

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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*Export-Import Bank: Financing Requirements and
Restrictions*

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Updated July 21, 2003

Abstract. Some legislative restrictions on the Export-Import Bank likely serve primarily to advance very specific U.S. international economic or foreign policy goals and likely have a limited impact on the Bank's activities. Other restrictions, however, may well reduce somewhat the pool of firms that seek Eximbank assistance in promoting U.S. exports. As a result, this assortment of restrictions and policy objectives often makes it difficult to determine what standard to apply to assess how well the Bank is performing. This report details the major restrictions Congress has placed on Eximbank activities.

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Export-Import Bank: Financing Requirements and Restrictions

July 21, 2003

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Export-Import Bank: Financing Requirements and Restrictions

Summary

The Export-Import Bank is an independent U.S. government agency that is charged with financing and promoting exports of U.S. goods and services. The Bank operates under a renewable charter, the Export-Import Bank Act of 1945, as amended, and has been authorized through September 30, 2006. Congress has amended the Bank's charter at times to meet various objectives, primarily U.S. foreign policy and international economic goals. These amendments restrict the Bank's activities relative to particular types of economic activities or have acted to advance other U.S. goals and objectives, such as improving workers' rights, protecting the environment, or protecting U.S. jobs.

Eximbank's legislative restrictions mark a clear distinction between the Export-Import Bank and any commercial financial institution and complicate the Eximbank's role as a quasi-banking institution involved in lending and insuring U.S. export transactions. Some restrictions likely serve primarily to advance very specific U.S. international economic or foreign policy goals and likely have a limited impact on the Bank's activities. Other restrictions, however, may well reduce somewhat the pool of firms that seek Eximbank's assistance in promoting U.S. exports. As a result, this assortment of restrictions and policy objectives often makes it difficult to determine what standard to apply to assess how well the Bank is performing. This report details the major restrictions Congress has placed on Eximbank's activities. This report will be updated as warranted by events.

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Export-Import Bank: Financing Requirements and Restrictions

Overview

The Export-Import Bank is an independent U.S. government agency that is charged with financing and promoting exports of U.S. goods and services. To accomplish these goals, Eximbank uses its authority and resources to: assume commercial and political risks that exporters or private financial institutions are unwilling, or unable, to undertake alone; overcome maturity and other limitations in private sector export financing; assist U.S. exporters to meet foreign, officially sponsored, export credit competition; and provide guidance and advice to U.S. exporters and commercial banks and foreign borrowers. With a budget of around \$600 million, the Bank finances about 1% of U.S. exports a year. Eximbank provides guarantees and insurance to commercial banks to make trade credits available to U.S. exporters. The Bank operates under a renewable charter, the Export-Import Bank Act of 1945, as amended, and has been authorized through September 30, 2006. Since Congress established Eximbank it has amended the bank's statutes at various times to restrict Eximbank's ability to approve transactions with firms involved in certain specified activities.

Eximbank has three main programs it uses to finance U.S. exports: direct loans, export credit guarantees, and export credit insurance. Eximbank's direct lending program is used primarily to aid U.S. exporters in instances where they face a foreign competitor that is receiving officially subsidized financing by a foreign government. These loans carry fixed interest rates and generally are made at terms that are the most attractive allowed under the provisions of international agreements. They are made primarily to counter attempts by foreign governments to sway purchases in favor of their exporters solely on the basis of subsidized financing, rather than on market conditions (price, quality, etc.), and to enforce internationally agreed upon terms and conditions for export financing. Guarantees and insurance are the main programs the Bank uses to assist American exporters. Both programs reduce some of the risks involved in exporting by insuring against commercial or political uncertainty.

Congressional Restrictions

When Congress established the Bank in 1947, it directed the Bank to "aid in financing and to facilitate exports and imports and the exchange of commodities and services," and to assist small businesses. Over the years, Congress has added various requirements that restrict the Bank's actions. Congress has directed the Bank to offer terms and conditions that are "fully competitive with the Government-supported rates

and terms and other conditions”¹ from U.S. exporters’ principal competitors, while pursuing “international agreements to reduce government subsidized export financing.”² In addition, Congress has directed the Bank to extend its services to projects that “offer reasonable assurance of repayment.”³ Congress also restrains the Bank by directing it to “supplement and encourage, and not compete with, private capital”⁴ and instructing it to “involve private capital in support of United States exports.”⁵

Congress has also directed the Bank to consider as a requirement for approval “any serious adverse effect” of the Bank’s programs “on the competitive position of United States industry, the availability of materials which are in short supply in the United States, and employment in the United States.” In particular, Congress has directed the Bank to emphasize “strengthening the competitive position of United States exporters and thereby of expanding total United States exports.”⁶ Congress also restricts the Bank’s ability to deny applications for credit for nonfinancial or noncommercial factors. These conditions are determined by the President of the United States after consulting with the House Banking and Financial Services Committee (now Committee on Financial Services) and the Senate Committee on Banking, Housing, and Urban Affairs and must be determined to be in the national interest of the United States in such areas as “international terrorism, nuclear proliferation, environmental protection and human rights (including child labor).”⁷

U.S. Production and Employment

Congress has expressed its concerns that Eximbank’s activities not have a negative effect on U.S. producers and U.S. jobs. In 1968, Congress directed the Bank through P.L. 90-267⁸ to require the Bank’s Board of Directors to consider “any serious adverse effect of such loan or guarantee on the competitive position of United States industry, the availability of materials which are in short supply in the United States, and employment in the United States,” as a precondition for receiving Eximbank’s support. In 1971, Congress expanded on this role by specifying that the policy objective of the Bank is to enhance U.S. jobs and incomes. Through P.L. 92-126⁹ Congress directed:

It is the policy of the United States to foster expansion of exports of manufactured goods, agricultural products, and other goods and services, thereby

¹ 12 USC Sec. 635(b)(1)(A)

² *Ibid.*

³ 12 USC Sec. 635(b)(1)(B)

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ 12 USC Sec. 635(b)(1)(A)

contributing to the promotion and maintenance of high levels of employment and real income, a commitment to reinvestment and job creation, and the increased development of the productive resources of the United States.

In 1978, Congress stated this role again in P.L. 95-630, which amended 12 USC Sec. 635(b)(1)(B) to include the requirement that the Bank emphasize “the objective of strengthening the competitive position of United States exporters and thereby of expanding total United States exports.” At the same time, Congress also added section 12 USC Sec. 635a-2, which directed the Bank to implement regulations and procedures to assess the impact of the Bank’s programs on U.S. industries and employment by reducing demand for U.S.-made goods, or by increasing imports and to request the International Trade Commission to assess the impact of the Bank’s programs:

The Bank shall implement such regulations and procedures as may be appropriate to insure that full consideration is given to the extent to which any loan or financial guarantee is likely to have an adverse effect on industries, including agriculture, and employment in the United States, either by reducing demand for goods produced in the United States or by increasing imports to the United States. To carry out the purposes of this subsection, the Bank shall request, and the United States International Trade Commission shall furnish, a report assessing the impact of the Bank’s activities on industries and employment in the United States.

In addition, in 1986, Congress required the Bank not to extend any credit or guarantee if

- (i) the commodity is likely to be in surplus on world markets at the time the resulting commodity will first be sold; or
- (ii) the resulting production capacity is expected to compete with United States production of the same, similar, or competing commodity; and
- (B) the Bank determines that the extension of such credit or guarantee will cause substantial injury to United States producers of the same, similar, or competing commodity.¹⁰

In 2002, Congress emphasized again the importance of U.S. employment in the Bank’s hierarchy of purposes. Through P.L. 107-189, which amended 12 USC Sec. 635(a)(1), Congress indicated that the “objects and purposes” of the Bank’s programs is to “contribute to the employment of United States workers.” In stating this objective even more explicitly, Congress directed that,

The Bank’s objective in authorizing loans, guarantees, insurance, and credits shall be to contribute to maintaining or increasing employment of United States workers.

Congress also requires the Bank to make an assessment of both the short- and long-term economic costs and benefits of the effects of its programs. It acknowledged that at times, the short-run displacement of firms and workers might be justified by the long-run benefits to the economy as a whole. As a result,

¹⁰ P.L. 99-472 [12 USC 635(b)(12)(e)]

Congress indicated that the restrictions specified in the preceding section need not apply when:

in the judgment of the Board of Directors of the Bank, the short- and long-term benefits to industry and employment in the United States are likely to outweigh the short- and long-term injury to United States producers and employment of the same, similar, or competing commodity.¹¹

Countries in Armed Conflict

In 1971, through P.L. 92-126, Congress amended 12 USC Sec. 635(b)(5) to restrict the Bank from providing its services to any country that engages in armed conflict with the United States or for goods that might be used in armed conflict with the United States:

The Bank shall not guarantee, insure, or extend credit, or participate in the extension of credit in connection with (A) the purchase of any product, technical data, or other information by a national or agency of any nation which engages in armed conflict, declared or otherwise, with the Armed Forces of the United States, (B) the purchase by any nation (or national or agency thereof) of any product, technical data, or other information which is to be used principally by or in any such nation described in clause (A), or (C) the purchase of any liquid metal fast breeder nuclear reactor or any nuclear fuel reprocessing facility.

Defense Articles

In 1968 through P.L. 90-267¹² and P.L. 90-390,¹³ Congress prohibited the Bank from using its services to export defense and defense-related articles and services. In 1988, Congress amended this section through P.L. 100-690, which provided a number of conditions in subparagraphs (B) through (H) under which the blanket restriction could be waived. These conditions include anti-narcotics purposes;¹⁴ the sale is in the “national interest;”¹⁵ the country purchasing the goods has not engaged “in a consistent pattern of gross violations of internationally recognized human rights;”¹⁶ and the articles are used only for purposes designated under the Arms Export Control Act.¹⁷

¹¹ *Ibid.*

¹² 12 USC Sec 635(b)(6), as amended by P.L. 100-690.

¹³ 12 USC Sec 635n

¹⁴ 12 USC Sec. 635(b)(6)(B)(ii)

¹⁵ 12 USC Sec. 635(b)(6)(B)(iv)

¹⁶ 12 USC Sec. 635(b)(6)(D)(II)

¹⁷ 12 USC Sec. 635(b)(6)(F)

Marxist-Leninist Countries

In 1968, through P.L. 90-267, Congress established Subsection 2 of 12 USC Sec. 635(b), which expressly restricted the Bank from providing its services to any Communist country and designated 30 countries as Communist countries. Congress amended this restriction in 1986 through P.L. 99-472 to specify that the Bank could not provide insurance, guarantees, or credit to purchase or lease any product by a Communist country, including any agency, or national of the country, unless the President determined that such a transaction was in the U.S. national interest. In 1992, Congress amended this section through P.L. 102-429, which removed the designation “Communist country” by replacing it with “Marxist-Leninist” country and reduced to nine¹⁸ the number of countries that are Marxist-Leninist.¹⁹ The President can waive this prohibition if he determines that a country is no longer a Marxist-Leninist country, or that doing so is in the national interest. The President is required to make such a determination for each transaction over \$50 million and he is required to notify Congress.

Human Rights

The Export-Import Bank’s role in human rights issues arises from Title 12 USC Sec. 635 Subsection (b)(1)(B). In general, the Bank is prohibited from denying any application for nonfinancial or noncommercial considerations unless the President, meaning the President of the United States, in coordination with the House and the Senate Committees on Banking (in the House, now the Committee on Financial Services), believes that denying such an application would advance the interests of the United States in the areas of “international terrorism, nuclear proliferation, environmental protection and human rights (such as are provided in the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948)²⁰ (including child labor).” The Statute further states that:

Each such determination shall be delivered in writing to the President of the Bank, shall state that the determination is made pursuant to this section, and shall specify the applications or categories of applications for credit which should be denied by the Bank in furtherance of the national interest.

These conditions, known as the Chafee Amendment, after its sponsor Senator John Chafee, were added through P.L. 95-630 in 1978, with the wording on child labor added through P.L. 105-121 in 1997. Through Executive Order No. 12166, October 19, 1979, President Carter delegated the responsibility to the Secretary of State for determining that a denial of credit under the conditions stated above would be in the interest of the United States. As a result, the main responsibility for dealing with human rights concerns rests with the Secretary of State, after consultation with

¹⁸ The nine countries are: Cambodian People’s Republic; Democratic People’s Republic of Korea; Democratic Republic of Afghanistan; Lao People’s Democratic Republic; People’s Republic of China; Republic of Cuba; Socialist Federal Republic of Yugoslavia; Socialist Republic of Vietnam; Tibet.

¹⁹ 12 USC Sec. 635(b)(2)(B)(ii)

²⁰ Language in parenthesis was added through P.L. 107-189.

the House and Senate Banking Committees (in the House, now the Committee on Financial Services). In addition, through an amendment offered by Senator Patrick Leahy (P.L. 105-118, Nov. 26, 1997, 12 USC Sec. 635i-8), the Bank is prohibited from supporting transactions that involve the sale of goods or services to units of a country's military or security forces if the Department of State has clear evidence that such units have engaged in "a consistent pattern of gross violations of internationally recognized human rights."

Nuclear Non-Proliferation

Congress has directed that the Bank will not use its services in order to export "technology, fuel, equipment, materials, or goods or services to be used in the construction, alteration, operation, or maintenance of nuclear power, enrichment, reprocessing, research, or heavy water production facilities,"²¹ unless it notifies Congress in writing describing and explaining each such transaction. The Bank is also prohibited from extending its services to any country that is determined by the Secretary of State to have: 1) materially violated, abrogated, or terminated nuclear safeguard agreements under the International Atomic Energy Agency; 2) was not a nuclear-weapon state prior to October 26, 1977, but detonated a nuclear explosive device after that date; 3) any country that has willingly aided or abetted after June 29, 1994 any non-nuclear-weapon state to acquire any nuclear explosive device or to acquire unsafeguarded special nuclear material; or 4) any person who has knowingly aided or abetted after September 23, 1996, any non-nuclear-weapon state to acquire any such nuclear explosive device or to acquire unsafeguarded special nuclear material.²² This prohibition can be waived if the President determines that such a transaction is in the "national interest,"²³ the Secretary of State determines that countries have taken the necessary corrective measures, that individuals involved in aiding or abetting non-nuclear-weapon states in acquiring a nuclear explosive device or unsafeguarded special nuclear material have ceased to do so, or that steps are being taken to ensure that such activities will not occur.²⁴

Environment

The Export-Import Bank is also subject to Executive Order No. 12144 (44FR 1957) entitled "Environmental Effects Abroad of Major Federal Actions." The Executive Order requires federal agencies that take actions that are subject to the Order to implement procedures that are consistent with the Order. In 1979, through Executive Order No. 12166 (Oct. 19, 1979, 44 F.R. 60971) and P.L. 95-630 Congress granted the Bank the authority to deny an application for credit, where, "such action could clearly and importantly advance United States policy in such areas as

²¹ 12 USC Sec. 635(b)(3)

²² 12 USC Sec. 635(b)(3) and (4)(A)

²³ 12 USC Sec 635(b)(4)(D)

²⁴ 12 USC Sec 635(b)(4)(E)

international terrorism, nuclear proliferation, environmental protection and human rights.”²⁵

In 1992, through P.L. 102-429 (12 USC Sec 635i-5) Congress required the Bank to establish procedures to, “take into account the potential beneficial and adverse environmental effects of goods and services for which support is requested under its direct lending and guarantee programs.”²⁶ These procedures apply to any transaction considered by the Bank for a long-term support of \$10 million or more, or for which the Bank’s support is critical, and which may have “significant environmental effects upon the global commons or any country not participating in the project.”²⁷ In addition, Congress directed that Bank’s environmental procedures could be used as a basis for withholding “financing from a project for environmental reasons or to approve financing after considering the potential environmental effects of a project.”²⁸

Countervailing and Antidumping Duty Orders

On June 14, 2002, President Bush signed P.L. 107-189 (S. 1372), the Export-Import Bank Reauthorization Act of 2002. This Act made a number of changes to the Bank’s charter, including changes in the way the Bank conducts its economic impact analysis.²⁹ These changes prohibit the Bank from providing loans or guarantees for exports of goods, primarily capital equipment, that foreign firms can use to increase their production of goods that are “substantially the same” as products that are subject to a countervailing or antidumping duty order under title VII of the Tariff Act of 1930, or a determination under title II (“escape clause relief”) of the Trade Act of 1974. The Bank is also required to develop a set of policies regarding exports of equipment that foreign firms can use in the production of items that are subject to a preliminary, rather than a final, injury determination. As a result of these changes, the Bank issued a draft of its revised economic impact procedures on September 6, 2002.

P.L. 107-189 made a number of changes to the statutes authorizing the Bank, including the conditions under which it must deny its services to U.S. firms for exporting items to foreign producers that could be used to manufacture items that are subject to an antidumping or countervailing duty order or a Section 201 investigation. Under section 18 of P.L. 107-189 (12 USC Sec. 635(e)(2), titled “Outstanding Orders and Preliminary Injury Determinations,” the Bank is prohibited from extending loans or guarantees

to an entity for the resulting production of substantially the same product that is the subject of — (i) a countervailing duty or antidumping order under title VII

²⁵ 12 USC Sec 635(b)(1)(B)

²⁶ 12 USC Sec 635i-5(a)(1)

²⁷ 12 USC Sec 635i-5(a)(1)(A)-(C)

²⁸ 12 USC Sec 635i-5(a)(2)

²⁹ For additional information, see: CRS Report RL31646, *Export-Import Bank’s Economic Impact Procedures: An Overview*.

of the Tariff Act of 1930; or (ii) a determination under title II of the Trade Act of 1974.³⁰

In addition, Congress directed the Bank to

establish procedures regarding loans or guarantees provided to any entity that is subject to a preliminary determination of a reasonable indication of material injury to an industry under title VII of the Tariff Act of 1930. The procedures shall help to ensure that these loans and guarantees are likely to not result in a significant increase in imports of substantially the same product covered by the preliminary determination and are likely to not have a significant adverse impact on the domestic economy.³¹

Other Restrictions

The Bank is also prohibited from:

Extending a loan, guarantee, insurance, or combination of services valued at over \$100 million unless it notifies Congress in writing describing and explaining each such transaction.³² (Added in 1983 through P.L. 98-181)

Using its services to help countries finance their balance of payments.³³ (Added in 1983 through P.L. 98-181)

Using its services to help countries finance or manage their international indebtedness.³⁴ (Added in 1983 through P.L. 98-181)

Guaranteeing, insuring, or extending credit or participating in extending credit for any export to Angola except for food or agricultural commodities.³⁵ This prohibition can be waived by the President if he certifies to Congress that Angola has “free and fair elections” in which all participants were “afforded free and fair access,” and that the Government of Angola is willing and is actively seeking, to achieve an equitable political settlement of the conflict in Angola, including free and fair elections, through a mutual cease fire and a dialogue;³⁶ has demonstrated progress in protecting internationally recognized human rights;³⁷ and has demonstrated progress in respect for freedom of the press, freedom of speech, freedom of assembly, freedom of association, internationally recognized

³⁰ P.L. 107-189, Sec. 18, 12 USC Sec. 635(e)(2).

³¹ *Ibid.*

³² 12 USC Sec. 635(b)(3)(A)

³³ 12 USC Sec. 635(b)(10)(A)(i)

³⁴ 12 USC Sec. 635(b)(10)(A)(ii)

³⁵ 12 USC Sec. 635(b)(11)

³⁶ 12 USC Sec. 635(b)(11)(A)

³⁷ 12 USC Sec. 635(b)(11)(B)

worker rights, and other attributes of political pluralism and democracy.³⁸ This restriction was added in 1989 through P.L. 101-240 and amended in 1992 through P.L. 102-429.

Extending guarantees, insurance, or credit for the purchase of any good or service by the military or Government of the Russian Federation if the President determines that the military or Government of the Russian Federation has transferred or delivered to the People's Republic of China an SS-N-22 missile system and that the transfer or delivery represents a significant and imminent threat to the security of the United States.³⁹ This section was added in 1997 through P.L. 105-121.

Implications for Congress

Since establishing the Export-Import Bank in 1947, Congress has amended the Bank's statutes at times to restrict its lending activities. Often these amendments have affected the Bank's activities relative to a particular type of economic activity or have acted to advance other U.S. goals and objectives. In some cases, these restrictions likely have had a limited impact on the Bank's activities, but served as indicators of Congressional intent and furthered U.S. foreign political and economic goals. Eximbank, however, responds to, rather than generates, requests for its services from U.S. firms that are exporting abroad. Ostensibly, such firms likely are aware of Congressional actions regarding Eximbank and, therefore, would not likely apply for Eximbank's services with projects that clearly violate a Congressionally-mandated restriction. In some cases, though, the legislative restrictions clearly distinguish Eximbank from a commercial bank or any private financial institution and impinge on its ability to respond on a purely commercial basis. Nevertheless, on an annual basis, demand for Eximbank's services usually outstrips its ability to respond due to Congressional limitations on the overall level of financing at which the Bank is allowed to obligate.

³⁸ 12 USC Sec. 635(b)(11)(C)(i-vi)

³⁹ 12 USC Sec. 635(b)(12)