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The Foreign Bank Supervision Act of 1991: Expanding the Umbrella of "Supervisory Reregulation"

As 1992 began, the most immediate evidence of Congress's response to the global scandal involving the notorious Bank of Credit and Commerce International (BCCI)[1] and the questionable activities of the Italian Banca Nazionale de Lavorro (BNL) in the United States,[2] other than to schedule still another round of investigatory hearings, were the provisions of the often mischaracterized banking "reform" bill of 1991 (Act)[3] that have greatly heightened U.S. Government scrutiny of and power over foreign banks. Title II of the Act contains the Foreign Bank Supervision Enhancement Act of 1991 (FBSEA), designed to strengthen federal supervision, regulation, and examination of foreign bank operations in the United States. In sum, the new provisions of the FBSEA:

(1) Mandate federal deposit insurance for all deposits under $100,000.[4]
(2) Require foreign banks to obtain the approval of the Board of Governors of the Federal Reserve System (Fed) before opening any branch, agency, or representative office; and permit the Fed to examine and close all such facilities.

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1. For a further discussion of the BCCI scandal, see the articles by Richard Dale, E. Gerald Corrigan et al., and John G. Heimann contained above in this Symposium section.
2. On the BNL matter, which involved illegal loans to Iraq, see *House Banking Staff Questions Foreign Bank Regulations in BNL Atlanta Scandal,* 55 Banking Rep. (BNA) 612 (Oct. 15, 1990).
3. Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Pub. L. No. 102-242, 105 Stat. 2236 (1991), (codified in scattered sections of 12 U.S.C.).
4. This provision was intended to apply to retail deposits only. However, the word "retail" was inadvertently dropped from the final text of the law. If the error is not corrected, the provision would seriously interfere with corporate customer transactions for foreign banks given the typical fluctuations of deposit account balances.

(3) Require foreign banks to report loans secured by 25 percent or more of the stock of an insured depository institution.
(4) Impose a criminal penalty for violations of the International Banking Act of 1978 (IBA).[5]
(5) Require U.S. regulators to carry out studies on the capital adequacy and desirability of requiring foreign banks to operate in the United States through subsidiaries rather than branches.
(6) Allow the Fed and Office of the Comptroller of the Currency (OCC) to share information with home country regulators.
(7) Increase civil penalties for filing false and misleading reports.

A brief discussion of the development of federal regulation of foreign banks in the United States and some of the broad policy issues entailed is followed by a more complete presentation of the main provisions of FBSEA. However, this article is not intended to constitute a definitive legal analysis of the new laws or the effect any of these laws may have on specific activities of individual institutions. Separate articles following in this Symposium Section consider the new interim rule of the Fed implementing FBSEA[6] and the practical impact of FBSEA on foreign bank operations in the United States.

I. A Backdrop: Development of Federal Regulation of Foreign Banks

Prior to the 1970s, foreign banks largely neglected the U.S. banking market. Indeed, the first comprehensive study of foreign bank activity in the United States was undertaken by the Joint Economic Committee of Congress in 1966, but no final legislation was ever enacted. However, in the early 1970s the Fed became aware of an increase in foreign bank activities. In 1973, for example, sixty foreign banks with $37 billion in assets operated in the United States; by 1978 foreign banks numbered 128, with $90 billion in assets.

In the face of this growth, the Fed grew concerned that no federal framework existed for supervision and regulation of foreign banks operating in the United States except when an actual U.S. bank subsidiary was formed.[7] Foreign bank presence and operations were largely within the embrace of disparate state bank regulations, giving these banks the possibility of gaining competitive advantage over federally regulated domestic banks.[8] Even in 1991, 94 percent of total foreign bank assets in the United States rested with 532 state-licensed branches

5. Pub. L. No. 95-369, 92 Stat. 607 (dispersed throughout various parts of title XII of the United States Code). For the legislative history of IBA, see U.S.C.C.A.N. 1421 (1978).
6. 57 Fed. Reg. 12,992 (Apr. 15, 1992).
7. *See, inter alia,* House Committee on Banking, Currency and Housing, Staff Reports on International Banking—A Supplement to Compendium of Papers Prepared for the FINE Study, 94th Cong., 2d Sess. 50 (1976).
8. *See* Kathleen J. Woody, *The International Economic Implications of Deregulating the U.S. Banking Industry,* 31 AM. U.L. REV. 25 (1991).

and agencies, while the remaining 6 percent of assets were with eighty-four federally licensed branches and agencies.[9]

Also in the 1970s, the Fed became concerned that as the role of foreign banks in the United States increased, these entities needed to be brought under federal monetary controls.[10] In 1975, the Fed proposed the Foreign Bank Act of 1975 to Congress. However, it was not until 1978 that Congress passed (and President Carter signed into law) the first federal statute attempting to regulate foreign banks: the IBA.[11] This legislation had two broad policy objectives: (i) the establishment of a system of federal regulation of foreign banking operations and activities; and (ii) the codification of the policy of "national treatment," that is, (to the extent feasible) foreign and domestic banks should receive equal treatment and operate on a "level playing field" in the United States. In light of these objectives the IBA brought foreign banks under (a) domestic, federal geographic expansion restraints on branching and interstate activities, (b) "Glass-Steagall" prohibitions on securities-related activities, (c) modified Federal Deposit Insurance Corporation (FDIC) insurance requirements, (d) Fed Reserve requirements, (e) the affirmative lending requirements of the Community Reinvestment Act of 1977, (f) federal examination authority, and (g) other regulations applicable to domestic banks. In effect, the IBA was not enacted out of concerns for prudential supervision objectives (as was the case with FBSEA) inasmuch as the Fed's study of the experience with foreign banks in the United States indicated that they were acting responsibly. The IBA was enacted largely for competitive equality and monetary policy purposes.[12]

By the end of 1991, 304 foreign banks operated in the United States with aggregate banking assets approximating $866 billion. The aggregate assets of branches and agencies (excluding subsidiaries) approximated 20 percent of total banking assets (that is, $718 billion).[13] As such, in an era in which the U.S. banking and thrift industries found themselves in serious financial distress and undercapitalization and the U.S. financial markets were in an increasingly illiquid state, foreign bank participation in U.S. financial markets was making a significant positive contribution to the U.S. economy.[14]

Notwithstanding these contributions by foreign banks in the late 1980s, the Fed became uneasy with the gaps in the federal regulatory framework in light of the BCCI and BNL affairs. BCCI brought into question the use of foreign banks for illegal purposes (money laundering and covert foreign ownership of U.S.

9. Source: Federal Reserve.

10. *See* IBA legislative history, *supra* note 5, at 1422.

11. IBA, *supra* note 5.

12. For discussion of IBA, see *Symposium on Regulation of Foreign Banks in the United States*, 1980 U. ILL. L. FORUM 1.

13. Source: Federal Reserve.

14. *See* Fed. Reserve System commentary to its FBSEA interim implementing rule, *supra* note 6, at 12,993.

banks, for example) and exposed significant gaps in developing international principles of "consolidated supervision" and "home country control." The BNL (Atlanta) state-licensed agency raised again the issue of illegal activities (in that instance the making of illegal loans to Iraq) and the issue of the adequacy of state supervisory and examination procedures.[15]

The Fed first responded by bringing foreign banks under the Crime Control Act of 1990 with respect to bank fraud and other crimes.[16] The Fed next responded by moving broadly in elaborating upon its prudential supervisory, examination, and enforcement concerns by pressing for the passage of FBSEA.[17]

II. The Act

A. Deposit Insurance

One of the main regulatory gaps of an overseas bank's regulation (for example, the Bank of England's regulation of BCCI in the United Kingdom) is often the absence of deposit insurance. FBSEA attempts to address this governmental concern of U.S. bank regulators by establishing two conditions to the ability of a foreign bank to accept or maintain deposit accounts having balances of less than $100,000: first, the foreign bank must establish one or more banking subsidiaries in the United States for that purpose; and second, the foreign bank must obtain federal deposit insurance for any such subsidiary in accordance with the Federal Deposit Insurance Act (FDIA).[18] (An exception to the foregoing requirement is provided for insured branches existing on the date of enactment.[19]) This section of FBSEA was supposed to apply only to retail deposits, as evidenced by the title of the statutory subsection. The word "retail," however, was omitted from the text of the law. This error creates a statutory prohibition against foreign banks accepting or maintaining deposit accounts having balances of less than $100,000 except through FDIC-insured U.S. bank subsidiaries. If not corrected, the law would seriously interfere with corporate customer transactions or, if enforced, would subject foreign banks to civil money penalties or criminal sanctions if they fail to obtain deposit insurance. Until this error is resolved, the Fed and OCC have indicated that foreign banks would not be considered in violation under section 6(c) of FBSEA if they restrict their depository activities in branches and agencies to those permissible under existing FDIC and OCC regulations in effect on December 19, 1991.[20]

15. *See supra* notes 1 and 2.
16. *See* Pub. L. No. 101-647, tit. XXV, 104 Stat. 4789 (1990).
17. *See* FDICIA, *supra* note 3, title II.
18. FDICIA, *supra* note 3, § 214(a)(1)(B) (amending IBA § 6, 12 U.S.C. § 3104(c)(1)).
19. *Id.*
20. 57 Fed. Reg. 12,992, 12,997 (Apr. 15, 1992).

B. Foreign Bank Offices

1. *Establishment of Foreign Bank Offices in the United States*

FBSEA prohibits a foreign bank from establishing a branch or an agency or acquiring ownership or control of a commercial lending company without the prior approval of the Fed,[21] regardless of whether the branch or agency is chartered under state or federal law. This means that a foreign bank may no longer avoid U.S. Government scrutiny by obtaining a state charter for its branch or agency, which is what most foreign banks had done under prior law.[22]

The Fed must not approve a foreign branch, agency, or acquisition of a lending company unless the foreign bank conducts business outside the United States and is "subject to comprehensive supervision and regulation on a consolidated basis" by its home country authorities and the foreign bank furnishes the Fed with information necessary to assess the application.[23] This requirement applies as well to new branches sought to be established by foreign banks operating state-chartered branches as of the date of enactment of FBSEA.

In effect, the Fed is generally trying to upgrade the quality and transparency of international banking supervision and is specifically retaining its own regulatory trigger in the event overseas home country supervision or the information available on a particular foreign bank is deemed inadequate in the view of the Fed. For a number of years the Fed has been supportive of the principles of "consolidated bank supervision" and "home country" supervisory control as employed in the 1983 Revised Concordant on Consolidated Bank Supervision as promulgated by the Basle Committee on Banking Supervision (Basle Committee).[24] However, the BCCI and BNL affairs have made clear that significant gaps in the Concordat's consolidated supervision principles (in terms of conceptual embrace and of practical application) still exist, and the host country regulators need to maintain authority to evaluate the quality (for example, adequate prudential standards such as on capital adequacy, risk asset exposure, and internal audit controls) and effectiveness of the home country's application of consolidated supervisory practices. The host country regulators also need to be aware of the nature and reliability of the information available on the foreign bank and its parent and affiliates before it defers to the supervisory and regulatory authority of the home country.[25] As such, the consolidated supervision and home country

21. *Id.* § 202(a) (amending IBA § 7, 12 U.S.C. § 3105); *see also* 12 C.F.R. § 225.25(a).

22. *See* S. Rep. No.102-167, 102d Cong., 1st Sess. 114 (1991).

23. FDICIA, *supra* note 3, § 202(a), 105 Stat. at 2286 (adding IBA § 7(d)(2), 12 U.S.C. § 3105(d)(2)); *see also* 12 C.F.R. § 211.25(c).

24. On Concordat, see Joseph Norton, *The Work of the Basle Supervisors Committee,* 23 Int'l Law. 245 (1989).

25. *See* Dale, *supra* note 1.

principles become conditional, and FBSEA sets a predicate for encouraging close cooperation between the Fed and relevant home country regulators.[26]

FBSEA amends the Bank Holding Company Act of 1956 (BHCA) to designate "managerial resources"—the competence, experience, and integrity of officers, directors, and shareholders—and "financial resources" of the foreign bank as statutory and regulatory factors that the Fed may consider in determining whether to approve an application of a foreign bank or its parent in connection with the establishment of new branches or agencies or the acquisition of control of a commercial lending company.[27] As in most bank failures (including BCCI), the quality and integrity of bank management and bank financial resources are often significant contributing causes. Essentially FBSEA incorporates the existing domestic approval standards under the Fed's Regulation Y.

FBSEA also establishes certain other discretionary, statutory standards that the Fed may take into account in assessing an application. These include the consent of the home country supervisor, the nature of the cooperative relationship of the Fed with this home country regulatory as to sharing of material information, various assurances of the foreign bank, compliance with U.S. laws, needs of the community, and relative size of the bank in its home country.[28] In addition, the Fed may impose such conditions on its approval as it deems necessary (for example, cessation of or restriction on certain activities).[29]

2. *Termination*

FBSEA places the ultimate regulatory sanction of an institutional "death sentence" (termination) in the hands of the Fed. The Fed may, after notice and opportunity for a hearing, order a foreign bank operating a state branch, or agency, or commercial lending company to terminate operations. In order to do so, the foreign bank must not be subject to "comprehensive supervision or regulation on a consolidated basis" by its home country authorities. In addition, there must be reason to believe that the foreign bank has violated the law or engaged in "unsafe or unsound banking practice," and thus, continued operation in the United States would not be consistent with public interest or purposes of the IBA, the Bank Holding Company Act of 1956, or the FDICA.[30] The Fed may also recommend to the OCC that the license of any federal branch or federal agency be terminated if the Fed has reason to believe that such foreign bank or

26. *See* H. REP. No.102-330, 102d Cong., 1st Sess. (1991), on FDICIA.
27. FDICIA, *supra* note 3, § 210 (adding Bank Holding Company Act of 1956 § 3(c)(5), 12 U.S.C. § 1842(c)(5)).
28. *Id.* § 202(a) (adding IBA § 7(d)(3), 12 U.S.C. § 3105(d)(3)); *see also* 12 C.F.R. § 211.25(c)(2).
29. *Id.* (adding IBA § 7(d)(5), 12 U.S.C. § 3105(d)(5)); *see also* 12 C.F.R. § 211.25(c)(4).
30. *Id.* (adding IBA § 7(e), 12 U.S.C. § 3105(e)); *see also* 12 C.F.R. § 211.26(a).

any affiliate has engaged in conduct for which the activities of any state branch or agency may be terminated as set forth above.[31]

The Fed has the authority to issue a termination order without a hearing if it determines that expeditious action is necessary in order to protect the public interest.[32] Unless the Fed extends the period, an order becomes effective within a 120-day period beginning on the date the order is issued.[33] Foreign banks ordered to terminate activities in the United States must follow federal and state law regarding closure or dissolution of such offices.[34] Should any office or subsidiary refuse to comply with a termination order, the Fed or the OCC is authorized to invoke the aid of the U.S. district court within the jurisdiction where an office or subsidiary of a foreign bank is located to obtain a judicial mandate requiring compliance with the order.[35]

Within thirty days after an order is issued, a foreign bank can obtain review of a termination order in the United States court of appeals for any circuit in which the bank branch is located or in the United States Court of Appeals for the District of Columbia Circuit.[36] According to the Act, the Fed and the Secretary of the Treasury are responsible for developing criteria to evaluate operations in the United States of foreign banks not subject to "comprehensive supervision or regulation on a consolidated basis."[37]

3. *Limitations on Powers of State Branches and Agencies*

As a prime subject area of prudential concern is with the risks inherent in broad bank powers, FBSEA effectively eliminates current competitive advantages that may have inured to state branches and agencies in the power area. New limitations on the activities of foreign state branches and agencies have been imposed. For example, after December 19, 1993, a foreign bank branch may not conduct business that a federal branch is prohibited from conducting unless the activity is within "sound banking practice" and if the foreign bank branch is insured, and the activity does not pose "significant risk" to the FDIC fund.[38]

In addition, for prudential supervisory objectives, state branches and agencies are subject to the same limitations, with respect to loans made to a single

31. *Id.* (adding IBA § 7(e)(5), 12 U.S.C. § 3105(e)(5)); *see also* 12 C.F.R. § 211.26(e).
32. *Id.* (adding IBA § 7(e)(2), 12 U.S.C. § 3105(e)(2)); *see also* 12 C.F.R. § 211.26(d)(3).
33. *Id.* (adding IBA § 7(e)(3), 12 U.S.C. § 3105(e)(3)).
34. *Id.* (adding IBA § 7(e)(4), 12 U.S.C. § 3105(e)(4)).
35. *Id.* (adding IBA § 7(e)(6), 12 U.S.C. § 3105(e)(6)).
36. *Id.* (adding IBA § 7(f)(1), 12 U.S.C. § 3105(f)(1)).
37. *Id.* (adding IBA § 7(e)(7), 12 U.S.C. § 3105(e)(7)). The Fed's interim rules set forth the basis for determining "comprehensive supervision or regulation on a consolidated basis." *See also* 12 C.F.R. § 211.25(c)(ii).
38. *Id.* (adding IBA § 7(h), 12 U.S.C. § 3105(h)). The Fed's interim rules did not address this provision. The Fed proposes to address this provision at a later date, after consulting the FDIC. 57 Fed. Reg. 12,992, 12,997 (Apr. 15, 1992).

borrower, as are applicable to federal branches and federal agencies under the IBA.[39] The limitations that are applicable to federal branches and agencies of foreign banks under the IBA are the national bank lending limits.[40]

The Fed or appropriate state supervisory authority may impose more stringent restrictions on state branches and agencies of foreign banks.[41]

C. Conduct and Coordination of Examinations

Under prior law (section 7(c) of the original IBA provisions), the Fed had examination powers over foreign bank operations. These powers, however, were viewed largely as ancillary or residual to those of the OCC, the FDIC, or the appropriate state banking authorities. Under FBSEA, the examination authorities of the Fed become (without preempting the examination authority of the other federal and state regulators) central to the statutorily prescribed examination web. Specifically, the Fed is authorized to examine each branch or agency of a foreign bank, each commercial lending company or bank controlled by one or more foreign banks or one or more foreign companies that control a foreign bank, and any other office or affiliate of a foreign bank conducting business in any state. Each branch or agency of a foreign bank must be subject to an on-site examination at least once during each twelve-month period (beginning on the date the most recent examination of such branch or agency ended).[42] The Fed, the OCC, and the FDIC are required to coordinate their examinations with each other and with appropriate state bank supervisors, to the extent such coordination is possible. They should also participate in simultaneous examinations of each office of a foreign bank and each affiliate of such bank operating in the United States when requested to do so.[43]

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39. IBA, *supra* note 5, § 4(b), 12 U.S.C. § 3102(b) (1978).

40. 12 C.F.R. § 211.29; *see* 12 U.S.C. § 84 (1983). This amount is 15 percent of a bank's unimpaired capital and unimpaired surplus in the case of loans that are not fully secured. An additional 10 percent of a bank's unimpaired capital and unimpaired surplus is added in the case of loans that are fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the loan. The lending limit also includes any higher amounts that are permitted by 12 U.S.C. § 84 for the types of obligations listed therein as exceptions to the limit. *See* 12 C.F.R. § 28.101 (1992) for OCC policy statement regarding the applicability of national banking laws to foreign banks operating at federal branches and agencies in the United States. For further discussion, see JOSEPH NORTON & SHERRI C. WHITLEY, BANKING LAW MANUAL ch. 7 (1992).

41. FDICIA, *supra* note 3, § 202(a) (adding IBA § 7(h), 12 U.S.C. § 3105(h)).

42. *Id.* § 203(a) (amending IBA § 7(c)(1), 12 U.S.C. § 3105(c)(1)); *see also* 12 C.F.R. § 211.27(c). The cost of the examination will be assessed against the foreign bank or the foreign company that controls the foreign bank. *Id.*

43. *Id.* § 203(a) (adding IBA § 7(c)(1)(B), 12 U.S.C. § 3105(c)(1)(B); *id.* § 203(b) (amending IBA § 4(b), 12 U.S.C. § 3102(b); *id.* § 203(c)(1) (amending FDIA § 10(b), 12 U.S.C. § 1820(b)(5)); *see also* 12 C.F.R. § 211.27(c).

D. Approval and Supervision of Representative Offices

As with branches and agencies, foreign banks may not establish representative offices without the prior approval of the Fed.[44] The Fed is required to take into account the same standards governing the approval of branches and agencies. And the Fed may impose any additional requirements that it determines are necessary to carry out the purposes of the Act.

The Fed may order the termination of the activities of a representative office on the basis of the same standards, procedures, and requirements applicable to the termination of branches and agencies.[45] The Fed is also authorized to examine each representative office of a foreign bank, the cost of which is assessed against and paid by the foreign bank.[46]

E. Reporting of Stock Loans

One of the regulatory concerns brought out by BCCI was that of concealed ownership interests in U.S. banks by foreign banking interests. In this context, FBSEA makes the reporting requirements of the FDIA applicable to loans secured by bank stock. These requirements have been expanded and such requirements are applicable to any foreign bank that is subject to the provisions of the BHCA.[47] The applicable section of the FDIA now reads as follows:

> Any financial institution and any affiliate of any financial institution that has credit outstanding to any person or group of persons which is secured, directly or indirectly, by shares of an insured depository institution shall file a consolidated report with the appropriate Federal banking agency for such insured depository institution if the extensions of credit by the financial institution and such institution's affiliates, in the aggregate, are secured, directly or indirectly, by 25 percent or more of any class of shares of the same insured depository institution.[48]

The term "financial institution" is defined to mean "any insured depository institution and any foreign bank that is subject to the provisions of the (BHCA) by virtue of section 8(a) of the (IBA)."[49]

FBSEA also requires the filing of a consolidated report on behalf of the financial institution and all affiliates of the institution. The report must "be filed in writing within 30 days of the date on which the financial institution or any such

44. *Id.* § 204 (amending IBA § 10, 12 U.S.C. § 3107(a)); *see also* 12 C.F.R. § 211.25(a)(1)(i). The Act, however, does not authorize the establishment of a representative office in any state in contravention of state law. *Id.* § 204 (amending IBA § 10(d), adding 12 U.S.C. § 3107(d)). A representative office of a foreign bank cannot make loans or accept deposits. Its principal purpose is to facilitate business contacts.

45. *Id.* § 204 (amending IBA § 10, 12 U.S.C. § 3107(b)); *see also* 12 C.F.R. § 211.26.

46. *Id.* § 204 (amending IBA § 10, 12 U.S.C. § 3107(c)); *see also* 12 C.F.R. § 211.27.

47. *Id.* § 205 (amending FDIA § 7(j)(9), 12 U.S.C. § 1817(j)(9)).

48. *Id.* (amending FDIA § 7(j)(9), 12 U.S.C. § 1817(j)(19)).

49. *Id.* (amending FDIA § 7(j)(9), 12 U.S.C. § 1817(j)(9)).

affiliate first believes that the security for any outstanding credit consists of 25 percent or more of any class of shares of an insured depository institution.''[50] The reporting requirements do not apply to transactions involving borrowers that have been the owners of record of the stock for one year or more, or stock issued by a newly chartered bank before its opening.[51]

F. Cooperation with Foreign Supervisors

The Act authorizes the disclosure by the Fed, OCC, FDIC, or the Office of Thrift Supervision (OTS) of information obtained in the course of exercising supervisory or examination authority to any foreign bank regulatory or supervisory authority if the agency determines disclosure is appropriate and the interests of the United States will not be harmed.[52] Prior to disclosure, the agencies must obtain agreement that the foreign authority will keep the information confidential.[53] The encouragement of cooperation between U.S. bank regulators has been part of congressional intent and policy since the 1983 International Lending Supervision Act[54] and is consistent with the ongoing efforts of the Basle Committee.[55]

G. Acquisition by Foreign Banks of Shares of U.S. Banks

Prior law contained an exception under which a foreign bank or its parent was not considered a ''bank holding company'' for purposes of those provisions of the BHCA pursuant to which any company that seeks to acquire control of more than 5 percent of the voting shares of a bank or bank holding company is required to obtain Fed approval before consummating such a transaction. FBSEA makes foreign banks and their parents subject to such approval requirements of the BHCA.[56]

H. Civil Money Penalties

In recent years U.S. banking legislation has introduced a period of ''supervisory reregulation,'' which relies heavily upon a broad arsenal of regulatory enforcement powers.[57] FBSEA extends this heavy-handed emphasis on enforce-

50. *Id.*

51. *Id.* This is not a complete discussion of the reporting requirements and exceptions thereto and, therefore, is qualified by reference to the statute, 12 U.S.C. § 1817(j)(9).

52. *Id.* § 206 (adding IBA § 15, 12 U.S.C. § 3109(a)); *see also* 12 C.F.R. § 211.28.

53. *Id.* § 206 (adding IBA § 15, 12 U.S.C. § 3109(b)); *see also* 12 C.F.R. § 211.28(b).

54. *See* Pub. L. No. 98-181, tit. IX, 97 Stat. 1278 (1983). For further discussion, see Robert R. Bench & Dorothy A. Sables, *International Lending Supervisors,* 11 N.C.J. Int'l & Com. Reg. 427 (1986).

55. On the Basle Committee, see Norton, *supra* note 23.

56. FDICIA, *supra* note 3, § 207 (amending IBA § 8(a), 12 U.S.C. § 3106(a)); *see also* 12 C.F.R. § 225.11(f).

57. *See* Daniel B. Gail & Joseph Norton, *A Journey from ''Deregulation'' to ''Supervisory Reregulation,'' The Financial Institutions Reform, Recovery and Enforcement Act of 1989,* 45 Bus. Law. 1103 (1990).

ment as the primary regulatory "club" over foreign bank operations in the United States. FBSEA authorizes the Fed and OCC to assess a civil money penalty against any foreign bank and any office or subsidiary of a foreign bank that violates, and any individual who participates in a violation of, any provision of the IBA or any regulation prescribed or order issued under the IBA, in an amount not to exceed $25,000 for each day the violation continues.[58] The procedure under which the Fed and OCC may assess and collect such penalties is the manner provided for civil money penalties under the FDIA.[59] The hearing procedure provided for under the FDIA is applicable to any such proceeding.[60]

The Act also contains a "separation from service" provision, which provides that the jurisdiction of the Fed or OCC to regulate foreign banks is not affected by the termination or the separation of an institution-affiliated party if notice is served within a six-year period starting when such party stops being an institution-affiliated party.[61]

The three-tiered civil money penalty structure established in 1989 by FIRREA has been extended to foreign banks for their failure to make timely or complete reports.[62] The first tier imposes civil liability of at most $2,000 per day on a foreign bank that maintains a procedure to avoid errors, but nonetheless files a late or misleading report. The burden is on the foreign bank to show the error was inadvertent. The second tier imposes a fine of not more than $20,000 per day on a foreign bank that does not maintain a procedure to avoid error, and that files late, incomplete, false, or misleading reports. The third tier provides that a foreign bank that knowingly or with reckless disregard files a false or misleading report is subject to a fine of $1,000,000 or 1 percent of the bank's total assets per day of the violation.[63]

I. Powers of Agencies Respecting Applications, Examinations, and Other Proceedings

FBSEA expands the powers of the Fed, OCC, and FDIC under the IBA by expressly setting forth their authority to administer oaths and issue subpoenas to require attendance and production and to enforce the same. The Fed, OCC, and FDIC are now granted the power in the course of, or in connection with, an application, examination, investigation, or other proceeding under the IBA to:

58. FDICIA, *supra* note 3, § 208 (adding IBA § 16(a), 12 U.S.C. § 3101).

59. *Id.* (adding IBA § 16(a), 12 U.S.C. § 3110(a)); *see* FDIA § 8(i)(2), 12 U.S.C. § 1818(i).

60. FDICIA, *supra* note 3, § 208 (adding IBA § 16(a), 12 U.S.C. § 3110(a)); *see* FDIA § 8(h), 12 U.S.C. § 1818(h).

61. FDICIA, *supra* note 3, § 208 (adding IBA § 16(b), 12 U.S.C. § 3110(b)).

62. *Id.* (adding IBA § 16(c), 12 U.S.C. § 3110(c)). For discussion of FIRREA enforcement provisions, see Daniel B. Gail & Joseph Norton, *The Financial Institutions Reform, Recovery and Enforcement Act of 1989: Dealing with the Regulators*, 107 BANKING L.J. 196 (1990).

63. FDICIA, *supra* note 3, § 208 (adding IBA § 16(c), 12 U.S.C. § 3110(c)).

"issue, revoke, quash, or modify any subpoena, including any subpoena requiring the attendance and testimony of a witness or any subpoena duces tecum."[64]

In the case of contumacy (willful contempt) of any person issued a subpoena or a refusal by such person to comply with such subpoena, the Fed, OCC, or FDIC may seek an order requiring compliance from the U.S. District Court for the District of Columbia or any U.S. district court within the jurisdiction where the proceeding is being conducted or the witness resides or carries on business.[65] The willful failure or refusal to comply with a subpoena is a crime and may be punishable by a fine or up to one year's imprisonment or both.[66]

J. Enforcement of Consumer Statutes

Beginning in the late 1960s, consumer protection began to become ingrained as a governmental objective of bank regulation as Congress enacted sundry consumer-oriented statutes applicable to banks and other financial institutions.[67] The ability of the federal bank regulatory agencies to enforce the federal consumer statutes against branches and agencies of foreign banks is now expanded under FBSEA.[68] A table depicting the agency and the type of branch or agency in which the agency has jurisdiction is set forth below:

Agency	Entity
OCC	federal branches and agencies
FDIC	insured state branches
Fed	branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks); commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act (Edge and Agreement corporations).[69]

64. *Id.* § 209 (amending IBA § 13(b), 12 U.S.C. § 3108(b)).

65. *Id.*

66. *Id.*

67. *See* Norton & Whitley, *supra* note 39, ch. 2.

68. FDICIA, *supra* note 3, § 212(a)(2) (amending Home Mortgage Disclosure Act of 1975 § 305(b), 12 U.S.C. § 2804(b)).

69. *See* Norton & Whitley, *supra* note 39, chs. 3 and 15.

The Act grants the agencies authority to enforce the following consumer statutes against branches and agencies of foreign banks:

- Home Mortgage Disclosure Act of 1975[70]
- Truth in Lending Act[71]
- Fair Credit Reporting Act[72]
- Equal Credit Opportunity Act[73]
- Fair Debt Collection Practices Act[74]
- Electronic Fund Transfer Act[75]
- Federal Trade Commission Act[76]
- Expedited Funds Availability Act[77]

K. Criminal Penalty for Violating the IBA

The criminal penalty for violating the IBA with the purpose of pecuniary gain to oneself or others or to create financial hardship to any person is up to five years imprisonment and a fine of up to $1,000,000 per day of the violation, or both.[78]

L. Studies and Report

The Fed and the Secretary of the Treasury are required to report to Congress by June 1992, analyzing: (1) the method of measuring capital adequacy established by the Supervisor's Committee of the Bank of International Settlements; (2) capital standards applied to foreign banks operating in the United States; and (3) the relations between foreign standards and risk-based capital and leverage requirements for U.S. banks. The report shall also establish guidelines for the Fed to use in determining if the capital of a foreign bank is equivalent to that required of U.S. banks.[79] Additionally, the Secretary of the Treasury, in a joint effort with the federal bank regulatory agencies, is required to conduct a study of whether foreign banks should be required to conduct banking operations in the United States through subsidiaries rather than branches. This report must be submitted to Congress by December 19, 1992.[80]

70. 12 U.S.C. §§ 2801-2810 (1988).
71. 15 U.S.C. §§ 1601-1677 (1988).
72. 15 U.S.C. § 1681 (1988).
73. 15 U.S.C. § 1691 (1988).
74. 15 U.S.C. § 1692 (1988).
75. 15 U.S.C. § 1693 (1988).
76. 15 U.S.C. §§ 41-58 (1988).
77. 12 U.S.C. §§ 4001-4010 (1988).
78. FDICIA, *supra* note 3, § 213 (adding IBA § 17, 12 U.S.C. § 3111).
79. *Id.* § 214b (adding IBA § 7(j), 12 U.S.C. § 3105(j)).
80. *Id* § 215; *see* 12 U.S.C. § 3102 note.

M. The Absence of Fair Trade Provisions

The original Senate version (S. 543) of FBSEA would have included a "fair trade" provision requiring the Treasury to initiate negotiations with other countries, (unless deemed fruitless or from governmental economic concerns) respecting a broader opening of overseas banking and financial service markets to U.S. firms. Utilizing a principle of "reciprocal national treatment," the Treasury would have been able to foreclose U.S. financial services markets to those foreign financial institutions whose home country denied equivalent access for U.S. firms. These provisions, however, were dropped in conference, though it appears that considerable congressional interest remains in revisiting this issue.[81]

III. Conclusion

FBSEA has brought the umbrella of "supervisory reregulation" over foreign bank operations, with the Fed becoming the pivotal regulator having significantly enhanced supervisory, examination, and enforcement authority. The ultimate efficacy of this legislation will rest in the hands of the Fed as it begins to apply its newly found powers and discretion. The Fed's ability to encourage (and not discourage by undue regulatory burdens and costs) the much-needed foreign bank participation in the U.S. banking environment, while trying to ensure effective prudential supervisory standards and to close the gaps made evident in the BCCI and BNL scandals, will test its institutional wisdom, judgment, and vision.

Also, FBSEA has created a juncture in the development and convergence of international bank supervisory efforts as focused within the Basle Committee. On the one hand, FBSEA has retrenched ultimate supervisory authority of foreign bank activity within the host country regulatory (the Fed); on the other hand, the legislation envisions greater international supervisory cooperation. The authors hope that FBSEA and Fed implementation will not revert to an attitude of supervisory parochialism, but that it becomes a catalyst for further constructive international efforts to create a "safe and sound," but "competitively equal" playing field for international banking activities.

A final concern is the looming congressional intervention into the delicate negotiating issues of "reciprocal national treatment" in financial services markets through statutory enactment of "fair trade" provisions. The authors hope that such an issue is left to the flexible discretion and position of the Treasury and is not encapsulated into a rigid statutory dress. This flexibility is particularly important as delicate negotiations on banking services continue under GATT and with the European Community. Such negotiations and the application of the "reciprocal national treatment" are best left (at least for the moment) with the executive branch.

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81. *See Foreign Bank Supervision Increases Under Banking Bill Sent to President*, 57 Banking Rep. (BNA) 951 (Dec. 9, 1991).