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# Does the Government Really Help Small Business Exporters? — An Analysis of Pre-Export Financing Programs under the Small Business Expansion Act of 1980 and the Export Trading Company Act of 1982

by *Toni P. Lester\**

## I. INTRODUCTION

As the unemployment rate reaches its highest level in almost six years,<sup>1</sup> the U.S. economy is currently at an all time low. The economy's demise is due to a variety of factors, including a \$90 million trade deficit in 1990 that was sparked by skyrocketing consumer demand for foreign products during the 1980's.<sup>2</sup> This demand created more jobs for our competitors abroad. A similar increase in U.S. exports could help stimulate employment at home.

Small companies have traditionally relied on domestic markets for their bread and butter, leaving big business to play the major role in promoting U.S. exports. Today, however, the small business sector has a significant role to play in the promotion of U.S. exports. In 1988, small

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<sup>1</sup> Robert D. Hershey, Jr., *U.S. Unemployment Increases To 7.1%, Worst In 5 1/2 Years*, New York Times, Jan. 11, 1992 at 1.

<sup>2</sup> Stanley B. Parrish, *U.S. Posts Surplus On Trade Again*, New York Times, Sept. 11, 1991, at D7.

companies employed 54% of the work force,<sup>3</sup> but less than half of those companies exported their products.<sup>4</sup> Thus, as the recession cuts into the buying power of most Americans, the health of the U.S. economy rests in part on the extent to which the small-business community can successfully market its products to foreign customers.

One of the most significant reasons why small companies are reluctant to export is their lack of access to adequate financing.<sup>5</sup> Commercial banks have historically either refused to finance small business exports altogether or made the costs of financing those exports restrictive. In the 1980's, however, a strong small-business lobby convinced Congress to enact legislation which provided incentives for commercial banks to finance small-business exports. The Small Business Expansion Act of 1980 required that the U.S. Small Business Administration ("SBA") guarantee commercial bank loans to small-business exporters.<sup>6</sup> Two years later, Congress also mandated that the Export-Import Bank of the U.S. ("Eximbank") establish a program to guarantee private sector loans to small exporters.<sup>7</sup> In 1990, the total amounts authorized under the Eximbank and SBA programs were \$88.6 million<sup>8</sup> and \$5 million,<sup>9</sup> respectively.

The 1980's legislation was ground-breaking because it required both agencies to adopt programs that fell outside of their traditional areas of expertise. The SBA, longstanding protector of small business interests on the *domestic* front, was required to finance the *international* activities of small companies. Eximbank, the government's chief export financing agency for almost 60 years, was told that it had to change its practice of supporting only *large* exporters and start targeting *small* exporters as well. While the motives of Congress in passing this legislation may have been noble, the law eventually gave birth to a series of overlapping gov-

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<sup>3</sup> *Small Business: Obstacles to Exporting: Hearing Before the Subcomm. On Exports, Tourism and Special Problems of the House Comm. on Small Business*, 100th Cong., 2nd Sess. 37 (1988) [hereinafter "Obstacles to Export Hearings"] (statement of Stanley Parrish, Assoc. Director, SBA).

<sup>4</sup> *Id.* at 33 (statement of Michael Czinkota, Deputy Assoc. Assist. Secretary, U.S. Dept. of Commerce).

<sup>5</sup> Charles E. Mahone, Jr., *Factors That Restrict Exports Of Small And Medium-Sized Firms: The Role Of Export Financing*, 2 *Journal Of Small Business Strategy* 24 (Nov. 1991).

<sup>6</sup> The Small Business Export Expansion Act of 1980, Pub. L. No. 96-481, 94 Stat. 2321, 2323 (1980) (current version at 15 U.S.C.A. Sec. 636(a)(14)(A)(1991).

<sup>7</sup> The Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1239 (1982) (current version in the Export-Import Bank Act of 1945, as amended, 12 U.S.C.A. Sec. 635a-4 (1991).

<sup>8</sup> *Export-Import Bank of the United States, 1990 Annual Report*, 13 (1990) [hereinafter "1990 Annual Report"].

<sup>9</sup> *Export Related Financings From FY79 to FY90 2* (Aug. 1990) [hereinafter "SBA Financings"].

ernment regulations administered by two different agencies who now compete for the same clientele.

In light of the above, two questions need to be asked: First, do both of these programs effectively meet the needs of small business exporters? Second, since the programs appear redundant, wouldn't one program administered by a single agency promote both lower costs and greater overall government efficiency?

This paper will attempt to address these questions by examining the legislation and subsequent regulations that lead to the establishment of the SBA and Eximbank guarantee programs. First, there will be a brief discussion of the types of financing needed by small-business exporters and the problems they face when they try to get financing. The 1980's legislation, which attempted to redress some of those problems, as well as the regulations and guidelines that were adopted by the SBA and Eximbank to implement that legislation, will then be covered. Finally, based on an evaluation of the above regulations and guidelines, measures to streamline the two programs will be proposed.

## II. FINANCING OBSTACLES FACED BY SMALL BUSINESS EXPORTERS

### A. Commercial Bank Export Financing

In the early 1980's, Congress acknowledged that although "small and medium-sized exporters create most [U.S.] jobs . . . , [they] face the greatest obstacles to successfully exporting the goods they produce."<sup>10</sup> Some of these obstacles come from within the small-business community itself. Small companies often are intimidated by unfamiliar foreign cultural and legal differences,<sup>11</sup> and lack sufficient international trade expertise to market their products.<sup>12</sup> But as one study of over 350 small companies showed, *access to export financing* is one of the most significant obstacles to exporting that small businesses face.<sup>13</sup>

Unless they have the rare luck of getting a foreign client to pay in cash, small exporters need to have access to several types of commercial bank financing, including letters of credit, deferred payment purchases, and direct loans. A letter of credit enables an exporter to look to a bank

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<sup>10</sup> House Committee On Banking, Finance, and Urban Affairs, H.R. Rep. No. 290, 97th Cong., 2nd Sess. 3, reprinted in 1992 U.S. Code Cong. & Ad. News 2471.

<sup>11</sup> *The Small Business Export Expansion Act and the Small Business Export Development Act: Hearing Before the Senate Select Comm. On Small Business*, 96th Cong., 2nd Sess. 136 (1980) [hereinafter "Export Expansion Hearings"] (statement of Peter Gould, Deputy Asst. Secretary, U.S. Dept. of Commerce).

<sup>12</sup> Abbas Ali and Paul Swiercz, *Firm Size and Export Behavior: Lessons From the Midwest*, 29 *Journal of Small Business Management* 77 (April 1991).

<sup>13</sup> Mahone, *supra* note 5, at 26.

for payment instead of to the foreign buyer. The bank in turn takes on the credit risk associated with the foreign buyer with respect to payment under the sales contract. This occurs when the bank agrees to pay the exporter's sales contract price on behalf of the foreign buyer if certain documents, like bills of lading, are delivered to the bank.<sup>14</sup> An exporter may want a bank to purchase at a discount the buyer's deferred payment obligations under the sales contract to the exporter.<sup>15</sup> An exporter may also try to convince a bank to give a buyer a direct loan to be used to purchase the exporter's products.<sup>16</sup>

Many banks are reluctant to finance small business exports because they are skeptical about the payment abilities of foreign buyers. This skepticism is especially true among small local bankers who usually service the small-business sector and have nominal experience in the international trade area. Bank fears, however, are not wholly without merit. Lurking beneath the surface of any export finance transaction are potential restrictions on a buyer's ability to pay, such as political unrest, war, and restrictive import or exchange rate regulations in the buyer's country.<sup>17</sup>

In fact, because of the risks associated with export finance, many banks have withdrawn from the export finance field altogether, except when they provide financing to large, preferred customers — as a favor to those customers.<sup>18</sup> Recent increases in domestic-business bankruptcies and the savings and loan scandal will probably make commercial banks even more hesitant to lend to small-business exporters.

Small companies also need working-capital financing for their export transactions. Working capital, or pre-export financing, typically covers the costs of purchasing raw materials and equipment used to produce an export.<sup>19</sup> As one Eximbank official explained, "lack of working capital financing is one of the biggest barriers small . . . companies face

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<sup>14</sup> Ralph H. Folsom, Michael Wallace Gordon and John A. Spanogle, Jr., *International Business Transactions in a Nutshell* 47 (1988).

<sup>15</sup> Robert Rendell, *Export Financing and the Role of the Export-Import Bank of the United States*, 2 J. Int'l L. Econ. 91, 92 (1976).

<sup>16</sup> Warren Glick and R. McKinsey, *The Export-Import Bank of the United States*, 2 Int'l Fin. L. 144 (Robert S. Rendell, 2nd ed. 1983).

<sup>17</sup> *Id.*

<sup>18</sup> *U.S. Export-Import Bank: On Recapitalization and Other Issues: Hearing Before the Subcomm. on International Finance, Trade and Monetary Policy of the Comm. on Banking Finance and Urban Affairs*, 100th Cong., 2nd Sess. 193 (1988) (citation of Journal of Commerce article entitled "Lack of Finance Crimps Exports", by Alan S. Cohen).

<sup>19</sup> *Export-Import Bank of the U.S., Financing and Insuring Exports: A User's Guide to Eximbank and FCIA Programs*, III-1 (1989) [hereinafter "1989 Eximbank User's Guide"].

when trying to export."<sup>20</sup> Because working-capital financing is very labor intensive, commercial banks do not believe that the smaller loans generate enough fees to justify the work involved in processing them. Banks prefer to deal exclusively with larger transactions because they can earn higher fees for the same amount of work.<sup>21</sup>

Banks are also reluctant to finance working-capital loans to small exporters because the exporters themselves are perceived as being uncreditworthy. Small exporters who are new to the exporting field and want to get loans directly from banks to cover production or marketing costs find banks especially unsympathetic to their needs. Without a proven international track record, such companies find it virtually impossible to get commercial bank loans.

Even if they are able to get working capital loans, small exporters find the costs associated with those loans very high. Banks sometimes charge as high as three percent<sup>22</sup> for servicing fees and up to three percent over the prime rate for working capital loans.<sup>23</sup> Banks also require that working capital loans be secured by inventory and accounts receivable and cite the high costs of monitoring these assets as another reason for the high rates and fees charged for these loans.<sup>24</sup>

Private sector banks are also generally unwilling to accept foreign receivables as security for small exporter loans because of the poor credit risks associated with these receivables. Thus, small exporters will generally get an unfavorable response from the commercial banking sector, unless they are wealthy enough to offer personal guarantees or mortgages on their family homes as security.

## B. Government Export Financing

Many governments, including the U.S. government, have financing programs to help support their countries' exports. Governments may offer low-interest direct loans to foreign buyers, guarantees on commercial-bank direct loans or letters of credit. Governments may also provide

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<sup>20</sup> *Id.*

<sup>21</sup> *Obstacles To Export Hearings*, *supra* note 3 at 72 (statement of John A. Bohn, Jr., President, U.S. Export-Import Bank).

<sup>22</sup> For example, servicing fees in the amount of \$10-\$15,000 could be charged on a \$250,000 working capital loan. See *Obstacles That Small Businesses Face In Obtaining Export Financing: Hearing Before the Subcomm. On Exports, Tax Policy and Special Problems of the House Comm. On Small Business*, 101st Cong. 1st sess. 85 (1989) [hereinafter "Export Financing Obstacles Hearing"] 12-18 (statement of Norman Sisisky, Chairman).

<sup>23</sup> Edward Reed, Richard Cotter, Edward Gill & Richard Smith, *Commercial Banking* 267 (1980).

<sup>24</sup> *Id.* at 264-65.

insurance to exporters to cover foreign political or exchange risks.<sup>25</sup> Government programs essentially subsidize exporters by providing their foreign buyers with below market rates on direct loans or by offering guarantees to banks who otherwise would have been unwilling to finance these transactions. Critics of government export financing programs thus often say that these programs operate in "such a manner as to contravene the basic principles of free and undisturbed world trade."<sup>26</sup>

Proponents of export subsidies, however, believe that "when the private sector fails to perform . . . activities necessary to the proper function of free markets, the government has a legitimate responsibility to correct these market failures by intervening"<sup>27</sup> with appropriate measures. Implicit in this statement is the assumption that commercial banks have shirked their civic duties by failing to adequately finance U.S. exports. The U.S. has seen a drastic increase in the use of government export subsidies by its major trading competitors.<sup>28</sup> Distasteful as they may be to critics, export subsidies probably will remain a fact of life for some time to come.

### C. Eximbank Financing

In response to the increased use of export subsidies by competitors of the U.S., Congress directed Eximbank to "neutralize the effect of such foreign credit on international sales competition."<sup>29</sup> Operating as the U.S. government's chief export financing agency, the Bank was originally established in 1945 to help the balance of trade by financing the sale of U.S. goods to post-World War Two Europe.<sup>30</sup> The Bank provides various types of export financing, including guarantees to commercial banks, direct loans to foreign buyers of U.S. exports, export credit insurance covering foreign receivable risks, and pre-export guarantees.<sup>31</sup> The Bank now supports a wide variety of export transactions, including construc-

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<sup>25</sup> Karen Hudes, *Protecting Against Inconvertibility and Transfer Risk: An Outline of Trade Financing Programs of the Export-Import Bank of the United States*, 9 HASTINGS INT'L & COMP. L. REV. 463, 464 (Spring 1986).

<sup>26</sup> *Brock Says Tentative Paris Agreement Is A Start But Not Enough*, U.S. Export Weekly (BNA) No. 379, at 65 (Oct. 20, 1981).

<sup>27</sup> *Aid and Trade: Hearing Before the Subcomm. On International Finance, Trade and Monetary Policy of the House Comm. On Banking, Finance and Urban Affairs*, 100th Cong. 2nd Sess. 69 (1988) (statement of Stuart K. Tucker, Overseas Development Council).

<sup>28</sup> Thomas Graham, *Sources of Export Financing*, 14 GA. J. INT'L & COMP. L. 464 (1984).

<sup>29</sup> 12 U.S.C.A. Sec. 635(2)(b)(1)(B) (1992).

<sup>30</sup> Rendell, *supra* note 15, at 95.

<sup>31</sup> *1990 Annual Report*, *supra* note 8, at 2.

tion projects and aircraft sales.<sup>32</sup>

Having supported over \$200 billion in exports,<sup>33</sup> the Bank has been traditionally viewed as a financing vehicle for *large* exporters. One small exporter once scathingly criticized the Bank for providing financing to only “seven companies [who] received 67 percent of Eximbank’s total funding budget [in one year] . . . with just a token amount allocated to small firms.”<sup>34</sup>

Eximbank’s lack of support for the small business sector probably was based in part on its belief that small businesses were incapable of directly promoting their own exports. The underlining premise behind this view was that small companies did not have sufficient resources to export effectively, whereas large multinationals had “the economies of scale and international production and marketing organizations required to compete in the burgeoning mass consumer and advanced technological industrial markets around the world”.<sup>35</sup> Thus, the most that a small company could do would be to “piggyback” onto large U.S. multinational export transactions on a subcontracting basis.<sup>36</sup> In the 1980’s, however, Congress became convinced that small companies should become more directly involved in the exporting process.

#### D. SBA Financing

Unlike Eximbank, the SBA has been devoted to guarding the interests of small business for almost forty years.<sup>37</sup> This was done primarily through loan and guarantee programs required by law to promote “plant construction . . . [and] the acquisition of land, material, supplies, equip-

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<sup>32</sup> *Export—Import Bank of the United States, 1988 Annual Report*, 1-9 (1988) [hereinafter “1988 Annual Report”].

<sup>33</sup> *Id.* at 2.

<sup>34</sup> E.A. Werling, *Eximbank Must Change Course*, *Enterprise*, at 17 (1982).

<sup>35</sup> See Lincoln Armstrong, *Small Business Overseas Marketing*, in *THE VITAL MAJORITY, SMALL BUSINESS IN THE AMERICAN ECONOMY, ESSAYS MARKING THE TWENTIETH ANNIVERSARY OF THE U.S. SMALL BUSINESS ADMINISTRATION* 373 (Deane Carson, ed. 1973) [hereinafter *The Vital Majority*].

<sup>36</sup> In the early 1980’s, the Bank implicitly acknowledged this philosophy when it provided evidence to Congress that many small exporters had indirectly benefitted from Eximbank loans to large companies like Boeing and Westinghouse. See *Export Promotion Programs of the Foreign Commercial Service and the Export-Import Bank*: Hearing Before the House Subcomm Of The Comm. On Government Operations, 98th Cong., 1st Sess. 58 (1983) [hereinafter “Export Promotion Hearings”] (statement of James E. Yonge, Director, Eximbank).

<sup>37</sup> For a description of the history of the SBA see essay by Anthony Chase, *Federal Support of the Vital Majority: The Development of the U.S. Small Business Administration*, in *The Vital Majority*, *supra* note 35 at 3-24.



ment and working capital”<sup>38</sup> for small-business transactions. The legislation made the SBA lead agency on all *domestic* small business transactions, but it did not give the SBA a stated role in supporting small-business’ *international* transactions.

In response to a series of hearings and reports which cited lack of adequate export financing as one of the most significant barriers to small-business exporters, Congress concluded that the federal government was not providing sufficient support for small business exporters and directed the SBA to provide financial assistance to serve their needs.<sup>39</sup>

### III. SBA AND EXIMBANK STATUTORY REVISIONS

As the above indicates, for most of their histories, neither the SBA nor Eximbank demonstrated a significant commitment to promoting small-business exports. The 1980’s legislation sought to remedy this situation.

#### A. SBA Legislation

Congressional hearings on the state of small business exports in 1980 prompted extensive input from both government and private sector experts. The hearings were held to consider the creation of an SBA Office of International Trade and an SBA program to guarantee pre-export loans to small businesses. There was some criticism that an International Trade Office established to provide international-marketing information to small companies would unnecessarily duplicate the same informational services already provided by the U.S. Commerce Department.<sup>40</sup> However, the response to the proposed pre-export guarantee program was uniformly favorable.

One leading state government official praised the proposed program,<sup>41</sup> and the U.S. Secretary of Commerce for Trade and Development said that the program would help solve the small-business credit predicament.<sup>42</sup> Officials from the commercial-banking industry also voiced their

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<sup>38</sup> The Small Business Act, Pub. Law no. 85-536, 72 Stat. 384 (1958) (current version at 15 U.S.C. Sec. 636(a) (1992).

<sup>39</sup> 15 U.S.C.A. Sec. 111(a)(1),(6), and (b)(3).

<sup>40</sup> *Small Business Export Expansion Act: Hearing Before the Subcomm. on Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong. 2nd Sess. 94 (1980) [hereinafter “Small Business Export Hearings”] (statement of Herta Lande Seidman, Asst. Secretary, U.S. Dept. of Commerce).

<sup>41</sup> *Export Expansion Hearings*, *supra* note 11 at 75 (statement of Stanley S. Newman, Deputy Commissioner, New York Dept. of Commerce).

<sup>42</sup> *Small Business Export Hearings*, *supra* note 40, at 94.

support for the proposed guarantee program.<sup>43</sup> In response to the recommendations made at the hearings, Congress mandated that the SBA provide guarantees for both domestic transactions and “revolving lines of credit for *export* purposes . . . to enable small business concerns . . . to develop foreign markets and for pre-export financing: [*Provided, however, that*] no extension or revolving line . . . [could] be for a period . . . exceeding 3 years”. [emphasis added]<sup>44</sup>

With respect to the new pre-export program, Congress let stand several important statutory requirements that related to domestic SBA loans and guarantees. For instance, the SBA was only allowed to guarantee that part of commercial-bank interest rates which did “not exceed the current average market yield on outstanding marketable obligations of the United States”<sup>45</sup> with similar maturities. Second, the SBA could only finance pre-export guarantees “of such sound value or so secured as reasonably to assure repayment”.<sup>46</sup> Finally, SBA guarantees could only cover up to eighty five percent of small export loans for up to \$750,000.<sup>47</sup>

### B. Eximbank Legislation

Two years after the enactment of the SBA legislation, Congress mandated that Eximbank also establish a new program to help exporters obtain commercial-bank pre-export financing. Specifically, the law provided that Eximbank guarantee commercial bank pre-export loans to exporters “when such loans are secured by export accounts receivable or inventories of exportable goods.”<sup>48</sup> In 1983, Congress expanded Eximbank’s list of acceptable collateral requirements to include “accounts receivable from leases, performance contracts, grant commitments, participation fees, member dues, revenue from publications, or such other collateral as the Board of Directors may deem appropriate.”<sup>49</sup>

### C. Inherent Conflicts In SBA and Eximbank Legislation

Both the SBA and Eximbank are “today faced with two major

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<sup>43</sup> *Export Expansion Hearings, supra* note 11, at 169 (statement of Alfred Daiboch, Asst. President, Banker’s Trust).

<sup>44</sup> 15 U.S.C.A. Sec. 636(a)(14)(A) (1992). Congress also passed legislation requiring the SBA to create a loan guarantee program to help small companies who are adversely affected by import competition. This program will not be discussed in this article.

<sup>45</sup> 15 U.S.C. Sec. 636(a)(4) (1992).

<sup>46</sup> *Id.* at Sec. 636(a)(6).

<sup>47</sup> *Id.* at Sec. 636(a)(20)(B)(i) and (ii).

<sup>48</sup> 12 U.S.C.A. Sec. 635a-4 (1989).

<sup>49</sup> The Export-Import Bank Act Amendments of 1983, Pub. Law no. 98-181, 97 Stat. 1157 (1983) (current version at 12 U.S.C.A. Sec. 635a-4 (1991)).

forces [which are pulling them] . . . in opposite directions . . . : the budget deficit and the trade deficit.”<sup>50</sup> On one hand, they must reduce the trade deficit by supporting U.S. exports. On the other hand, they run the risk of contributing to the budget deficit if they incur losses as a result of guaranteeing uncreditworthy exporters.

The law indirectly demands that the SBA take into account budget deficit issues by providing that all SBA transactions must be “of such sound value or so secured as reasonably to assure repayment”.<sup>51</sup> Similarly, Eximbank must make sure that its loans have “a reasonable assurance of repayment.”<sup>52</sup> Furthermore, the Export Trading Company Act directs Eximbank to provide guarantees only when commercial banks are not willing to provide financing to “*otherwise creditworthy* [emphasis added]. . . exporters.”<sup>53</sup> However, since the types of transactions financed under both programs do not offer a reasonable assurance of repayment from a strictly commercial perspective, there is a good chance that both agencies will incur losses as a result of payment defaults.

In 1983, Congress further clouded the repayment issue for Eximbank. That year, legislation was passed which directed the Bank to approve guarantees “on terms and conditions which are fully competitive with the Government supported rates and terms . . . from principal countries whose exporters compete with United States exporters.”<sup>54</sup> This provision was intended to apply to competitive bidding situations in which foreign export credit agencies were providing financing to uncreditworthy exporters. In order to support the U.S. exporter in such instances, Congress urged the Bank to “re-examine the creditworthiness”<sup>55</sup> of the U.S. exporter, presumably by applying more liberal credit

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<sup>50</sup> Stephan M. Minikes, *U.S. Government Role In Financing And Promoting International Construction Projects*, International Construction Law Seminar Materials, A.B.A. Forum Comm. On The Construction Industry, 23 (1985).

<sup>51</sup> 15 U.S.C.A. Sec. 636(a)(6) (1992). Congress was obviously concerned about potential losses under the ERLC Program, since it suggested during the Small Business Expansion Act’s deliberations that the SBA “take affirmative steps to moderate the agency’s default rate.” See House Small Business Comm., H.R. Report No. 96-1434, 126 Cong. Record (1980).

<sup>52</sup> 12 U.S.C.A. Sec. 635(b)(1)(B) (1989) provides that Eximbank “loans . . . shall . . . offer reasonable assurance of repayment.” While this provision doesn’t specifically mention the term “guarantees”, it presumably should serve as a guide for all Bank credit decisions. This assumption is supported by a statement made by former Bank President, James E. Yonge, who told Congress that in making credit decisions under the WCG Program, Eximbank looked “to the domestic exporter for [its] . . . required ‘reasonable assurance of repayment’.” See *Export Promotion Hearings, supra* note 36, at 50.

<sup>53</sup> 12 U.S.C.A. Sec. 635-a(1) (1989).

<sup>54</sup> 12 U.S.C. § 635(b)(1)(A) (1989).

<sup>55</sup> House Comm. On Banking, Finance and Urban Affairs, H.R. Report No. 98-176, 98th Cong. 1st Sess. 7 (May 16, 1983).

evaluation criteria. Many small companies, however, feel that Eximbank has ignored this mandate by continuing to demand the same type of prohibitive requirements that made pre-export financing inaccessible to them in the first place.

Another issue which exacerbates the budget deficit issue for Eximbank is the fact that the Bank has operated at a large loss for the last several years.<sup>56</sup> This is because the Federal Financing Bank, which loans Eximbank money to finance its loans, currently charges Eximbank rates that are higher than the rates that Eximbank in turn charges its own borrowers.<sup>57</sup> As Eximbank's 1990 annual report admits, "absent the elimination of this deficiency, through the attainment of profitable operations . . . Eximbank may ultimately be unable to repay its current debt . . . ."<sup>58</sup>

How can either agency resolve the budget deficit problem? One alternative is to approve a large number of transactions and offset potential losses by requiring additional security and charging higher front-end fees. Another alternative would be to finance only loans that are deemed viable from a strictly commercial perspective. While these alternatives might satisfy budget deficit concerns, they would not please the small business community. Indeed, both the SBA and Eximbank have been criticized for either refusing to finance exports because they worry too much about potential losses<sup>59</sup> or demanding unreasonably burdensome security requirements for their guarantees.<sup>60</sup> Specific security requirements under the Eximbank Working Capital Gains ("WCG") Program will be discussed below.

#### IV. PROGRAM REGULATIONS AND GUIDELINES

Eximbank implemented the revisions to its enabling statute by simply issuing guidelines that it updates from time to time,<sup>61</sup> but it never adopted any formal regulations. The SBA, however, did adopt regulations that established the Export Revolving Line of Credit ("ERLC") Program<sup>62</sup> and published proposed guidelines<sup>63</sup> that attempted to clarify

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<sup>56</sup> 1990 Annual Report, *supra* note 8, at 40.

<sup>57</sup> 1988 Annual Report, *supra* note 32, at 33,34.

<sup>58</sup> *Id.*

<sup>59</sup> Graham, *supra* note 28, at 465.

<sup>60</sup> *Export Financing Obstacles Hearing*, *supra* note 22 at 85 (position paper on Export Finance submitted by the Industry Sector Advisory Comm. on Small and Minority Business for Trade Policy Matters).

<sup>61</sup> 1989 *Eximbank User's Guide*, *supra* note 19.

<sup>62</sup> 13 C.F.R. Sec. 122.54-1 to 6 (1992).

<sup>63</sup> *U.S. Small Business Administration Draft Export Revolving Line of Credit User's Guide* (March 1991) [hereinafter "SBA User's Guide"]. The proposed SBA guidelines appear to try to

certain issues left unanswered by the ERLC Program regulations.

The proposed SBA guidelines also tried to respond to recommendations made by a consultant hired by the agency to evaluate the ERLC Program in 1989.<sup>64</sup> The evaluation was based on interviews with commercial banks, exporters and SBA staff. The consultant concluded, among other things, that the SBA's staff lacked sufficient expertise to process international transactions and that program documentary requirements were too complicated.<sup>65</sup>

A detailed description and comparison of the types of transactions covered, eligibility and collateral requirements, repayment terms, fees charged and guaranteed interest rates under both programs will be covered below.

#### A. Types of Transactions Covered

The SBA regulations provide that the SBA will guarantee commercial bank loans if those loans are used to "develop a foreign market and/or finance labor and materials for pre-export production."<sup>66</sup> Similarly, Eximbank guidelines state that Eximbank will issue guarantees to cover commercial bank loans used (1) to purchase materials or services used to produce exports or (2) to market products "or conduct other promotional activities aimed at developing new overseas business."<sup>67</sup> "Other promotional activities" presumably includes the costs of hiring foreign consultants.

#### B. Exporter Eligibility

Some small companies may find Eximbank's eligibility requirements intimidating. Former Eximbank Chairman William Draper once said that only exporters who had "management with the skills and experience necessary to make the venture a success"<sup>68</sup> would be considered eligible for coverage. However, Bank guidelines originally did little to clarify what actual criteria the Bank used to determine if a company had the

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mirror Eximbank's WCG Program as much as possible. The SBA even calls its proposed guidelines a "User's Guide". This is the same name that Eximbank uses for its guidelines. The SBA is currently soliciting comments about its proposed guidelines from the public.

<sup>64</sup> See Irving Burton Associates, *Draft Review of the Export Revolving Line of Credit Program Prepared for the Small Business Administration* (September 1989) [hereinafter "ERLC Review"].

<sup>65</sup> *Id.* at 22.

<sup>66</sup> 13 C.F.R. Sec. 122.54-3 (1992).

<sup>67</sup> *Export-Import Bank of the U.S., Financing and Insuring Exports: A User's Guide to Eximbank and FCLIA Programs*, III-2 (July 1990) [hereinafter "1990 Eximbank User's Guide"].

<sup>68</sup> William H. Draper III, President and Chairman of the Export-Import Bank of the United States, Prepared Statement Before the House Subcomm. On Int'l Econ. Policy and Trade, 2 (Aug. 1984).

requisite skills and experience. The guidelines, which simply stated that an eligible exporter was a company that had "exporting potential",<sup>69</sup> have been revised recently to clarify this situation. They now state that exporters need to have a "positive net worth and experience in the field . . . [and] principals or senior management are expected to have at least two years of cumulative export experience."<sup>70</sup> Eximbank also requires that exporters submit financial statements which cover the past three years,<sup>71</sup> thus implying that applicants must have at least three years of general business experience to be eligible.

Furthermore, in a case study used by Eximbank during training sessions, a model exporter is described as one who has international experience, significant technical experience and graduate level educational credentials. The case study applicant's international experience consists of its having piggybacked onto large firm international sales transactions. The skills of the applicant's management team were obtained in MBA programs at nationally known universities, and the exporter's technical consultant had 35 years of experience.<sup>72</sup>

The SBA is more liberal than Eximbank with respect to exporter eligibility requirements. SBA regulations simply state that exporters are eligible for SBA financing if they have been in business for at least *one* year.<sup>73</sup> This one year requirement may be waived if the SBA determines that the exporter has more extensive international trade experience.

### C. Lender Eligibility

The SBA regulations and proposed guidelines are silent about lender eligibility requirements. Eximbank guidelines, however, state that commercial banks must have some business loan experience, such as collection and U.C.C. filings, to be eligible for a guarantee.<sup>74</sup>

In addition to offering guarantees to commercial banks, the law directs Eximbank to make arrangements to guarantee state and municipal agencies who finance local exports.<sup>75</sup> To date, the Bank has made such agreements with the City of Los Angeles, the Port Authority of New

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<sup>69</sup> 1989 *Eximbank User's Guide*, *supra* note 19, at III-1.

<sup>70</sup> 1990 *Eximbank User's Guide*, *supra* note 67, at III-7.

<sup>71</sup> *Id.* at III-5.

<sup>72</sup> *Export-Import Bank of the U.S.: Case Study for Working Capital Guarantee Program*, 1 (undated).

<sup>73</sup> 13 C.F.R. Sec. 122.54-(2)(a) (1992).

<sup>74</sup> 1990 *Eximbank User's Guide*, *supra* note 67, at III-2.

<sup>75</sup> The law requires Eximbank to allocate some of its small business financings to guarantees of state export finance agency loans to exporters. See 12 U.S.C.A. Sec. 635(b)(1)(E)(vii)(I) (1989).

York, and the states of Maryland, Michigan and Oklahoma.<sup>76</sup>

#### D. Repayment Terms

Repayment terms under the ERLC Program must be no longer than eighteen months. However, the law implies that the terms can be extended for an additional eighteen month period since the statute sets the overall loan term at three years.<sup>77</sup>

Eximbank will cover loans for up to the earlier of six months from the date of the last disbursement under the loan or six months from the last date in the disbursement period.<sup>78</sup> Eximbank considers a request for a loan renewal as if it were a new application, but the guidelines are not clear on how long the renewal term can last.

#### E. Guaranteed Loan Amounts

Eximbank guidelines state that the lender can only lend ninety percent of the collateral value. Thus, there are theoretically no set limits on the Eximbank guaranteed loan amount.<sup>79</sup> Since the Bank is supposed to encourage, but not replace the private sector,<sup>80</sup> the Bank also stipulates that it will only guarantee ninety percent of the commercial bank loan.<sup>81</sup> The SBA guarantees eighty five percent of the commercial loan up to \$750,000.<sup>82</sup>

#### F. Guaranteed Interest

In addition to paying the fees discussed above, the SBA regulations state that commercial banks cannot charge interest rates on pre-export loans that are higher than two and one-quarter over the New York prime rate.<sup>83</sup> This fulfills the statutory requirement that the rates charged on SBA guaranteed loans must be reasonable and legal.<sup>84</sup> Since the regulations and proposed guidelines are silent about guaranteed interest coverage, it can be assumed that the SBA will guarantee interest up to two and one-quarter over the prime rate.

In contrast to the SBA, Eximbank clearly states that it will guarantee "the rate of interest provided in the loan agreement or one percent

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<sup>76</sup> *Eximbank Fact Sheet: City/State Program*, 1-5 (Oct. 1990).

<sup>77</sup> 15 U.S.C.A. Sec. 636(a)(14)(A) (1992).

<sup>78</sup> *1990 Eximbank User's Guide*, *supra* note 67, at III-6.

<sup>79</sup> *1990 Eximbank User's Guide*, *supra* note 67, at III-2.

<sup>80</sup> Minikes, *supra* note 50 at 19.

<sup>81</sup> *1990 Eximbank User's Guide*, *supra* note 67, at III-4.

<sup>82</sup> 15 U.S.C.A. Sec. 636(a)(20)(B)(i) and (ii) (1992).

<sup>83</sup> 13 C.F.R. Sec. 122.8-4(d).

<sup>84</sup> 15 U.S.C.A. Sec. 636(a)(14)(A) (1990).

over the U.S. Treasury borrowing rate for borrowings having the same maturities, whichever is lower."<sup>85</sup> Eximbank also places no limits on the amount of interest that commercial banks may charge exporters for guaranteed loans.<sup>86</sup> Thus, exporters may still be forced to pay unreasonably high commercial bank fees and interest rates under the WCG Program even though their loans are now guaranteed by the government.

### G. Collateral Requirements

The collateral requirements under the ERLC and WCG Programs have received a great deal of criticism from both commercial banks and exporters. Eximbank requires that commercial banks share on a ninety-ten first lien basis any security obtained by the bank for the pre-export loans.<sup>87</sup> Some financial institutions have criticized Eximbank's first lien policy because they believe that it unfairly forces them to subordinate their positions on the guaranteed loans.<sup>88</sup> The SBA also expects to share the collateral with its guaranteed banks on a first lien basis.<sup>89</sup>

In addition to the above collateral requirements, Eximbank asks for personal guarantees when the exporter is a closely held company.<sup>90</sup> The SBA also requires that its guarantees be secured by the personal guarantees of company principals.<sup>91</sup> However, small business exporters object to these personal guarantee requirements because they believe that they should not be made personally liable for purely business transactions. As the president of one small exporter complained, the small exporter is forced to "risk his primary capital base to satisfy government lender(s) obviously skeptical of their own export promotion mission . . . an over-valued dollar or an unexpected serious illness . . . triggers a liquidation of all he owns by a government with everything to gain and nothing to lose".<sup>92</sup> The criticism against the level of collateral coverage required under both programs, however, is somewhat misguided. The law demands that the SBA and Eximbank keep their losses at a minimum, and the only way to ensure that this will occur is to require sufficient security.

With respect to foreign receivables, the law specifically allows Ex-

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<sup>85</sup> 1990 *Eximbank User's Guide*, *supra* note 67, at III-4.

<sup>86</sup> *Id.* at III-7.

<sup>87</sup> 1990 *Eximbank User's Guide*, *supra* note 67, at III-2.

<sup>88</sup> *Export-Import Bank of the United States 1989 State/City Initiative Pilot Projects — Final Report*, 31 (March 1988) [hereinafter "Pilot Projects"].

<sup>89</sup> See *Small Business Administration Sample Authorizations and Loan Agreement for Guaranty Loans* (Form EX-1565A-GL-1238) 3 (undated).

<sup>90</sup> 1990 *Eximbank User's Guide*, *supra* note 67, at III-7.

<sup>91</sup> 13 C.F.R. Sec. 120.103-2 (1985).

<sup>92</sup> *Export Financing Obstacles Hearing*, *supra* note 22, at 72 (statement of Ervin Allmen, President, W.C. Smith, Inc.).



imbank to accept foreign receivables as collateral. Eximbank guidelines state that this does not include receivables that are sixty days past due, unless they are secured by Foreign Credit Insurance Association ("FCIA") insurance or irrevocable letters of credit.<sup>93</sup>

The SBA regulations, however, are not as clear about foreign receivables. They state that the SBA will only accept collateral that is "located within the U.S., its territories and possessions".<sup>94</sup> A conservative interpretation of this provision could cause the SBA's staff to refuse to accept any foreign receivables. This could have a disastrous effect on new small exporters, since foreign receivables are the very backbone of pre-export finance. The proposed SBA guidelines now take a slightly more flexible approach to the receivable issue by allowing banks to accept foreign receivables under certain circumstances.<sup>95</sup>

The proposed SBA guidelines would make a distinction between (1) foreign receivables that are payable through letters of credit issued in developing countries and (2) receivables from developing countries that are payable through letters of credit confirmed by a U.S. bank. The SBA will not accept the former as collateral unless they have FCIA insurance coverage. It will accept the latter without any insurance.<sup>96</sup> The insurance requirement could pose problems for small exporters since this adds yet another cost to an already expensive financing package.

#### H. Program Fees

The SBA charges several different types of fees to use the ERLC Program, including guaranty fees, commitment fees and guaranty renewal fees. Commercial banks are charged a one-quarter of one-percent up front *guaranty fee* for loans with maturities of less than one year and a two-percent fee for maturities of more than one year.<sup>97</sup> These fees are often passed on by the lender to the exporter. The SBA also charges the exporter a *commitment fee* which will be the higher of one-quarter of one percent or \$200.<sup>98</sup>

Although the law allows the repayment period on guaranteed loans to cover up to eighteen months, the SBA regulations are silent when it

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<sup>93</sup> 1990 *Eximbank User's Guide*, *supra* note 67, at III-3. The Foreign Credit Insurance Association is an arrangement between a group of private insurance companies and Eximbank to provide insurance to U.S. exporters and commercial banks to cover political and commercial risks. See Hudes, *supra* note 25, at 463.

<sup>94</sup> 13. C.F.R. Sec. 122.54-5 (1989).

<sup>95</sup> *SBA User's Guide*, *supra* note 63, at 6.

<sup>96</sup> *Id.*

<sup>97</sup> 13. C.F.R. Sec. 120.104-1(a) (1985).

<sup>98</sup> *Id.* at Sec. 120.104-2(c).

comes to describing what fees, if any, would be charged to exporters who wish to extend the terms of their guaranteed loans. The SBA could choose to interpret the regulations conservatively by treating short-term renewal applications as if they were original applications for medium-term guarantees. Thus, in addition to the fee of one quarter percent initially assessed on the short-term loan, the agency could charge a two-percent guaranty fee for the renewal.

The SBA must have received complaints about this possible interpretation because the proposed guidelines provide that approvals for loan renewals with original maturities of 12 months or less, would only be charged an additional one quarter-percent guaranty renewal fee.<sup>99</sup> A two-percent fee will in turn be charged for renewals on medium-term guarantees.<sup>100</sup> However, the guidelines still do not take into account the fact that exporters who originally applied for repayment terms in excess of one year still run the risk of having to pay an additional two-percent fee, even if the renewal request is to cover a very short period of time.

Eximbank's fee structure has also been criticized by small exporters as being too expensive.<sup>101</sup> Eximbank charges a processing fee, a facility fee, and a usage fee. The *processing fee* of \$100 is charged by the Bank to review the guarantee application. The *facility fee*, which is similar to the SBA's guaranty fee, is chargeable to the lender, and amounts to one-half of one percent of the loan amount. Finally, the *usage fee*, which is similar to the SBA's commitment fee, is one-quarter of one percent on the outstanding balance of the loan, notwithstanding the loan repayment term.<sup>102</sup>

### I. Exporter Reporting Requirements

The SBA regulations require that exporters submit monthly progress reports to the lender during the term of the loan and projected cash flow charts along with their application to the SBA.<sup>103</sup> The Eximbank guidelines request more information from exporters during the application process. Exporters must submit financial statements covering the past three years and projected financial statements covering the proposed loan period under the WCG Program.<sup>104</sup>

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<sup>99</sup> *SBA User's Guide*, *supra* note 63, at 5.

<sup>100</sup> *Id.*

<sup>101</sup> *Pilot Projects*, *supra* note 88, at 27.

<sup>102</sup> *1990 Eximbank User's Guide*, *supra* note 67, at III-6.

<sup>103</sup> 13 C.F.R. Sec. 122.54-6(a), (b) (1989).

<sup>104</sup> *1990 Eximbank User's Guide*, *supra* note 67, at II-11.

**V. WHICH PROGRAM IS THE LEAST EXPENSIVE FOR SMALL  
BUSINESS EXPORTERS?**

As the above discussion indicates, an exporter will be faced with a conflicting array of fees and costs when it comes to deciding whether or not to apply for an ERLC or WCG Program guarantee. A hypothetical case can be used to illustrate the exporter's dilemma. Imagine that a company needs a short-term loan for \$400,000 to purchase raw materials to be used to produce paper products for export to a foreign buyer. The company would be charged the following fees and rates under both programs:

	<u>SBA</u>	<u>Eximbank</u>
<i>Processing Fee</i>	0	\$100
<i>Guaranty Fee (or Facility Fee):</i>		
for < 1 year repayment term	\$1,000	\$2,000
for > 1 year repayment term	\$8,000	(no limit on repayment terms)
<i>Commitment Fee (or Usage Fee)</i>	\$1,000	\$1,000
<i>Interest</i>	Prime + 2 1/4%	No interest cap

As the above indicates, the exporter's costs will be based largely on the type of repayment terms that it needs. Since this exporter needs short-term financing, it will probably find the SBA program will probably seem more attractive because of the lower \$1000 guaranty fee. However, for a company that needs medium-term financing, the choice is more complicated. Initially, this company will probably find the \$2,000 Eximbank facility fee more appealing since the SBA will charge \$8,000 for the same repayment terms. However, the same exporter could face higher interest rate charges under the Eximbank Program since Eximbank places no limits on the amount of interest that commercial banks can charge.

Even if the fees under both programs were the same, exporters still have to find a commercial bank to give them a loan. While the WCG Program may be appealing to banks because Eximbank provides a ninety-percent guarantee of principal and places no restrictions on interest rate charges, commercial lenders will probably be unhappy with the interest rate coverage Eximbank offers, i.e., only Treasury plus one percent. On the other hand, while the SBA guarantees interest rate charges up to prime plus two and one-quarter percent, the SBA will only guarantee eighty-five percent of principal amount of the loan. Thus, there are no clear cut rules for determining which program is best suited for small exporters.

## VI. TRACK RECORD OF PROGRAMS

In addition to the confusion over program costs, there has also been criticism from the banking and small-business communities about the performance records of both the WCG and ERLC Programs. This criticism has been influenced by a variety of factors, including: (1) federal budget cuts that have severely interfered with Eximbank staffing levels and caused overall program delivery to suffer; (2) the SBA staff's lack of the requisite international trade experience; and (3) the displeasure of exporters and bankers with the relatively high level of collateral coverage required by both agencies.

### A. Eximbank Track Record

The WCG Program got off to a very slow start when it was first established in 1983. During the first seven months that the program was in existence, the Bank received a total of 42 applications, but approved only 17. Despite later efforts to clarify program application requirements, the Bank approved only one WCG application in 1984, one in 1985 and one in 1986.<sup>105</sup> The Bank justified these low approval rates by explaining that many of the applications it received were either not well defined or were poor credit risks. It also complained to Congress that it did not have adequate resources to market the program effectively.<sup>106</sup> Critics, however, have charged that the low authorization rates were the result of a clear bias on Eximbank's part against small exporters.<sup>107</sup>

In 1988, however, Eximbank saw a drastic increase in exporter use of the WCG Program. The total amount of guarantees authorized that year was \$75.5 million. Even though exporter use of the WCG Program has steadily increased over the last few years,<sup>108</sup> the perception remains that Eximbank discriminates against small-business exports. Some banks believe that Eximbank's documentation is too complicated. Others say that Eximbank's policy of taking a first lien position sours commercial bank interest in the program<sup>109</sup>. Small exporters in turn complain that

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<sup>105</sup> These figures are listed in a summary of WCG Program activity, dated 9/24/90, that was obtained as a result of the author's Freedom of Information Act request.

<sup>106</sup> Draper, *supra* note 68, at 5.

<sup>107</sup> *Financing Of Small Business Exports by the Export-Import Bank: Hearing before the Subcomm. on Export Promotion and Market Development of the Senate Comm. On Small Business*, 98th Cong., 2nd Sess. 24 (1984) (statement of Senator Rudy Boschwitz).

<sup>108</sup> By 1990 the total amount authorized under the program had risen to \$88.6 million. (See 1990 *Annual Report*, *supra* note 67, at 15.)

<sup>109</sup> Banks still retain a 10% unguaranteed risk in the pre-export loan and thus believe that they should be able to liquidate any collateral *before* Eximbank gets a chance to do so. See *Pilot Projects*, *supra* note 88, at 31.

Eximbank's poor turnaround time in processing applications<sup>110</sup> causes companies to lose bids on foreign contracts.

It is too simplistic, however, to accuse Eximbank staff of harboring purely discriminatory motives when they process guarantee applications. It is more likely that budgetary problems have had the greatest impact on the way in which the WCG Program has been administered in more recent years. Specifically, even though the Bank experienced a thirty-eight percent increase in the amount of loan and guarantee applications it received in 1988, Congress did not approve a corresponding increase in the Bank's administrative budget to hire new employees. This has forced the Bank to make its already small staff responsible for an even wider range of responsibilities.<sup>111</sup> This in turn has caused the "banking community's lack of confidence in Eximbank's responsiveness; [and] lack of knowledge by emerging businesses of Eximbank's programs."<sup>112</sup>

### B. SBA Track Record

Like Eximbank, the SBA also had great difficulty launching the ERLC Program in its early years. In 1983, the total amount of loans guaranteed under the program was \$7.6 million.<sup>113</sup> Although Eximbank was able to significantly increase exporter use of its program in the ensuing years, the SBA has not been so successful. In 1989, nine years after the ERLC Program was created, the amount of SBA guarantees approved reached its peak at \$10.3 million. But in 1990, the total authorized amount fell to \$5 million.<sup>114</sup>

A study commissioned by the SBA in 1989 to evaluate the ERLC Program listed three main reasons for the program's poor track record: (1) lack of sufficient international trade experience on the part of SBA staff,<sup>115</sup> (2) poor marketing of the program to bankers,<sup>116</sup> and (3) insufficient guaranteed risk coverage on bank loans (i.e., that the eighty-five guarantee coverage is too low).<sup>117</sup>

Congress did not adequately anticipate just how hard-pressed the SBA would be to implement a large scale international trade program

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<sup>110</sup> *Pilot Projects*, *supra* note 88, at 6.

<sup>111</sup> *Future of the Export-Import Bank Direct Lending Program: Hearing Before the Subcomm. On International Development, Finance, Trade and Monetary Policy of the House Comm. On Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 57 (1989).

<sup>112</sup> *Pilot Projects*, *supra* note 88, at 6.

<sup>113</sup> *SBA Financings*, *supra* note 9, at 2.

<sup>114</sup> *Id.*

<sup>115</sup> *ERLC Review*, *supra* note 64, at 17.

<sup>116</sup> *Id.* at 32.

<sup>117</sup> *Id.* at 12.

when the Small Business Expansion Act was passed in 1980. It is thus understandable that a domestically-oriented SBA initially floundered when it first tried to administer the ERLC Program. The SBA is now trying to remedy this situation by sending its finance staff to export finance training sessions.<sup>118</sup> Whether or not these efforts will be successful will likely not be known for some time.

Marketing the ERLC Program to bankers has posed its own set of problems. The SBA study concluded that marketing problems were partly due to the organizational structure of commercial banks. Since the SBA has had longstanding relationships with the domestic lending departments of most banks, the international departments of these banks were never contacted by the SBA's staff. Unfortunately, it is the international commercial bank staff that has the necessary expertise to deal with the types of transactions covered by the ERLC Program.<sup>119</sup>

As the above discussion indicates, budgetary problems and lack of international expertise has had a drastic effect on how successfully the ERLC and WCG Programs have been administered. Eximbank has marketed its program well, but its staffing has been inadequate to competently perform the followup necessary to implement the program. Moreover, the SBA's lack of sufficient international trade expertise has left it falling well short of reaching the ERLC Program's potential.

In light of the above, the business public has become extremely cynical about both government programs. As one small exporter so aptly explained "the inexperience and poor expertise of most financial institutions, bankers, and government agencies, which usually encourage your cooperation, only let you down when the real opportunity arises. It seems they are most interested in filling in their PR to the chagrin of the exporter".<sup>120</sup>

## VII. MEASURES TO STREAMLINE BOTH PROGRAMS

In view of the above evaluation, it is clear that changes need to be made in both programs if there is any hope that the government will be able to support small exporters in the manner envisioned by Congress in the early 1980's. There are two possible alternatives that Congress could take to achieve this result. One alternative would require both agencies to adopt the same coverage and program terms. The other alternative would require that both programs be combined and administered by one agency instead of two.

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<sup>118</sup> *Obstacles to Export Hearings*, *supra* note 3, at 92.

<sup>119</sup> Burton Associates, *ERLC Review*, *supra* note 64, at 17.

<sup>120</sup> Mahone, *supra* note 5, at 33.

A. Alternative #1: Uniform Coverage and Program Terms

To carry out this alternative, Congress should enact legislation that requires both agencies to charge the same fees and provide the same level of guarantee coverage. If this alternative were implemented, exporter confusion over conflicting program terms and fees would be eliminated. Furthermore, guarantee coverage should be raised to the highest possible levels so that banks and exporters have a greater incentive to use these programs. A uniform guarantee coverage and fee structure might look like the following:

<i>Processing Fee</i>	0
<i>Guaranty Fees</i> (no limit on the repayment term)	\$2,000
<i>Commitment Fees</i> (or Usage Fee)	\$1,000
<i>Interest Covered</i>	Prime + 2 1/4%
<i>Guaranteed Amount</i>	95% (of \$750,000 for the SBA and 95% of the collateral value for Eximbank)

In the above case, Eximbank's application fee and the two tier SBA guaranty fee have been dropped. The SBA's eighty-five percent guarantee coverage and Eximbank's ninety percent coverage have been increased to ninety-five percent. Commercial banks would be limited to charging the SBA-stipulated rate of prime plus two and one-quarter percent. However, in order to counter bank displeasure with the rate restriction, it is suggested that both agencies allow commercial banks to take a first lien position on their fifteen percent unguaranteed loan amounts. However, unless Congress is willing to clearly admit that the government should finance uncreditworthy pre-export transactions, it is important that both agencies be allowed to continue to use discretion in asking for personal guarantees and additional security when necessary. Finally, the SBA's staff should continue to get the necessary training to further develop their international trade skills.

B. Alternative #2 - A Pre-Export Program Administered  
By One Agency

This alternative could prove to be the more effective of the two, but would probably be more difficult to implement. In this case, the programs would be combined and administered by one agency. It is clear that Eximbank's staff has the greatest amount of training in the field of international trade finance. In contrast to the SBA, Eximbank also has more extensive contacts in the international commercial banking community. However, because of budgetary constraints, Eximbank staffing levels are too low to accommodate exporter needs under the WCG Pro-

gram. Thus, Eximbank should serve as the chief administrator of the combined guarantee program, and the SBA's regional offices could provide brokerage services for Eximbank.

Under this arrangement, Eximbank would delegate authority to the SBA to guarantee pre-export loans on Eximbank's behalf, subject to certain clearly delineated criteria set forth by Eximbank in an agreement with the SBA. The SBA's staff would be required to attend Eximbank training sessions to learn about program guidelines. Exporters would be able to apply for loan amounts which exceed the SBA \$750,000 limit. Guarantee and commitment fees, and the principal and interest rate coverage recommended in Alternative #1 would also be adopted. Thus, lenders and exporters would no longer be confronted with two conflicting programs designed to serve the same purpose.

This alternative would harness Eximbank's international expertise and solve its staffing problems at the same time. It would also take advantage of the SBA's regional offices, which have access to exporters at the local level. Similar arrangements have already been made by Eximbank to delegate authority to certain commercial banks to make guaranteed loans under the WCG Program.<sup>121</sup>

Eximbank and the SBA have made joint efforts in the past with respect to the ERLC and WCG Programs. Since Eximbank and the SBA are directed by law to *cooperate* in the promotion of small-business exports,<sup>122</sup> the two agencies signed a co-guaranty agreement in 1984 for the purpose of serving small exporters more efficiently and effectively. Under the arrangement, both agencies agreed to guaranty on a fifty-fifty basis ninety percent of pre-export loans to small companies for loan amounts up to \$1 million. Fees and other program terms were to be the same as the SBA's ERLC Program fees and terms. The SBA also agreed to administer the co-guaranty program through its regional offices.<sup>123</sup> However, to date there has been virtually no use of this program by small exporters.<sup>124</sup>

In order to ensure that alternative #2 has greater success than the

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<sup>121</sup> Eximbank allows certain commercial banks to issue guarantees on Eximbank's behalf to cover up to \$300,000 without Eximbank's prior approval, subject to specific guidelines and requirements set forth in an agreement between the lender and Eximbank. See *1990 Eximbank User's Guide, supra* note 67, at III-8.

<sup>122</sup> 15 U.S.C.A. Sec.635(2)(b)(1)(E)(viii).

<sup>123</sup> See *Memorandum of Understanding Between The Small Business Administration and The Export-Import Bank of the United States*, 1-11 (August 30, 1984).

<sup>124</sup> Interview with Eximbank marketing staff member (January 21, 1992). There is little documented evidence to suggest what the reasons are for the lack of exporter use of this program, but exporters and banks probably have similar negative reactions to this program as they do to the SBA's ERLC program. Lack of exporter interest in this co-guaranty program is also probably due to



aforementioned co-guaranty program, stronger legislation mandating the creation of a combined program, as opposed to directing “cooperation”, would have to be enacted. Of course, any legislation of this type would also have to be accompanied by a corresponding increase in Eximbank’s guaranty authority, and Eximbank’s administrative budget would have to be raised to take into account the increased costs associated with implementing such a program.

#### VIII. CONCLUSION

The above proposals are not meant to be rigidly implemented. They are intended instead to serve as a catalyst for dialogue between the small business community, Congress, Eximbank and the SBA. As the U.S. continues to experience the debilitating effects of the recession, measures that increase support for the small business community must be seriously considered. Hopefully, such measures will create government programs that more effectively serve the needs of the small business community and, ultimately, the U.S. economy.

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the fact that exporters prefer to go directly to Eximbank when they need guarantees for loans that are higher than the \$750,000 SBA loan limit.