policy to ignore state reciprocity statutes was reaffirmed in the *Conover* decision. *Conover*, 715 F.2d at 604. Hence, reciprocity appears to be a moot issue in Florida, although state international banking agency applications must contain a short description of the treatment of U.S. banks in the country of the foreign bank.

<sup>14</sup> Note, *supra* note 1, at 155-56 n.80.

<sup>15</sup> 12 U.S.C. §§ 72, 614 (1982).

<sup>16</sup> 12 C.F.R. § 211.3(a) (1985). *See generally* C.E. Hornsby & S.E. Lucio, *Recent Developments in International Banking Law* paper presented at the Florida Bar Banking Law Update Conference (1980) (available from authors).

requirements,<sup>17</sup> and all branches of foreign banks engaged in retail local deposit-taking were required to insure those deposits with the Federal Deposit Insurance Corporation.<sup>18</sup>

More significantly, the Act provided that nonbanking activities of foreign banks in the United States, such as the underwriting of corporate securities, had to be discontinued or phased out over a number of years except where "grandfathered" under the terms of the Act.<sup>19</sup> This restriction was imposed to avoid granting foreign banks a competitive advantage over domestic banks which could not, under applicable law, engage in nonbanking activities.<sup>20</sup> Similarly, foreign banks were restricted by the Act with respect to the establishment of interstate operations. Each bank had to designate a "home state" where it maintained its main branch or agency and any deposit-taking outside the home state would be limited to Edge-type deposits.<sup>21</sup> This restriction is comparable to those applicable to domestic banking institutions which maintain operations in more than one state.<sup>22</sup>

This overview demonstrates that the pattern of foreign banking activity in the United States is a product of the historical development of state laws permitting the establishment of operations by foreign banks in certain key states and the continuing changes resulting in the International Banking Act of 1978. As an example of this pattern, and of the organizational options available to foreign banks, this article will analyze the major options available to foreign banks in the State of Florida.

Florida has permitted foreign banks to establish a presence in the state since 1977.<sup>23</sup> As of 1985, there were well over fifty foreign banks represented in Florida through one or more international banking organizations.<sup>24</sup> There are seven major organizational options available under Florida law.<sup>25</sup> They include the formation or

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<sup>17</sup> 12 U.S.C. § 3105(a)(2) (1982).

<sup>18</sup> *Id.* § 3104.

<sup>19</sup> *Id.* § 3103.

<sup>20</sup> *Id.* § 1843 generally prohibits any bank holding company from engaging in nonbanking activities, directly or indirectly through a subsidiary. National banks are also restricted to activities "incidental and necessary to carry on the business of banking." *Id.* § 24 (Seventh). See Hablutzel & Lutz, *supra* note 5, at 151-52.

<sup>21</sup> 12 U.S.C. § 3103 (1982). See generally Hablutzel & Lutz, *supra* note 5, at 150. Edge-type deposits are those incidental to international or foreign business, including deposits from foreign governments, persons and companies, as well as certain U.S. deposits in the nature of credit balances held with respect to such international banking business. See, e.g., 12 C.F.R. § 211.4(e)(1), (2) (1985).

<sup>22</sup> 12 U.S.C. § 1842(d) (1982).

<sup>23</sup> FLA. STAT. § 663.01-.14 (Supp. 1985). See Doss, *Florida's Invitation to the International Banking Community*, 51 FLA. B.J. 449 (1977).

<sup>24</sup> See Lewis, *International Banking: Now It's Firmly Established in Florida*, Miami Today, June 27, 1985, at 24, col. 2. In recent years, several of these banks have been closed due to the depressed economic conditions in Caribbean and Latin American banking markets.

<sup>25</sup> There are other options, such as the formation of a federal private bank or a state

acquisition of: (1) national domestic banks; (2) a federal international banking agency; (3) a state international banking agency; (4) an Edge; (5) a federal or state banking representative office; (6) a state commercial lending subsidiary; and (7) a state international banking administrative office.

Selecting from these varied options requires that a foreign bank fully understand the alternatives available as well as their use in furthering the foreign bank's business objectives.

### I. National Domestic Banks

Commercial banks in Florida may be organized under either a state or a federal charter. To enter commercial banking, a foreign bank may organize a new bank or acquire control of an existing bank located in Florida. Under Florida law, however, "no bank . . . the operations of which are principally conducted outside of this state, shall acquire, retain, or own, directly or indirectly . . . control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted . . ." <sup>26</sup> This statute, aimed at preventing domestic interstate banking, appears broad enough to prohibit a foreign bank from acquiring control over a state or national bank in Florida. Despite this language, the Florida Attorney General, the Florida Comptroller's Office, the OCC, and the Federal Reserve Board have taken the position that this prohibition could not constitutionally apply to prevent the acquisition by a foreign bank of a national bank in Florida. As a result, at least four foreign banks to date have acquired national banks in Florida. <sup>27</sup>

A foreign bank acquiring control of a bank in Florida must register with the Federal Reserve Board as a "bank holding company" pursuant to the federal Bank Holding Company Act of 1956

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agreement corporation, but these are rarely used vehicles. Because an "international banking facility" is not a separate entity but merely a segregated set of asset and liability records of an existing banking office, it may hold foreign deposits free of federal reserve requirements and limitations on interest paid on such accounts. *See generally* 12 C.F.R. § 217.1(1) (1985); FLA. STAT. § 665.071(1) (Cum. Supp. 1984); FLA. ADMIN. CODE ANN. § 3C-17.01 (1985). Florida law prohibits foreign banks from accepting local deposits or exercising fiduciary powers. Foreign banks may, therefore, not establish an international banking "branch" in the state. FLA. STAT. § 663.06(5) (Supp. 1985) (states which allow establishment of local deposit-taking "branches" include California and New York). Although Florida law also prohibits a foreign bank from acquiring a domestic bank, this prohibition has been construed not to prevent the formation or acquisition of a domestic national bank by a foreign banking group. Several such acquisitions have been consummated in recent years.

<sup>26</sup> FLA. STAT. § 658.29(1) (1985).

<sup>27</sup> The acquisitions include: (1) Miami National Bank by Banco Zaragozano; (2) Eagle National Bank by Banco de Colombia, S.A.; (3) Peoples National Bank of Hialeah by Banco Norienta de Venezuela; and (4) International Bank of Miami by Banco Zaragozano. None of these acquisitions have been contested.

(BHCA).<sup>28</sup> The BHCA might prohibit the foreign bank from acquiring a bank in Florida if it already owned a commercial bank in another state within the United States,<sup>29</sup> because a foreign bank that has designated a "home state" (a state where it receives domestic deposits) may not acquire a bank in another state.<sup>30</sup> The Edge alternative, however, would be available in this case.

The problems of acquisition can be resolved, especially where a foreign bank is closely held, by having the individual stockholders of the foreign bank acquire the bank in their individual capacities with funds from the foreign bank. Florida statutes do not prohibit foreign individuals from owning a state or national bank in Florida even if they also control a foreign bank.<sup>31</sup>

The United States Change in Bank Control Act of 1978<sup>32</sup> requires any individual or group of individuals to obtain the approval of the federal banking authorities prior to acquiring control of the voting stock of any federal or state insured bank.<sup>33</sup> Florida law also requires the prior approval of the Department of Banking and Finance before a controlling interest in a Florida bank may be purchased or acquired by a person or group of persons.<sup>34</sup> If the purchaser of a Florida bank is a corporation, it must register with the Federal Reserve Board as a bank holding company.<sup>35</sup>

## II. Federal International Banking Agency

A foreign bank may establish a federal international banking agency (FIBA) in Florida.<sup>36</sup> FIBAs operate as full service commercial banks in all respects except they can neither accept deposits nor exercise trust powers.<sup>37</sup> A FIBA can make any loan or investment a national bank can make, including commercial, industrial, real estate, and consumer loans. These loans may be secured or unsecured, domestic or international.<sup>38</sup> Other bank services, such as letters of credit, collections, money transfers, foreign exchange transactions and the like, are also permitted.<sup>39</sup>

Loans, investments, and other banking activities are subject to the same restrictions and limitations applicable to national banks. For example, under federal banking law, a national bank may not,

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<sup>28</sup> 12 U.S.C. § 1841 (1982).

<sup>29</sup> *Id.* § 1842(d).

<sup>30</sup> *Id.* § 3103.

<sup>31</sup> FLA. STAT. § 658.29 (1985).

<sup>32</sup> 12 U.S.C. § 1817(j) (1982).

<sup>33</sup> *Id.*

<sup>34</sup> FLA. STAT. § 658.28(1) (1985).

<sup>35</sup> 12 U.S.C. § 1842 (1982).

<sup>36</sup> *Id.* § 3102(a).

<sup>37</sup> *Id.* § 3102(d).

<sup>38</sup> *Id.* § 3102(b).

<sup>39</sup> *See generally* 12 C.F.R. § 28.101 (1986).

generally, extend credit to a single borrower in an aggregate amount greater than fifteen percent of the unimpaired capital and surplus of the national bank.<sup>40</sup> This limitation prohibits the federal branches and agencies of the foreign bank from lending an aggregate amount greater than fifteen percent of the foreign bank's total capital and surplus to a single borrower.<sup>41</sup>

Although a FIBA cannot accept deposits, it may hold "credit balances" on behalf of its customers.<sup>42</sup> Credit balances are funds received at a FIBA incidental to or arising out of the exercise of its banking powers. These funds are not intended to be deposits and do not remain with the FIBA after the transactions to which they relate are completed.<sup>43</sup> Such funds accrue from collections, money transfers, undisbursed loan proceeds, and compensating balances.

A foreign bank with a FIBA in Florida may establish other agencies within the state on the same basis that a national bank may establish branches.<sup>44</sup> At present, a foreign bank with a FIBA in Dade County (which includes Miami) can establish as many additional FIBAs in that county as the OCC will permit national banks, based upon the convenience and needs of the community, to establish branches.<sup>45</sup>

To establish a FIBA in Miami a foreign bank must file an application with the OCC, along with certain supporting materials. The standard filing fee is approximately 2,500 U.S. dollars. An application is usually granted within ninety days from the date the application is accepted for filing.

A FIBA must maintain "capital equivalency deposits" in such amount as the OCC specifies with a "member" bank (*i.e.*, a member of the Federal Reserve System) located in the state in which the FIBA is established.<sup>46</sup> The capital equivalency deposits must at least be equal to the greater of: (i) the minimum capital that would be required to organize a national bank in the community in which the FIBA is located; or (ii) five percent of the total liabilities of the FIBA. They must be dollar denominated and may include certificates of deposit or investment securities of the type which national banks may hold for their own account.<sup>47</sup>

Federal Reserve Board rules subject FIBAs, state international banking agencies, and Edges, which are part of a financial group with total worldwide consolidated bank assets in excess of one billion dol-

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<sup>40</sup> 12 U.S.C. § 84 (1982).

<sup>41</sup> 12 C.F.R. § 28.101(5) (1985).

<sup>42</sup> 12 U.S.C. § 3102(d) (1982).

<sup>43</sup> 12 C.F.R. § 28.2(a) (1986).

<sup>44</sup> 12 U.S.C. § 3102(h) (1982).

<sup>45</sup> *Id.* § 36(c).

<sup>46</sup> *Id.* § 3102(g).

<sup>47</sup> 12 C.F.R. § 28.6 (1986).



lars, to virtually the same reserve requirements on their credit balances, deposits, and interest rate ceilings as are applicable to domestic member banks of the Federal Reserve System.<sup>48</sup>

A FIBA is subject to a semi-annual assessment fee imposed by the OCC to cover various service charges relating to the examination and supervision of such agency. The assessment is based on the total U.S.-based assets of the FIBA.

### III. State International Banking Agency

A foreign bank may establish a state international banking agency ("SIBA") in Florida.<sup>49</sup> A SIBA must comply, except where otherwise specified by regulation or statute, with all of the provisions of the general banking laws applicable to a Florida bank.<sup>50</sup> SIBAs have all powers and can make all loans or investments FIBAs operating in Florida or state banks can make or exercise.<sup>51</sup> SIBAs cannot exercise fiduciary power nor receive deposits from persons who are U.S. citizens or residents who maintain their principal place of business in the United States. SIBAs have an advantage over FIBAs in that they may accept deposits from nonresidents while FIBAs may not.<sup>52</sup> As a result of this advantage, a number of FIBAs have recently converted to SIBAs. Thus, Florida SIBAs may make loans to any persons or company, accept deposits from foreign corporations or individuals, participate in banker's acceptances, and carry out other typical commercial banking activities. SIBAs can also provide many "private banking" services that do not involve the exercise of fiduciary powers. A recent change in state legislation permits SIBAs to offer investment advisory services to foreign persons.<sup>53</sup>

A SIBA must comply with certain asset maintenance requirements or, in lieu thereof, maintain within Florida certain capital equivalency deposits.<sup>54</sup> Under the so-called "105 rule," a SIBA which does not elect to comply with the capital equivalency requirements must maintain eligible assets in Florida equal to 105 percent of its liabilities (or some lesser amount, but never less than 100 percent of the amount of its liabilities, which the Florida Department of Banking (FDB) may permit by regulation).<sup>55</sup>

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<sup>48</sup> 12 C.F.R. § 204.1 (1986).

<sup>49</sup> FLA. STAT. § 663.01 (1985).

<sup>50</sup> *Id.* § 663.02; FLA. ADMIN. CODE ANN. § 3C-15.03(5)(b) (1985).

<sup>51</sup> FLA. STAT. § 663.06(6) (1985).

<sup>52</sup> *Id.* § 663.06(5)(a); *Conover*, 715 F.2d at 604.

<sup>53</sup> FLA. STAT. § 663.06(5) (1985); *see also* Lewis, *supra* note 13, at 2.

<sup>54</sup> FLA. STAT. § 663.07 (1985); FLA. ADMIN. CODE ANN. § 3C-15.10 (1985).

<sup>55</sup> Eligible assets include cash on hand, cash on demand deposit with other banks (including reserves deposited at a federal reserve bank), cash items in the process of collection, federal funds sold, bonds, notes, debentures, evidence of indebtedness payable in the United States, and many other types of assets. FLA. STAT. § 663.07(1) (1985). This can be contrasted with "capital equivalency deposits," which are restricted to dollar deposits

There are certain differences in the application to a given case of the asset maintenance requirement or the capital equivalency deposit. For SIBAs with total liabilities of less than twenty-five million U.S. dollars, the "capital" which must be maintained in Florida may be less under the 105 rule. The 105 rule also permits an agency to invest its capital in a slightly broader range of assets. In any event, transactions between the agency and its affiliates are generally excluded from the computation of both assets and liabilities.<sup>56</sup>

A SIBA must pay a filing fee of five thousand U.S. dollars.<sup>57</sup> SIBAs also pay semiannual assessments to the FDB to cover the regulatory costs of the supervision and examination of the agency by that department.<sup>58</sup>

To establish a SIBA in Florida, a foreign bank must demonstrate that its total assets exceed its total liabilities by at least twenty-five million U.S. dollars.<sup>59</sup> Although reciprocity is formally required to be taken into account in evaluating a foreign bank license application, the 1983 legislative changes sponsored by the Florida Comptroller's office virtually ensure that no application will be rejected simply because the foreign country does not permit the entry of Florida banks.<sup>60</sup>

After a 1985 change in Florida law sponsored by the Florida Comptroller's office, foreign banks with less than the statutory-required minimum capital (*i.e.*, with less than twenty-five million dollars) may be permitted to establish a SIBA in Florida.<sup>61</sup> The foreign bank must establish to the satisfaction of the FDB that: (1) it has been in the business of banking for at least ten years; (2) it is empowered by the laws of the country in which it is organized to receive deposits from the general public and to engage in general commercial banking business; (3) it is ranked by the banking authority in such country as one of the five largest banks in terms of domestic deposits; and (4) it is duly organized, in good standing, and duly licensed to conduct a general banking business in such foreign country. The FDB may also impose other reasonable conditions on these smaller foreign banks as prerequisites to gaining entry into Florida.<sup>62</sup>

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maintained by the foreign bank with a state bank in Florida, usually in the form of certificates of deposits or investment securities. *Id.* § 663.07(1)(a); FLA. ADMIN. CODE ANN. § 3C-15.10 (1985).

<sup>56</sup> FLA. ADMIN. CODE ANN. § 3C-15.10(1) (1985).

<sup>57</sup> FLA. STAT. § 663.04(d) (1985).

<sup>58</sup> FLA. ADMIN. CODE ANN. § 3C-15.13 (1985).

<sup>59</sup> FLA. STAT. § 663.05(1)(e) (1985).

<sup>60</sup> See *supra* note 10 and accompanying text.

<sup>61</sup> FLA. STAT. § 663.05(2)(a)-(c) (1985); see Lewis, *supra* note 24, at col. 5.

<sup>62</sup> The purpose of these changes is to permit the participation of leading banks from countries in the Caribbean Basin area and Latin America which, because of inflation at home or significant devaluation in the value of their currency, find it difficult to meet the

#### IV. Edge and Agreement Corporations

A foreign bank, by itself or in conjunction with other foreign banks, may own an Edge subsidiary. Edges are chartered by the Federal Reserve Board as an investment corporation or a banking corporation.<sup>63</sup> An Edge is "engaged in banking" only if it accepts deposits in the United States from nonaffiliated persons.<sup>64</sup>

To organize an Edge in Florida, an application to the Federal Reserve Board must be filed with the Federal Reserve Bank of Atlanta.<sup>65</sup> The filing place may change if the foreign bank has a "home state" designation in another region of the Federal Reserve System. The application is usually granted by the Federal Reserve Board between 90 to 120 days from the time it has been completed and duly accepted for filing.

Edges operate as distinct U.S. international commercial banks, separate from their foreign or domestic parents. As distinct entities (unlike agencies or branches which are merely organs of a foreign bank), Edges are regulated by U.S. banking authorities, not their foreign country counterparts. Edges may establish demand, time and savings accounts and issue certificates of deposit for governments or non-U.S. persons.<sup>66</sup> Edges may also hold "credit balances" for and on behalf of their U.S. customers arising out of the foreign or international business of the Edge.<sup>67</sup> Edges may lend money to foreign borrowers, and they may lend to borrowers within the United States if the loan is in connection with international trade, finance, or investment.<sup>68</sup>

The powers of an Edge are more limited than those of a FIBA or SIBA, since an Edge may not engage in U.S. domestic lending activities. For example, a SIBA in Florida may regularly take commercial, industrial, real estate, or consumer loans in the United States, whereas an Edge may not do so. An Edge, however, can keep this profitable business within the parent bank's system by referring do-

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pre-1985 unimpaired capital requirements to establish a SIBA in Florida. See Lewis, *supra* note 24, at col. 5.

<sup>63</sup> 12 C.F.R. § 211.4(b)(2) (1985).

<sup>64</sup> *Id.* § 211.4(d).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 211.7(a)-(d). This is a principal reason why many foreign depositors book their deposits in an Edge rather than an agency. An agency or branch, whether state or federal, is merely a division of the foreign bank and is subject to scrutiny by both U.S. and foreign bank regulators. See, e.g., Hablutzel & Lutz, *supra* note 5, at 137 n.2. It is not clear what effect the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (1982), has on requests for information made on a branch or agency, through its home office, by foreign regulators. Although 12 U.S.C. § 3402 requires a "governmental authority" to comply with the procedures set forth in 12 U.S.C. §§ 3404-3409, this requirement applies only to U.S. governmental authorities. 12 U.S.C. § 3401(3) (1982). An Edge, however, could not be inspected without the consent of the Federal Reserve Board.

<sup>67</sup> 12 C.F.R. § 211.4(e)(1) (1985).

<sup>68</sup> *Id.* § 211(4)(e)(2).

mestic loan business to any of its affiliates with the authority to make such loans.

Since an Edge is not a "bank,"<sup>69</sup> it may establish branches throughout the United States, notwithstanding state laws prohibiting interstate banking.<sup>70</sup> An Edge based in Florida may thus establish banking branches in New York City, Houston, Chicago, and Los Angeles, with each branch having the same banking structure and powers. An Edge may also establish branches outside the United States<sup>71</sup> capable of exercising general banking powers as well as conducting virtually any kind of banking business permitted by the country in which they are located.<sup>72</sup>

Because it is a separate entity, an Edge must maintain its own capital.<sup>73</sup> The minimum capital required is two million U.S. dollars.<sup>74</sup> The foreign parent may not invest more than ten percent of its own capital in an Edge.

Certain Edge lending and investment activities are limited by capital requirements imposed on the individual Edge rather than the aggregate group. For example, generally, an Edge may not lend to any one borrower more than ten percent of the Edge's capital and surplus.<sup>75</sup> Its capital and surplus must be equal to at least seven percent of its "risk assets."<sup>76</sup> Risk assets are defined to include all assets other than the following three exceptions: (1) cash amounts due from banking institutions in the United States; (2) U.S. government securities; and (3) federal funds sold. Because foreign banks, which are not regulated in the first instance by U.S. banking authorities, were using their Edge subsidiaries in the United States to transfer large amounts of U.S. dollars to their foreign home offices, it has been recently proposed that foreign owned Edges be limited in their lending to their foreign affiliates to the amount of funds captured in the United States (such as deposits).<sup>77</sup>

To avoid specific restrictions applicable to Edges, such as limitations on foreign bank participation in the ownership and management of the corporation,<sup>78</sup> an agreement corporation can be used.

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<sup>69</sup> *Id.* § 211.4(e)(4).

<sup>70</sup> 12 U.S.C. § 1841(c) (1982).

<sup>71</sup> This is because under 12 U.S.C. § 1842(d), no state law prohibition would apply. Edges are therefore one of the preferred methods for New York money center banks such as Citicorp and Chase Manhattan Bank to establish interstate banking operations.

<sup>72</sup> 12 C.F.R. § 211.4(c)(2) (1985).

<sup>73</sup> *Id.* § 211.3(b).

<sup>74</sup> SIBAs or FIBAs, on the other hand, are mere divisions of their parent foreign banks. *See id.* § 211.6(d).

<sup>75</sup> *Id.* § 211.4(b)(2).

<sup>76</sup> *Id.* § 211.6(b).

<sup>77</sup> *Id.* § 211.6(d).

<sup>78</sup> This limitation was prompted by the concern of the Federal Reserve Board that foreign banks, which U.S. banking authorities do not regulate in the first instance, were using their U.S. Edge subsidiaries to transfer U.S. dollars to their foreign home offices. *See*

An agreement corporation is a state corporation which enters into an agreement with the Federal Reserve Board to exercise the same powers of an Edge and is subject to many of the same restrictions.<sup>79</sup>

## V. Banking Representative Offices

A foreign bank may establish a federal or state banking representative office ("BRO") in Florida without significant legal formality. To establish a state BRO the foreign bank merely files an application with the FDB and pays a one thousand dollar fee.<sup>80</sup> The assets of the foreign bank, however, must exceed its liabilities by at least ten million U.S. dollars.<sup>81</sup> Establishing a federal BRO is simpler and does not require a filing fee. A foreign bank desiring to establish a federal BRO needs only to register by letter with the U.S. Secretary of the Treasury; no other act is required.<sup>82</sup> BROs may not accept deposits, make loans or conduct any banking business in Florida. A BRO's activities are normally limited to the solicitation of new business, negotiation with existing or potential clients, research, liaison and other general administrative functions.

A "bank" is defined as an institution where deposits are taken and commercial loans are made.<sup>83</sup> Since a commercial lending subsidiary (CLS), such as a finance company, only makes loans and does not take deposits, it is not a "bank" and is therefore not subject to banking regulation at either the federal or state level. A CLS's lending activities are subject only to various state and federal *ad hoc* restrictions. These include prohibition against charging usurious interest or restrictions imposed on lending to consumers and lending on an installment basis.<sup>84</sup> A CLS is typically established to permit a small foreign bank, which may not have the requisite capital for a FIBA or SIBA, to enter the U.S. market and eventually establish a more substantial, traditional banking presence. A CLS can also be used along with an Edge to provide a full service lending capability.<sup>85</sup>

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Amendments to Regulation K, 50 Fed. Reg. 35,238 (1985) (to be codified at 12 C.F.R. pt. 211) (proposed Aug. 30, 1985).

<sup>79</sup> 12 U.S.C. §§ 601-604 (1982); 12 C.F.R. § 211.4(f) (1985).

<sup>80</sup> FLA. STAT. § 663.12 (1985).

<sup>81</sup> *Id.* § 663.05(1)(e).

<sup>82</sup> 12 U.S.C. § 3107(a) (1985).

<sup>83</sup> *See, e.g.*, 12 U.S.C. § 1841(c) (1982); FLA. STAT. § 658.12(3), (13) (1985).

<sup>84</sup> *See, e.g.*, FLA. STAT. §§ 520.01, 687.01 (1985); 12 C.F.R. § 226.1 (1985).

<sup>85</sup> The Edge would, of course, be subject to lending limits based on its total capital (which, as a subsidiary, would not include the capital of the foreign bank). The CLS is not subject to any lending limitations but it would have to be separately capitalized and it is doubtful any foreign bank would contribute substantial amounts of capital to this type of entity.

## VI. International Administrative Office

An international administrative office (IAO) is a specialized type of banking office available in Florida<sup>86</sup> to coordinate and support the hemispheric or regional activities of the foreign bank from the Florida office.<sup>87</sup> For instance, if a Japanese bank has several banking offices throughout Latin America, an IAO in Florida could act as the center for the negotiation or servicing of loans, preparation of documents, data processing, recordkeeping, accounting, administration of foreign personnel, coordination or movement of funds, and other matters. All of the day-to-day transactions with the foreign bank's customers would be handled by the foreign bank's other offices, although the IAO could conceivably handle certain liaison activities as well.

To establish an IAO in Florida, an application must be filed by the foreign bank with the FDB, along with an initial fee of 2,500 U.S. dollars.<sup>88</sup> The foreign bank must have unimpaired capital of twenty-five million U.S. dollars.<sup>89</sup>

## VII. Conclusion

The menu available to a foreign bank desiring to establish a banking presence in the United States (particularly in Florida) may not be as varied as the wine list at a famous restaurant, but such a foreign entity can usually arrange a satisfactory structure. Because the variety of organizational options permits most business activities to be conducted, a foreign bank's business objectives are of paramount importance. If the purpose of the U.S. office is simply to obtain access to U.S. dollars at a more competitive rate than can be found on the international interbank market, a foreign bank may wish to establish a local dollar deposit-taking facility and then lend funds back to the home office. If the purpose of the office is to cater to foreign clients of the bank who have investments or business interests in the United States, then deposit-taking and other private banking powers may be unnecessary. If the objective of the foreign bank is simply to develop a profitable banking operation, then a local lending alternative may be the preferred choice. Alternatively, the foreign bank may establish a U.S. office in order to facilitate international financial operations between its country and the United States.

These considerations may be affected by whether the establishment of a banking presence in more than one U.S. financial center is needed to accomplish the foreign bank's objectives. A bank's objec-

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<sup>86</sup> FLA. STAT. § 663.063 (1985).

<sup>87</sup> See Lewis, *supra* note 24, at col. 3.

<sup>88</sup> FLA. STAT. § 663.063(4) (1985).

<sup>89</sup> *Id.* § 663.063(1).

tives may be accomplished by proper planning in order to lead to the development of a satisfactory banking framework in the United States.