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## The Establishment of Foreign Bank Agencies and Branches in New York

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# NOTES

## THE ESTABLISHMENT OF FOREIGN BANK AGENCIES AND BRANCHES IN NEW YORK

### I. INTRODUCTION

In recent years foreign banking associations have played an increasingly important role in the United States money market. While foreign banks have been operating in the United States since the 1870's,<sup>1</sup> no substantial foreign banking existed in this country until the early 1970's.<sup>2</sup> Since that time, however, there has been rapid expansion, and by 1978 there were 210 foreign bank facilities controlling \$66 billion in assets in the United States.<sup>3</sup> Most of this activity is confined to New York, Illinois, and California.

New York alone accounts for three quarters of all foreign bank assets in this country.<sup>4</sup> Although this concentration may be due in part to exclusionary banking laws in a number of states,<sup>5</sup> New York City's preeminence as a world money center coupled with the worldwide expansion in international trade<sup>6</sup> has made New York attractive to foreign banks. A New York affiliate accords its foreign parent access to international money markets after the parent's

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1. See Note, *Foreign Banking in the United States*, 6 VAND. J. TRANSNAT'L L. 595, 597 (1973). Foreign banks with a United States presence during this early period were of Japanese and Canadian origin. *Id.*

2. Edwards, *Regulation of Foreign Banking in the United States: International Reciprocity and Federal-State Conflicts*, 13 COLUM. J. TRANSNAT'L L. 239, 239 (1974). For a brief account of the early history of foreign banking activity in the United States, see 6 VAND. J. TRANSNAT'L L., *supra* note 1, at 597-600.

3. Note, *The International Banking Act of 1978: Federal Regulation of Foreign Banks in the United States*, 8 GA. J. INT'L & COMP. L. 145, 145 n.1 (1978). For the purpose of comparison, in 1965 there were 27 foreign banking facilities in the United States, and in 1974 there were approximately 80. Edwards, *supra* note 2, at 240 n.7.

4. Lees, *Foreign Banking in the United States: Growth and Regulatory Issues*, 5 DEN. J. INT'L L. & POL'Y 463, 467 (1975).

5. Ten states—Florida, Maine, Maryland, Minnesota, New Jersey, Ohio, Rhode Island, Texas, Virginia, and West Virginia—specifically prohibit foreign banks from operating within their borders. In addition, Alaska, Georgia, Hawaii, Missouri, and Oregon prohibit the taking of deposits by foreign banks. See Halperin, *The Regulation of Foreign Banks in the United States*, 9 INT'L LAW 661, 667-68 & nn.32-51, 54 (1975).

6. For a discussion of the parallel expansion of United States banks into foreign markets, see M. MAYER, *THE BANKERS* 453-56, 476 (1974); Solomon,

home office has closed for the day, permits daily settlement of its parent's United States dollar transfers, and provides its parent liquidity in times of tight credit and loan generation in times of surplus funds.<sup>7</sup> A New York office also enables a foreign bank to engage in arbitrage and other operations associated with the shift of Eurodollars to New York. In addition to activities related to money market operations, a New York presence allows a foreign banking corporation access to United States securities markets<sup>8</sup> and affords the entity a better opportunity to provide banking

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*Developing Nations and Commercial Banks: The New Dependency*, 12 J. INT'L L. & ECON. 325, 326-29 (1978).

7. For a more detailed discussion of foreign bank activities in the United States, see Halperin, *supra* note 5, at 662; Lees, *supra* note 4, at 463-65.

There is no universal rationale for involvement in the United States which would apply to all foreign banks, but as a general rule foreign banking establishments are concerned with wholesale operations relating to foreign trade. The Japanese banks, for example, appear to be principally interested in financing Japanese trade. But not all banks have so limited their activities. The Canadians have been active in loans to broker-dealers, interest rate arbitrage, and lending Eurodollars. 6 VAND. J. TRANSNAT'L L., *supra* note 1, at 605. Several British banks have even crossed the wholesale boundary and have become active participants in retail banking: Lloyds Bank purchased California's 94 branch First Western Bank, and Barclay's Bank acquired the 18 branch First Westchester National Bank, both consumer banking institutions. Halperin, *supra* note 5, at 663.

8. One advantage which foreign banks have traditionally enjoyed is the ability to engage in securities underwriting. See, e.g., Lees, *supra* note 4, at 469-70. This activity is forbidden to United States banks by the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.), but foreign banks often are entitled to perform underwriting functions under the laws of their home countries. Since foreign banks have not been considered "banks" under federal law, the Glass-Steagall restriction does not apply to them. Despite the greater limitations placed on foreign banks in a number of areas by the International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 (to be codified in scattered sections of 12 U.S.C.), the underwriting prerogative was preserved intact. See *id.* § 8(c) (to be codified at 12 U.S.C. § 1841); see also 8 GA. J. INT'L & COMP. L., *supra* note 3, at 175. In New York a foreign bank typically enters the underwriting business through the establishment of an investment company subsidiary. See N.Y. BANKING LAW §§ 508, 4001 (McKinney 1971 & Supp. 1978); see also Edwards, *supra* note 2, at 247. It is also interesting to note that United States banks may engage in underwriting abroad. See M. MAYER, *supra* note 6, at 462-63.

A second competitive advantage enjoyed by foreign banks is their ability to operate branches across state lines, a power expressly denied to United States banks by the McFadden Act, ch. 191, 44 Stat. 1224 (1927) (codified in scattered sections of 12 U.S.C.). See Halperin, *supra* note 5, at 669. This advantage has been eliminated, except with regard to existing facilities, by the International Banking Act of 1978, Pub. L. No. 95-369, § 5, 92 Stat. 613-14 (to be codified at 12 U.S.C. § 1842). See 8 GA. J. INT'L & COMP. L., *supra* note 3, at 164-66.

services to the United States affiliates of the bank's foreign clients. Access to securities markets includes the facilitation of contact with institutional investors, the provision of investment advisory services, and the ability to make call loans to dealers. The latter contemplates not only traditional banking services, but includes assistance with business contacts and information concerning the United States market.

While the advantages of a New York presence are numerous, the process involved in obtaining a license is complex. Much of the process extends beyond the terse requisites of the applicable statutes and administrative regulations to the informal customs and practices of the New York Banking Department (Department).

It is the purpose of this note to disentangle some of the complexity and to provide a working guideline for an attorney faced with the preparation of an agency or branch license application. Before proceeding to a discussion of the application process, however, it is appropriate to review the various forms through which a foreign banking corporation may enter the New York market and to examine certain aspects of the New York bank regulatory scheme which affect the application process and the early operation of a New York agency or branch.

## II. DOING BUSINESS THROUGH AN AGENCY OR BRANCH

In addition to an agency or branch, a foreign banking corporation may enter the New York<sup>9</sup> market by means of a representative office or a subsidiary.<sup>10</sup> A representative office is not truly a banking establishment since it is not permitted to perform any banking functions; rather, it is merely a sales service office<sup>11</sup> and no license is required for its maintenance. A subsidiary, the opposite end of the spectrum, is a New York chartered bank, possessing the same powers and subject to the same regulations as other banks operating under New York state charters. Neither of these two forms necessitate the same application process as an agency or a branch; accordingly, the requisites of subsidiary incorporation and repre-

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9. For an overview of California and Illinois law concerning foreign bank entities, see Lees, *supra* note 4, at 472-73.

10. In addition to a New York chartered subsidiary or a New York licensed agency or branch, a foreign bank may enter the New York market through a federal subsidiary, agency, or branch. See International Banking Act of 1978, Pub. L. No. 95-369, § 4, 92 Stat. 610 (to be codified at 12 U.S.C. § 3102). It may also enter the New York market by means of an investment company, NEW YORK BANKING LAW art. XII (McKinney 1971), or an Edge Act corporation subsidiary.

11. See Halperin, *supra* note 5, at 663.

sentative office establishment are outside the scope of this discussion.<sup>12</sup>

### A. *New York Agency*

A New York agency of a foreign bank is expressly authorized to buy, sell, pay, and collect bills of exchange, to issue letters of credit, to transmit money, and to make loans.<sup>13</sup> In practice, agencies have also been permitted to engage in buying and selling foreign exchange and factoring. Agencies are not allowed to accept deposits, however,<sup>14</sup> and as a result of this restriction, most of an agency's loanable funds must come from Fed funds and Eurodollar borrowings.<sup>15</sup>

Despite the prohibition on the taking of deposits, an agency is allowed to "maintain for the account of others credit balances incidental to, or arising out of, the exercise of its lawful powers."<sup>16</sup> Because this statutory directive is tersely stated, the precise distinction between a "deposit" and a "credit balance" remains elusive and has been the source of much debate. While the dividing line between the two is not precise, certain transactions are clearly on one side or the other. It is uncontested, for example, that an agency may receive unlimited advances from its head office or other affiliated banks and borrowings from unaffiliated banks. On the other hand, an agency is clearly prohibited by the New York Banking Law from issuing certificates of deposit or accepting savings or checking accounts. Although borrowings from non-bank sources may be considered deposits, recent conversations with officials of the Banking Department indicate that a bona fide loan will not be considered a deposit, if the circumstances do not reveal that a deposit relation was intended.<sup>17</sup> In addition, agencies historically have been accorded complete access, as purchasers and sellers, to the Fed funds market. Funds of the following types are also regarded as credit balances:

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12. It is important to note, however, that while the New York Banking Law proscribes the simultaneous operation of both a branch and an agency by the same foreign bank, N.Y. BANKING LAW § 202-d (McKinney 1971), any other combination of entities is permissible. Such a combination may be desired, depending upon the business strategy of the particular bank.

13. N.Y. BANKING LAW §§ 200, 201, 201-a (McKinney 1971).

14. *Id.* § 202-a.

15. See Haplerin, *supra* note 5, at 664.

16. N.Y. BANKING LAW § 202-a (McKinney 1971).

17. Interviews with officials of the New York State Banking Department (April 5, 1979).

- (1) Correspondent balances of banks with which the agency has sufficient letter of credit and other business;
- (2) Compensating balances kept at the agency in connection with loans made by the agency;
- (3) Funds received for transmission to or from other offices of the foreign bank or third parties; and
- (4) Balances serving as collateral for liabilities under letters of credit issued by the agency or under other obligations undertaken on behalf of customers.

In determining whether particular funds constitute a "credit balance" or a "deposit" it is more important to focus on the transaction than on any instrument involved. Thus, a credit balance may be withdrawn by check without changing its character as a credit balance, although the use of a non-negotiable draft for this purpose would probably more adequately insulate the transaction from criticism.

One standard of characterizing the nature of a particular transaction is whether the funds are in the agency's possession for a customer's specific purpose, or are with the agency solely to provide income or to await an undetermined disposition. If the former, it is likely that a credit balance is involved. If the latter, it is probable that the funds constitute a deposit. A "rule of thumb" used by the Banking Department is that funds, other than those serving as loan collateral or compensating balances, should not remain in an agency's hands for more than 30-60 days.<sup>18</sup>

A second index of characterization used by the Banking Department focuses on the sources and uses of funds. A credit balance may only arise from the exercise of the lawful powers of an agency. The fact that particular funds were the result of such a lawful exercise is not sufficient to characterize them as a credit balance, however. If they are used by the customer as he would use a typical checking account, it is probable that the funds will be characterized as a deposit.

In addition to forbidding agencies to accept deposits, section 202-a of the Banking Law also prohibits agencies from exercising "fiduciary powers."<sup>19</sup> Although the statute does not specifically describe the nature of the proscribed fiduciary functions, the language presumably refers to those powers listed in section 201-b which a foreign branch may be authorized to exercise. The regulations of the Banking Department do permit agencies to engage in

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18. *Id.*

19. N.Y. BANKING LAW § 202-a (McKinney 1971).

some activities of a fiduciary nature. These include taking custody for safekeeping of customers' securities, receiving and disposing the dividends of such securities, placing orders for the purchase or sale of securities, and executing voting and other rights in connection with custodian accounts.<sup>20</sup> On the other hand, the Department has explicitly stated that agencies of foreign banks may not receive from security issuers or disburse to security holders principal and interest on debt securities or on similar sums such as withholding reimbursements. Furthermore, agencies may not validate or effect issuance, transfer, exchange, conversion, or retirement of securities, or act as the issuer's agent for service of process or receipt of securities for forwarding. The foregoing would be true even of private placements and even if there is a disclaimer, accepted by all parties, of any fiduciary relationship between the agency and the security holders. Nonetheless, the Department has conceded that New York agencies, under their power to receive and transmit funds, could, in one or a few large transactions substantially without investor contact, handle remittances of funds to and from issuers in respect of their securities issues. In order to avoid the limitation on the exercise of fiduciary powers by foreign bank agencies, a foreign parent may find it desirable to incorporate a New York trust company to serve as a fiduciary adjunct of its agency.<sup>21</sup>

### B. *New York Branch*

A New York branch of a foreign banking corporation possesses all the powers enjoyed by a foreign bank agency.<sup>22</sup> A branch operates at a comparative disadvantage with respect to its loans, however, because it is subject to the lending limits applicable to New York banks,<sup>23</sup> while agencies are not bound by such regulations.<sup>24</sup> The limit is generally ten percent of the bank's capital. In most cases the restriction poses no hardship, since a branch's capital, for the purposes of its lending limits, is the capital of its parent.<sup>25</sup> In

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20. N.Y. BANKING DEP'T, LEGAL INTERPRETATION LI 3 (1977).

21. See N.Y. BANKING LAW § 4001 (McKinney 1971).

22. *Id.* §§ 200, 201, 201-a. A branch, like an agency, may not exercise any powers which are not granted to it in its charter, however. See note 61 *infra* and accompanying text.

23. N.Y. BANKING LAW § 103 (McKinney 1971 & Supp. 1978).

24. Edwards, *supra* note 2, at 244.

25. *Id.* In this regard a branch has an advantage over a subsidiary, which must rely on its own capital. *Id.*

A second historical disadvantage of incorporating a subsidiary rather than obtaining a branch license was that the foreign parent became subject to the Bank

addition to the powers accorded an agency, a branch may also accept deposits,<sup>26</sup> and, by acquiring the requisite certifications, may operate a personal loan department<sup>27</sup> and exercise certain trust powers.<sup>28</sup> The process for obtaining personal loan department authorization is reasonably simple. The only statutory requirement for such authorization prescribes that the superintendent of banks be satisfied that the department will be operated in accordance with section 202 of the Banking Law.<sup>29</sup> The Banking Department requires that applicant branches submit a letter of application, stating reasons for requesting authorization and describing the experience of proposed personal loan department managers.<sup>30</sup>

The requisites for obtaining authorization to exercise the fiduciary powers enumerated in section 201-b of the Banking Law are somewhat more formal. A branch wishing to acquire such authorization must submit a letter application containing the following information:<sup>31</sup>

- (1) An outline of the trust services which the branch expects to offer;
- (2) Name, background, and qualifications of the branch officer who will be in charge of the trust operation, as well as a detailed resume of the person to whom the day to day responsibility will be delegated;
- (3) Opinion of counsel for the branch that:
  - (a) the laws of the country in which the bank is incorporated and the certificate of incorporation authorize the bank to engage in corporate trust activities like those authorized in section 201-b of the Banking Law; and
  - (b) the reciprocity requirements of section 202-a of the Banking Law are satisfied;<sup>32</sup> and

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Holding Company Act of 1956, 12 U.S.C. §§ 1841-49 (1976). See Edwards, *supra* note 2, at 250-53; Lichtenstein, *Foreign Participation in United States Banking: Regulatory Myths and Realities*, 15 B.C. INDUS. & COM. L. REV. 879, 917-71 (1974) (exhaustive treatise); MacKenzie & MacKenzie, *Penetration of the United States Market by a Foreign Bank*, 6 INT'L LAW. 876 (1972).

26. N.Y. BANKING LAW §§ 200, 201-a (McKinney 1971). A foreign bank branch may not accept deposits of a profit-making organization greater than \$150,000, however. N.Y. BANKING DEP'T, SPECIAL REGULATION OF THE BANKING BOARD, Part 208 (1976).

27. N.Y. BANKING LAW § 202(4)(a) (McKinney Supp. 1978).

28. *Id.* §§ 201-a—210-b, 202-a.

29. *Id.* § 202(4)(a).

30. Interviews with officials of the New York State Banking Department (April 5, 1979).

31. *Id.*

32. See notes 86-94 *infra* and accompanying text.



(4) Submission of the powers of attorney granted to the branch manager<sup>33</sup> for review by the Banking Department to ascertain whether such powers cover contemplated trust activities.

In addition, the superintendent must be satisfied that under the laws of the parent bank's country of incorporation, a New York trust company may be authorized to exercise similar powers through an agency or branch or may be authorized to own all the shares, except directors' qualifying shares, of a banking organization both organized under the laws of such country and authorized to exercise similar fiduciary powers.<sup>34</sup> Upon obtaining a certificate of authorization, a branch may act as fiscal or transfer agent, serve as trustee under any notes, bonds, debentures, or other evidences of indebtedness, and take, accept, and execute any and all such trusts, duties, and powers as may be conferred upon or entrusted to it.<sup>35</sup> These powers may only be exercised, however, with regard to: (1) the bank's country of incorporation, (2) an instrumentality or subdivision of said country, or (3) a corporation incorporated under the laws of, or doing business in,<sup>36</sup> that country.

### III. RESERVE REQUIREMENTS

A New York branch of a foreign bank is subject to the same statutory reserve requirements as is a New York bank<sup>37</sup> and, unless exempted, may also be subject to additional reserve requirements provided by the regulations of the Banking Board.<sup>38</sup> These reserves

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33. See notes 68-70 *infra* and accompanying text.

34. N.Y. BANKING LAW § 202-a (McKinney 1971). For a discussion of the reciprocity requirement, see notes 86-94 *infra* and accompanying text.

35. N.Y. BANKING LAW § 202-a (McKinney 1971). An opinion of the Department of Insurance states that a foreign bank branch may also serve as trustee of "trusteed assets" under section 99 of the New York Insurance Law, but only with regard to an insurer organized under the laws of the bank's country of incorporation.

36. The extent to which a corporation must be involved in a country in order to be "doing business" therein for the purposes of section 201-b has never been addressed by the Banking Department. The private opinions of several Department officials suggest, however, that the Department is prone to take a conservative position on this issue and that rather substantial contacts might be required. Interviews with officials of the New York State Banking Department (April 13, 1979).

37. See N.Y. BANKING LAW §§ 107, 202-c (McKinney 1971 & Supp. 1978).

38. N.Y. BANKING DEP'T, GENERAL REGULATIONS OF THE BANKING BOARD Part 21 (1977). Since 1975, branches have also been subject to the "voluntary" reserve requirements of the Federal Reserve Board on large certificates of deposit and net Eurodollar borrowings, 61 FED. RES. BULL. A7 (1975); See Lees, *supra* note 4, at

must be deposited with a bank which meets the capital and surplus tests of section 33 of the Banking Law<sup>39</sup> and which has been specifically approved by the superintendent of banks as a depository for the branch. For each such depository, the foreign parent must submit an application to the superintendent, nominating the bank and requesting the superintendent's designation of that institution as an approved depository.<sup>40</sup> The Banking Department requires that the foreign bank's board of directors be involved in this process. A certified copy of the board resolution nominating the particular bank must accompany the application.<sup>41</sup> In order to discourage the depository institution from using branch reserves as a set-off against its claims on the foreign parent, the Department directs the superintendent to turn down a foreign branch's application unless the foreign bank and the nominated depository have agreed to exempt deposited reserves from liens, charges, and set-offs arising from claims against the foreign bank itself.<sup>42</sup>

In addition to the reserve requirements discussed above, a foreign branch must maintain dollar deposits or marketable securities<sup>43</sup> equal in value to five percent of the branch's total liabilities, excluding accrued expenses and amounts due affiliates,<sup>44</sup> in an

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474. The International Banking Act of 1978, Pub. L. No. 95-369, § 7(a)(1)(B), 92 Stat. 620, empowers the Federal Reserve Board, in cooperation with state bank regulatory authorities, to impose reserve requirements on foreign bank branches if the foreign bank has assets of at least \$1,000,000,000. Since foreign branches are already subject to extensive New York state reserve requirements, it is unlikely that federal reserves will also be imposed, however.

39. N.Y. BANKING LAW § 33 (McKinney 1971). In most cases, combined capital and surplus must be at least two million dollars, and banks located outside, as well as inside, New York are eligible for designation. In today's market, this capital test would exclude only the smallest of banks.

40. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 108 (1970).

41. *Id.* § 108.2.

42. N.Y. BANKING DEP'T, GENERAL REGULATIONS OF THE BANKING BOARD Part 51 (1969).

43. Securities which may be used for this purpose are "interest-bearing stocks and bonds, notes, debentures, or other obligations of the United States or any agency or instrumentality thereof, or guaranteed by the United States, or of [New York], or of a city, town, village, school district, or instrumentality of [New York] or guaranteed by [New York], . . . or obligations of the International Bank for Reconstruction and Development, or obligations issued by the Inter-American Development Bank, or obligations of the Asian Development Bank, . . ." N.Y. BANKING LAW § 202-b(1)(a) (McKinney 1971).

44. N.Y. BANKING DEP'T, SUPERINTENDENT'S REGULATIONS Part 322 (1976). At a minimum the amount deposited must be equal to \$100,000. N.Y. BANKING LAW § 202-b(1)(a) (McKinney 1971); see Edwards, *supra* note 2, at 244; Halperin, *supra* note 5, at 664.

approved depository. Securities are valued at the lower of cost or market. It should be noted that while an out-of-state bank may be designated a reserve depository, only banks located in New York may serve as depositories under the "Five Percent Rule."<sup>45</sup>

The Banking Law also requires a foreign banking corporation operating a branch in the state of New York to maintain an asset level equal to 108 percent of the liabilities payable at or through the branch.<sup>46</sup> This "108% Rule" is intended to ensure that the entity's obligations will be met thereby providing a cushion for creditors. Agencies, which are not subject to lending limits, reserve requirements, or the Five Percent Rule, must meet the asset maintenance requirements of the 108% Rule.<sup>47</sup>

It should be noted that not all accounting liabilities require cover under the 108% Rule. The liabilities which must be covered include current accounts (including compensating balances), time deposits, letters of credit sold for cash or issued on a deferred payment basis, certified and official checks, federal funds purchased, outstanding acceptances, borrowings, unearned interest income, and accounts payable.<sup>48</sup> On the other hand, section 202-b(2) of the Banking Law specifically excludes accrued expenses and amounts due affiliates from coverage.<sup>49</sup> The Banking Department has excluded profit/loss accounts and reserve accounts.<sup>50</sup>

On the other side of the balance sheet, not all accounting assets are eligible for inclusion in the 108% calculations. Eligible assets may be composed of "currency, bonds, notes, debentures, drafts,

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45. N.Y. BANKING LAW § 202-b(1)(a) (McKinney 1971).

46. *Id.* § 202-b(2).

47. *Id.* See Edwards, *supra* note 2, at 244. The importance attached to the 108% Rule by the Banking Department is reflected in N.Y. BANKING DEP'T, SUPERINTENDENT'S REGULATIONS Part 323 (1977), which requires daily calculation of liability coverage.

48. See N.Y. BANKING DEP'T, SUPERINTENDENT'S REGULATIONS Part 323, § 323.1(c) (1977).

49. N.Y. BANKING LAW § 202-b(2) (McKinney 1971).

50. See N.Y. BANKING DEP'T, SUPERINTENDENT'S REGULATIONS Part 323, § 323.1(c) (1977). In the future the superintendent may also exclude deposits insured by the Federal Deposit Insurance Corporation from the list of liabilities requiring coverage. The Banking Law empowers the superintendent to make such an exclusion, N.Y. BANKING LAW § 202-b(3) (McKinney 1971), but historically foreign bank branches have not been eligible for FDIC insurance. See generally Halperin, *supra* note 5, at 664 n.19. This limitation was eliminated by the International Banking Act of 1978, however, which mandates that branches accepting deposits of less than \$100,000 be insured. International Banking Act of 1978, Pub. L. No. 95-369, § 6(b), 92 Stat. 607 (to be codified at 12 U.S.C. § 1813).

bills of exchange, or other evidences of indebtedness or other obligations payable in the United States or in United States funds or, with the prior approval of the superintendent, in funds freely convertible into United States funds . . . ."<sup>51</sup> Nevertheless, the superintendent is given broad power to exclude assets and is only required by statute to give credit to branch reserves, assets held pursuant to the Five Percent Rule, and certain deposits and credit balances held with banks outside New York.<sup>52</sup> Under current Banking Department policy, cash, United States government securities, loans, overdrafts, advances, customers' liability on acceptances, and Fed funds sold are also eligible assets.<sup>53</sup> Loans payable in United States dollars outside the United States are generally considered to be eligible assets, but the Banking Department usually requires that evidence of the indebtedness be kept at the office of the New York agency or branch. Deposits and credit balances held by banks outside the United States may only be considered eligible assets to the extent of eight percent of the agency's or branch's liabilities requiring cover.<sup>54</sup> Deposits and credit balances held by banks within the United States may only be considered eligible assets if those banks have executed agreements waiving any rights of set-off against obligations owed by the foreign banking corporation, other than through its agency or branch.<sup>55</sup> On the other hand, the Banking Department has found several types of assets to be ineligible. These include fixed assets, equity securities, participation certificates,<sup>56</sup> accrued interest receivable, and loans to affiliates.<sup>57</sup>

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51. N.Y. BANKING LAW § 202-b(2) (McKinney 1971). The Banking Department has never promulgated any guidelines to determine which currencies are considered to be "freely convertible into United States funds" within the meaning of this section. As of the date of this writing, however, the currencies of the following countries are so considered: Australia, Belgium, Brazil, Canada, Denmark, France, Italy, Japan, Mexico, the Netherlands, Sweden, Switzerland, United Kingdom, and West Germany. Interviews with officials of the New York State Banking Department (April 5, 1979).

52. N.Y. BANKING LAW § 202-b(2) (McKinney 1971).

53. N.Y. BANKING DEP'T, SUPERINTENDENT'S REGULATIONS Part 323, § 323.1(c) (1977).

54. *See id.*

55. *See id.*; *see generally* N.Y. BANKING DEP'T, GENERAL REGULATIONS OF THE BANKING BOARD Part 51 (1969).

56. It is the practice of some foreign banks to make loans through the head office, then to apportion the loan asset among its various branches. While this is not a participation certificate in the strictest sense, the Banking Department has in the past disallowed the use of such assets in 108% computations. *See generally* N.Y. BANKING DEP'T, SUPERINTENDENT'S REGULATIONS Part 323, § 323.1(c) (1977).

57. *Id.*; interviews with officials of the New York State Banking Department

#### IV. THE APPLICATION PROCESS

Securing a license to operate a New York agency or branch is a long and involved process, requiring the preparation of application documents numbering in the hundreds of pages. Most of the data requested by the Banking Department relate either to the foreign bank's authority to establish a banking entity in New York or to the foreign corporation's strength as a financial institution. In addition, the Banking Department demands that the applicant give thorough consideration to the operational requisites of a New York agency or branch, particularly with regard to sources and uses of funds.<sup>58</sup> The few application documents which relate to matters other than authority, institutional strength, and operational plan are strictly formal in nature and demand little preparation time.<sup>59</sup>

##### A. *Documents Evidencing Authority to Operate a New York Banking Entity*

The Banking Law requires, as a condition precedent to the issuance of an agency or branch license, that an applicant bank be authorized by the laws of its country of incorporation to operate a New York agency or branch.<sup>60</sup> The Department is concerned that a bank not be permitted to do anything in New York that it would not be allowed to do in its home country.<sup>61</sup> Accordingly, an appli-

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(April 5, 1979).

58. Interviews with officials of the New York State Banking Department (April 5, 1979). See N.Y. Banking Dep't, *Projection of Income and Expense to be Filed in Connection with Application by Foreign Banking Corporation to Open and Maintain a Branch/Agency* [hereinafter cited as *Projection of Income and Expense*]. The other application document which relates directly to this Banking Department concern is the "copy of the option or conditional lease on the proposed branch or agency location . . ." N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a)(13) (1978). See N.Y. BANKING LAW § 200(2) (McKinney 1971).

59. These documents are the letter application, license fee (\$250), investigation fee (\$2000), certificate of compliance with section 296-a of the Executive Law (relating to non-discriminatory practices in credit), instrument appointing the superintendent of banks the true and lawful attorney for service of process, and "certificate of designation" specifying the name and address of the agent to whom process may be forwarded. See N.Y. BANKING LAW §§ 9-d, 200, 201 (McKinney 1971 & Supp. 1978); N.Y. EXEC. LAW § 296-a (McKinney Supp. 1978); N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE G 108 (1976); N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a) (1978).

60. N.Y. BANKING LAW § 200(1) (McKinney 1971).

61. Interviews with officials of the New York State Banking Department (April 5, 1979).

cant bank must submit "a letter or certificate from the appropriate supervisory authority of the . . . country under whose laws [the] applicant was organized" permitting it to apply for an agency or branch license.<sup>62</sup> It must additionally submit an opinion by a member of the bar of its country stating that: (1) the "applicant's charter authorizes it to carry on" the business contemplated by the application, (2) the "applicant has at all times conducted, and is now conducting, its business as authorized by its charter and by-laws and in compliance with the laws of" its country of incorporation, and (3) that the application complies with the laws of the bank's home country.<sup>63</sup> The Banking Department does not rely upon counsel's opinion alone to establish the existence of an applicant's authority under its charter and by-laws, however; the Department itself examines the bank's enabling documents to verify that authority. The bank must include in its application "two duly authenticated copies" of its charter and by-laws "or the equivalent thereof" for this purpose.<sup>64</sup> If, as is the case in many civil law jurisdictions, the bank does not have "by-laws" as that term is understood in the United States, the application should include an opinion of local counsel that the documents under which the bank operates constitute the equivalent of a charter and by-laws under the laws of the bank's country of incorporation.

The process of authenticating charters and by-laws depends upon whether the documents are publicly or privately filed.<sup>65</sup> If these documents are privately filed, *i.e.*, in the possession of the bank itself, the Banking Department requires that they be authenticated by means of a duly sworn and notarized statement of a bank officer attesting to the validity of the submitted document. If as in some countries, the charter is publicly filed, *i.e.*, not in the possession of the applicant bank, but on file in a government agency, the Department requires a similar statement from a government official who has custody of the bank's charter. In the latter instance, the Department may also require submission of the "letters patent" of the foreign banking corporation.<sup>66</sup> Letters patent of a bank are, in essence, the documents evidencing a grant of power by the government to engage in the banking business. Such

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62. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a)(7) (1978).

63. *Id.* § 104.3(a)(12).

64. *Id.* § 104.3(a)(4). See N.Y. BANKING LAW § 201 (McKinney Supp. 1978).

65. Interviews with officials of the New York State Banking Department (April 5, 1979); interviews with members of the New York bar (May 1978).

66. Interviews with members of the New York bar (May 1978).

documents are held by a government agency and may require some time to procure. Accordingly, a duly notarized copy should be obtained at an early date in case the Banking Department requests it. The copy should not be submitted absent such a request, however, since the time required to review it may delay the application process.

In addition to proof that the foreign banking corporation itself possesses the power to establish a New York banking entity, the Banking Department requires that the application contain certain documents executed by the parent bank authorizing and enabling the New York agency or branch. First, the application must include a certified copy of resolutions by the applicant bank's board of directors:

- (i) authorizing the filing of the application and designating the officer who is to sign the application;
- (ii) designating the person who is to be in charge of the business and affairs of the branch or agency; [and]
- (iii) authorizing the execution of a power of attorney in favor of the person designated to be in charge of the business and affairs of the branch or agency and in favor of at least one other officer . . . .<sup>67</sup>

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67. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a)(9) (1978). The resolutions must also authorize "the appointment of the superintendent [of banks] as true and lawful attorney for service of process" and authorize "the designation of the officer or agent to whom process may be forwarded by the superintendent . . ." *Id.*

The Banking Department's requirement that the applicant bank's board of directors authorize the execution of a power of attorney and designate the person to be in charge of its branch or agency has created difficulties for Japanese banks, whose boards of directors typically do not concern themselves with such matters; rather, such action is customarily taken by a senior manager of the bank. In light of this, it has been suggested to the Banking Department that an opinion of local counsel identifying the officers who may execute a power of attorney under Japanese law be accepted in lieu of an authorization from the bank's board of directors. The Department has indicated, however, that the purpose of its regulation is to involve the board of directors in the appointment of the senior officers of the New York agency. Nonetheless, the Department agreed that the requirements of the supervisory procedure would be satisfied if the board of directors, by resolution, delegated its responsibility to appoint the senior officers of the New York agency and to authorize the execution of power of attorney in their favor to one representative director: As long as such resolution remains in effect and that representative director remains in office, further board action should not be necessary in connection with the appointment of, or the execution of powers of attorney in favor of, the senior officers of the New York agency. Interviews with officials of the New York State Banking Department (April 5, 1979); interviews with members of the New York bar (May 1978).

A copy of the power of attorney must also be included in the application,<sup>68</sup> and care should be taken in its drafting to ensure that it enables the agency or branch officers to perform all of the functions contemplated for the agency or branch.<sup>69</sup> The Banking Department insists that the power of attorney be granted severally to the agency or branch officers.<sup>70</sup> Consequently, should a bank desire that its agents act jointly under the power of attorney, the Department has required that the power be granted in favor of at least three persons, any two of whom may act jointly. The apparent reason for insisting upon several powers is the Department's concern that an entity not be prevented from acting in the absence of one of its empowered officers.

### B. *Documents Relating to the Strength of the Foreign Banking Corporation*

In addition to proof that the foreign bank is authorized to establish a New York agency or branch, the Banking Department requires evidence that the bank is a reputable institution of solid financial standing, that the bank's country of incorporation has a relatively stable political and economic system, and that the proposed agency or branch managers have sufficient banking experience. Of these areas of inquiry, the financial documentation is the most exhaustive, with four separate sets of documents required.<sup>71</sup> Three of these—a copy of the bank's most recent annual report in English,<sup>72</sup> “a complete and detailed statement of the applicant's financial condition as of a date within 60 days prior to the date of

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68. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a)(10) (1978).

69. In the case of a branch, which may later decide to apply for authorization to exercise fiduciary powers or to establish a personal loan department, these powers should be included in the original power of attorney document in order to avoid future delays in approval of the additional branch powers. See text accompanying note 33, *supra*.

70. Interviews with officials of the New York State Banking Department (April 5, 1979); interviews with members of the New York bar (May 1978).

71. A branch application must include a fifth financial document: “a certificate as to [the bank's] paid-in capital stock, surplus fund and individual profits, expressed in each case in the currency of the . . . country of origin and in United States dollars, based on the current conversion rate . . .” N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(b)(1) (1978). See N.Y. BANKING LAW § 201(3) (McKinney 1971).

72. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a)(3)(iii) (1978).



application,"<sup>73</sup> and complete and detailed financial statements for the applicant's five latest fiscal years<sup>74</sup>—relate to the historical performance of the foreign bank itself. These are subjected to ratio and other financial analysis. The emphasis is on capital position, and the applicant is generally compared to other banks in its native country, rather than to United States banking standards, since the measures of sound banking practice in other countries often vary considerably from those in the United States.<sup>75</sup>

The fourth financial document—income and expense projections for the New York entity's first three years of operation<sup>76</sup>—relates to the thoroughness of the foreign bank's planning and should evidence a business strategy which justifies the bank's entry into the New York market. The Banking Department reviews the projections for reasonableness; excessive return on investment or understated expenses will trigger "red flags" and cause the Department to ask further questions, with a resulting delay in application approval. Accordingly, a reasonable effort should be made to present realistic figures, especially those respecting legal and accounting fees and other operating expenses. In addition, the data should demonstrate compliance with the 108% Rule, either by a specific

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73. *Id.* § 104.3(a)(3)(i). With the superintendent's permission this statement may be as of a date within 120 days prior to the date of the application. N.Y. BANKING LAW § 201(4) (McKinney 1971). Problems necessitating the use of the earlier date generally arise with regard to the time the bank closes its books. The Department has indicated that in such a case, as well as in case of any other reasonable excuse, permission to use the earlier date will probably be granted. Interviews with officials of the New York State Banking Department (April 5, 1979).

74. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a)(3)(ii) (1978). The five year financial history is a standard requirement in contemporary commercial lending practice. See generally E. REED, R. COTTER, E. GILL & R. SMITH, COMMERCIAL BANKING 173-74 (1976) [hereinafter cited as E. REED]; DEVELOPING A BUSINESS LOAN TRAINING PROGRAM (ROBERT MORRIS ASSOCIATES) 12 (1978).

75. Interviews with officials of the New York State Banking Department (April 5, 1979).

76. Projection of Income and Expense, *supra* note 58. See N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a)(8) (1978); N.Y. Banking Dep't, Outline of Background Information Requested in Support of Application by Foreign Banking Corporation for Agency or Branch (April 1974) [hereinafter cited as Certificate of Merit Outline]; note 79 *infra*. The requirement of three year pro forma financials, like the requirement of a five year financial history, is standard in contemporary commercial lending. See generally E. REED, *supra* note 74, at 173-74; Third National Bank of Nashville, Tennessee, Internal Commercial Credit Training Manual § 209.2 (1978).

description of the assets and liabilities in the projections or by a separate statement describing eligible and ineligible assets and liabilities requiring cover and those not requiring cover.<sup>77</sup> Unlike its cursory attention to income and expense projections in the past, the Banking Department has recently expressed an increased interest in such data. This is due in part to the rising number of smaller banks applying for agency and branch licenses and in part to the Department's perception that applicant banks often had incorrect and understated cost projections.<sup>78</sup> Thus, the requirement that applicants submit income and expense projections not only provides the Department with information with which to evaluate an application, but also forces the foreign banks to better assess the cost of doing business in New York.

In addition to concerns about an applicant's financial strength, the Banking Department is also interested in a foreign applicant's reputation in the international banking community and in the stability of the economic and political regime in the bank's home country. This information is contained in the "Certificate of Merit," the single most difficult part of the application to prepare.<sup>79</sup> Accumulation of data on the country of incorporation may

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77. See notes 46-57 *supra*, and accompanying text. In addition, the bank's initial deposit in compliance with the Five Percent Rule "shall be based on the branch's one-year projection of total liabilities." N.Y. BANKING DEP'T, SUPERINTENDENT'S REGULATIONS Part 322, § 322.2 (1976). See notes 43-45 *supra*, and accompanying text.

78. Interviews with officials of the New York State Banking Department (April 5, 1979).

79. See N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a)(8) (1978); see also N.Y. BANKING LAW § 26 (McKinney Supp. 1978). The Certificate of Merit is a long and involved document, encompassing a wide range of data and often comprising half of the entire application. The outline of its contents suggested by the Banking Department is as follows:

I. *Profile of Native Country*

1. Political stability
2. Economic ties with the Export-Import Bank, IMF, etc.
3. Foreign trade
  - a. Balance of payments
  - b. Legal controls
  - c. Volume with United States and other countries
4. Foreign exchange restrictions

II. *Banking System*

1. Description of components
2. Supervisory authority—powers and functions
3. Frequency of examination of banks and scope of examinations
4. Function of Central Bank and its relationship to private banks

5. Deposit insurance, if any
  6. Powers of foreign banks to conduct business in the country
- III. *Description of Your Bank*
- A. Background information
1. History
  2. Growth—resources, capital accounts, deposits, expansion of services
  3. Subsidiaries
  4. Branch systems
  5. Agencies, branches or subsidiary banks in the United States
  6. Ownership
  7. Directorate
  8. Management
  9. Background and business contacts of dominant directors, top management and large stockholders
- B. Type of Business Conducted
1. Business presently handled—specialization, if any
  2. Foreign Department
  3. Fiduciary Operations—nature, volume
  4. Analysis of loans and deposits by type of class showing relation to total
- IV. *Applicant's Place in Native Banking Industry*
1. Comparative size in terms of resources, capital accounts and deposits
  2. Volume of Business
    - a. Lending
    - b. Foreign exchange
    - c. Transmissions
    - d. Letter of credit financing
  3. Relation of such business performed by the applicant to total business performed by all banks in its native country
- V. *Proposed Office*
- A. If a branch is proposed
1. Source of business
    - a. Deposits
    - b. Loans and principal type of financing to be provided
    - c. Use of deposits to be derived from branch—how and where invested
  2. Management of office
    - a. Names and brief biographies of managing officer or officers
  3. Projection of operations
    - a. Estimated new deposits
    - b. Estimated income, expenses and break-even point
- B. If an agency is proposed
1. Source of business
    - a. Loans and principal type of financing to be provided
  2. Management of office
    - a. Names and brief biographies of managing officer or officers
  3. Projection of operations
    - a. Estimated volume of loans and credit balances
    - b. Estimated income, expenses and break-even point

be facilitated if that country has made a recent debt offering in the United States. In such a case the prospectus prepared in connection with the offering may be used to obtain much of the desired information. Data on the applicant itself should be available to the foreign bank, although it may take time to assemble and prepare. One potential problem, however, is the "References" section of the Certificate, which calls for a list of the foreign bank's United States correspondents, New York lines of credit, and native country supervisory authorities.<sup>80</sup> Since the Banking Department will address questions to each institution listed and will not process the application until substantially all references have responded, it is advisable to include the name of a particular individual at each bank or government agency to whom correspondence may be addressed. In order to expedite response time, it is also advisable to alert each of the persons listed to the potential inquiry from the Banking Department.

The final area of inquiry in an agency or branch application relates to the qualifications of the proposed officers. The Banking Department requires detailed biographical and financial information on the proposed agency/branch manager and one other offi-

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#### VI. References

1. List of New York correspondents
2. List of other United States correspondents
3. Officers of correspondents to whose attention inquiries may be directed
4. Lines of credit extended to applicant by New York banks
5. Supervisory authorities in native country

#### VII. Public Convenience and Advantage

1. Rationale for application
  2. Manner in which the proposed facility will contribute to the New York money market
  3. Extent to which the proposed facility will provide public convenience not presently afforded by existing facilities
  4. How the office will contribute to the promotion of international trade
  5. How it will attract business to New York which is not presently channelled here
  6. Competitive effect on existing banking facilities
  7. Applicant's reason for applying for branch or agency, as case may be
  8. Reason for selecting form of facility proposed, i.e., branch or agency
  9. If a conversion, reasons for decision to change form of operation
- Certificate of Merit Outline, *supra* note 76.

80. See note 79 *supra*.

cer.<sup>81</sup> Also, each of these officers must execute a statement that he has neither been convicted in any criminal proceeding nor has had any civil judgment rendered against him.<sup>82</sup> Some of this information must also be provided on the chief foreign exchange trader of the agency or branch.<sup>83</sup> Unlike some countries which require that foreign bank managers have prior banking experience within their borders,<sup>84</sup> New York does not insist that the proposed agency or branch officers have prior New York or United States banking experience; instead, the Banking Department looks for prior general banking experience, although some special recognition is given to experience in international banking.<sup>85</sup>

### C. *The Requirement of Reciprocity*

Pursuant to section 202-a of the Banking Law and Supervisory Procedure CB 104, a foreign banking corporation applying for a branch license must submit, in addition to all the documents required for an agency application,

an opinion of a member of the bar of the . . . country of origin or a certificate of the appropriate bank supervisory authority thereof that under the laws of the . . . country of origin a bank or trust company organized under the New York State Banking Law may be authorized to maintain a branch or agency in the . . . country of origin or to own all the shares (except for directors' qualifying shares) or a banking organization organized under the laws of the . . . country of origin. Such opinion shall contain references to, or extracts from, any relevant statutes and such certificate shall state that the certifying official is authorized to issue licenses to foreign banking corporations for the purpose of maintaining a local branch or agency.<sup>86</sup>

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81. The forms to be used for this purpose are included in the information packet given to potential applicants by the Banking Department. *See generally* N.Y. BANKING LAW § 201(2) (McKinney 1971).

82. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(a)(11) (1978).

83. *See* Projection of Income and Expense, *supra* note 58.

84. *See, e.g.*, H. SCHNEIDER, H. HELLWIG & D. KINGSMAN, *THE GERMAN BANKING SYSTEM* 39 (1978) [hereinafter cited as H. SCHNEIDER].

85. Interviews with officials of the New York State Banking Department (April 5, 1979).

86. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.3(b)(2) (1978). New York is not alone in requiring reciprocity as a condition precedent for the grant of a branch license. Brazil, Canada, and Japan, for example, have reciprocity laws. Halperin, *supra* note 5, at 672-74; 6 VAND. J. TRANSNAT'L L., *supra* note 1, at 567. It is not a universal requirement, however, *see, e.g.*, H.

Thus, in the absence of the type of reciprocity described above, a foreign bank will not be permitted to establish a branch in New York.<sup>87</sup>

The characterization of a "branch" or "agency" for the purposes of Supervisory Procedure CB 104 will be made under New York law, not under the law of the foreign country.<sup>88</sup> The Banking Department will look to see if a New York bank would be permitted to do a "general banking business" in the applicant's country.<sup>89</sup> To determine whether the New York reciprocity requirement has been fulfilled, the Banking Department will conduct its own inquiry into the activities in which a New York bank would be entitled to engage in the foreign bank's home country. As part of its inquiry the Department might address specific questions to the banking authorities of that country, and would probably also discuss the questions both with New York banks currently operating in the foreign country and with those who had attempted to engage in banking activities there. In addition, the Department may request an original copy and an English translation of the applicable law.<sup>91</sup> The existence of statutory authorization alone is insufficient, however, and if the applicant's country maintains a *de facto* policy of excluding foreign banks, reciprocity will not be considered to exist.<sup>92</sup>

There is no "grandfathering" clause included in the New York Banking Law. Therefore, if the laws of the foreign country allowing reciprocity are repealed, banks incorporated in that country will be compelled to convert their New York branches into agencies.<sup>93</sup> Pre-

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SCHNEIDER, *supra* note 84, at 39 (West Germany), and one scholar has suggested that with regard to some countries, New York's insistence on reciprocity may abrogate United States treaties. Lichtenstein, *supra* note 25, at 885 n.22.

87. N.Y. BANKING LAW § 202-a (McKinney 1971).

88. Interviews with officials of the New York State Banking Department (April 5, 1979).

89. *Id.*

90. Interviews with officials of the New York State Banking Department (April 5, 1979).

91. *Id.* Mexico has had this type of policy. The Mexican finance ministry had statutory authorization to grant banking concessions, but as a practical matter did not do so. See Brinsmade, *Mexican Law—An Outline and Bibliography of English Source Materials Relating to Certain Aspects Thereof*, 6 INT'L LAW. 829, 836 (1972).

92. Interviews with officials of the New York State Banking Department (April 5, 1979).

93. *Id.* The Colombian bank was forced to surrender its branch license and to incorporate a New York banking subsidiary, for which no reciprocity requirement

cedent already exists for refusal to renew a branch license under such circumstances. The Banco de Bogota lost its license when Colombia disallowed the continued presence of United States banking interests in that country.<sup>94</sup>

A bank incorporated in a country whose laws do not meet the requirements of section 202-a may still be able to establish a New York branch by first establishing a wholly owned banking subsidiary in a country whose laws meet New York state reciprocity requirements. The banking subsidiary could then apply for a branch license in New York. This procedure has never been attempted, however, and the Banking Department has no official position regarding the validity of such a strategy.

#### D. *Authentication of Documents.*

All documents written in a foreign language must be accompanied by a certified English translation and a statement of the translator attesting to the accuracy of the translation. In addition, the Banking Department requires that the following documents be notarized, if executed in the United States:

- (1) Statements of accurate translation;
- (2) Application of a Foreign Banking Corporation for a License to Transact Business in the State of New York;
- (3) Statement of financial condition as of a date within 60 days of the date of application;
- (4) Instrument appointing the superintendent the bank's lawful attorney for service of process;
- (5) Certificate of designation;
- (6) Resolutions of the applicant bank's board of directors;
- (7) Power of attorney in favor of the proposed manager of the agency or branch and at least one other officer;
- (8) Litigation affidavits; and
- (9) Statement of authenticity of charter and by-laws.<sup>95</sup>

If any of those documents are executed outside of the United States, they must either be executed in the presence of a competent official of the United States ("consularized") or of a notary public of the country of execution. In the latter instance, the no-

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exists. For a discussion of the change in Colombian law, see J. BOYCE & F. LOMBARD, *COLOMBIA'S TREATMENT OF FOREIGN BANKS* 33 (1976).

94. See N.Y. BANKING DEP'T, *SUPERVISORY PROCEDURE* CB 104 (1978).

95. For a listing of United States officials competent to perform this function, see N.Y. CIV. PRAC. RULE 4542 (McKinney Supp. 1978).

tary's seal and signature must be verified by a competent United States official.<sup>96</sup>

Some documents must also display the bank's affixed corporate seal. Applicant banks from countries whose laws do not require that a corporation have a seal should include an opinion of local counsel to that effect.<sup>97</sup>

### E. *The Application Approval Process*

While there is no requirement that a foreign banking corporation take any preliminary steps before submitting a formal agency or branch application, the Banking Department recommends that applicant banks first participate in an informal conference with the Department.<sup>98</sup> This enables the Department both to acquaint the potential applicant with the application and investigation processes and with the New York Banking Law,<sup>99</sup> and to acquaint itself with the foreign bank. The Banking Department additionally recommends that the initial application be filed in draft form. The Department's comments, sometimes quite technical, may then be reflected in the final application.

After an application is formally submitted, the Department may request that some material be changed and that additional material be supplied. The Department then sends letters requesting comments or information concerning the applicant bank to a number of institutions, including the Federal Reserve Board, the Federal Reserve Bank of New York, the home country banking authorities, and the applicant bank's correspondents.<sup>100</sup> Since no further action is taken on the application until the United States, foreign

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96. Interviews with officials of the New York State Banking Department (April 5, 1979); interviews with members of the New York bar (May 1978).

97. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.2 (1978).

98. Interviews with officials of the New York State Banking Department (April 5, 1979). Banking practice in the United States is often substantially different from that in other countries, *see, e.g.*, H. SCHNEIDER, *supra* note 84 (West Germany); U. STEUBER, INTERNATIONAL BANKING 9-10, 21-22, 40-41, 43-45 (1976) (United States, United Kingdom, France, and Japan); *compare* Kelly, *United States Foreign Policy: Efforts to Penetrate Bank Secrecy in Switzerland from 1940 to 1975*, 6 CAL. W. INT'L L.J. 211 (1976) with 14 SAN DIEGO L. REV. 414 (1977) (bank secrecy), and it has been the Banking Department's experience that applicant banks are often unfamiliar with the principles of United States banking law. Interviews with officials of the New York State Banking Department (April 5, 1979).

99. Interviews with officials of the New York State Banking Department (April 5, 1979); interviews with members of the New York bar (May 1978).

100. *See* text following note 80 *supra*.



banking authorities, and most of the bank's correspondents have replied, it is advisable to provide the Banking Department with a particular person at each of these institutions to whom the Department may address its inquiries.<sup>101</sup> It is also advisable to alert those persons to assure prompt responses. Once the responses have been received, the legal, commercial banks, and market analysis and research divisions of the Banking Department review the application. After any additional information or change requested by the divisions has been supplied or made, the market analysis and research division makes its licensing recommendation to the superintendent of banks. If the superintendent decides to grant the license, the application and a summary of the results of the Banking Department's investigation are forwarded to the Banking Board for approval in accordance with section 26 of the Banking Law. To date, the Banking Board has never rejected the recommendations of the superintendent.<sup>102</sup> Once an application has been approved by the Banking Board, the superintendent will generally issue a license within 24 hours.<sup>103</sup>

#### F. License Renewal

Agency and branch licenses must be renewed annually for each of the first five years of operation. After five years, the license may be renewed for an indefinite time "if the superintendent shall find that such foreign banking corporation has conducted its business honestly and efficiently . . ." <sup>104</sup> A renewal application is sent by the Banking Department to the licensee bank approximately 90 days prior to the expiration of the license.<sup>105</sup> The completed application should be received by the Banking Department at least 15 days prior to the expiration date of the current license and must include a certificate of compliance with section 296-a of the Executive Law (prohibiting discriminatory practices relating to credit) and a statement of financial condition as of a date within 60 days of the renewal.<sup>106</sup>

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101. Interviews with officials of the New York State Banking Department (April 5, 1979).

102. Interviews with members of the New York bar (May 1978).

103. N.Y. BANKING LAW § 26 (McKinney Supp. 1978).

104. N.Y. BANKING DEP'T, SUPERVISORY PROCEDURE CB 104, § 104.4 (1978).

105. See note 73 *supra*.

106. Interviews with officials of the New York State Banking Department (April 5, 1979).

## V. CONCLUSIONS

Between 1976 and 1978, 70 agency and branch applications were submitted to the New York State Banking Department.<sup>107</sup> All were approved. Thus, for a major foreign banking corporation, the issue is not whether its application will be approved, but the amount of time necessary to secure approval. Recent experience with agency applications indicates that at least six months are required to obtain an agency license for a well-organized and sophisticated foreign banking corporation.<sup>108</sup> The process will more likely take nine months to a year and branch applications may take up to three months longer. The amount of time that will be required for any particular bank depends primarily upon the applicant bank's standing in the international financial community, the responsiveness of the regulatory authorities in the bank's country of incorporation to inquiries from the Banking Department, and the applicant's familiarity with United States banking law and practice. In addition, the number of other agency and branch applications pending before the Banking Department will affect the time necessary to obtain approval of a particular application. Applications submitted during the summer months may experience additional delays due to the vacation schedules of Banking Department officials and members of the Banking Board.

While many of these factors are beyond the control of an applicant foreign bank, the applicant can expedite the approval process by two methods: (1) delegate the authority to prepare application documents to persons thoroughly familiar with New York banking law, and (2) anticipate the additional documents and other information which the Department may require and secure them at an early date so that they will be available for immediate submission, if requested. Officials of the Banking Department have recently indicated that a license application can be approved within two or three months.<sup>109</sup> A foreign banking corporation which follows these guidelines may be able to secure approval within this time period.

*Clifford D. Harmon*

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107. Interviews with members of the New York bar (May 1978).

108. Interviews with officials of the New York State Banking Department (April 5, 1979).

