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# Terminal-Based EFT Services: The Need for Uniform Federal Legislation

*by* THERESA A. EINHORN\*

## INTRODUCTION

The growth of electronic funds transfer (EFT) services has raised several significant issues which do not fit squarely into the existing legal and regulatory scheme governing depository institutions. In this closely regulated industry, it is becoming increasingly apparent that modern technology has outpaced the laws enacted decades ago, and that these laws are inadequate to accommodate the needs and desires of today's consumer. The need to reexamine existing law is well illustrated in the area of remote terminal deployment, where inconsistent and often unclear rules govern different financial institutions.

Terminals located away from the premises of a depository institution—including automated teller machines (ATMs) and point of sale (POS) terminals—enable the consumer to accomplish his routine financial transactions in convenient locations and at convenient times. Electronic terminals are used by the consumer to initiate a variety of transactions, including deposits, cash withdrawals, transfers between accounts, and accessing approved lines of credit. POS terminals are also being used for check authorization and guarantee, and to pay for goods and services by debits and credits to the consumer's and merchant's account held at a depository institution.

Different financial institutions, even though they may be sharing the same electronic terminals for use by their customers, are subject to substantially inconsistent laws and regulations governing the scope of their authority to operate and use remote terminals. The

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scope of an institution's authority will depend not only upon the type of institution—commercial bank, savings and loan association, credit union or other—but also upon whether it is federally or state-chartered. The relationship between federal and state laws and regulations is sometimes complicated and unclear, and in some cases it is impossible even to ascertain the scope of a particular type of depository institution's authority to establish and operate remote electronic terminals because existing law fails to address the issue.

This article examines the various federal and state laws and regulations governing remote terminal deployment, and notes recent trends at both the federal and state level. The article concludes by pointing out the need for legislation establishing a uniform set of rules giving depository institutions authority to operate remote terminals under less restrictive rules than those governing traditional "brick and mortar" branches.

## I. FEDERALLY-CHARTERED DEPOSITORY INSTITUTIONS

None of the federally-chartered depository institutions—national banks, federal savings and loan associations (S&Ls), federal credit unions or federally-chartered mutual savings banks<sup>1</sup>—are explicitly authorized by law to establish and operate remote electronic terminals. Federal regulators have attempted to accommodate existing statutes to modern technology by issuing regulations designed to enable depository institution to offer consumers new and more convenient services. However, the lack of explicit statutory authority to deploy remote terminals, combined with the lack of uniformity between the various federal regulations, leaves the authority of federally-chartered institutions to offer terminal-based EFT services subject to rules which are substantially inconsistent and often unclear.

### 1. *National Banks*

The inadequacy of existing laws to resolve even the most fundamental questions raised by modern technology is well illustrated in the case of remote terminals operated by national banks. The McFadden Act requires national banks in any given state to observe

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1. Under Title XII of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, effective March 10, 1979, federal charters are for the first time available for mutual savings banks. A federal charter is available, however, only for state-chartered mutual savings banks in states whose laws do not prohibit conversion, and the law does not authorize *de novo* federal chartering of mutual savings banks. 12 U.S.C. § 1464(a) (1976), *as amended by* Pub. L. No. 95-630 § 1202, 92 Stat. 3641, 3710-11 (1978).

the geographic branching restrictions imposed on state-chartered banks.<sup>2</sup> The question which arose when national banks began to establish off-premises electronic terminals was whether these terminals should be considered "branches," and thus subject to state statutory restrictions on branching. The McFadden Act defines a "branch" as "any branch bank, branch office, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."<sup>3</sup>

The Comptroller of the Currency took the view that national banks' remote terminals were not "branches" within the meaning of the McFadden Act, and in 1974 issued an interpretive ruling permitting national banks to establish "customer-bank communication terminals" (CBCTs) without regard to state branching laws.<sup>4</sup> The Comptroller's CBCT ruling did not withstand judicial challenge, however. Several lawsuits were filed against national banks operating CBCTs, and in all but one of the judicial opinions rendered, some or all of the functions performed by CBCTs were found to constitute "branch" banking within the meaning of the McFadden Act.<sup>5</sup> Finally, in the case of *Independent Bankers Association of America v. Smith*<sup>6</sup> the Comptroller's CBCT ruling itself was nullified.

The court in *IBAA v. Smith* based its decision on the principle, set forth by the United States Supreme Court in *First National Bank in Plant City v. Dickinson*,<sup>7</sup> that the definition of a branch "must not be given a restrictive meaning which would frustrate the congressional intent" to assure "competitive equality" between national and state banks.<sup>8</sup> Applying this principle, the court in *IBAA v. Smith* concluded that a CBCT established by a national bank and

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2. 12 U.S.C. § 36(c) (1976).

3. *Id.* § 36(f).

4. 12 C.F.R. § 7.7491 (1974), *revised*, 40 Fed. Reg. 21,700 (1975), *rescinded*, 41 Fed. Reg. 36,198 (1976).

5. Illinois *ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co.*, 409 F. Supp. 1167 (N.D. Ill. 1975), *aff'd in part and rev'd in part*, 536 F.2d 176 (7th Cir. 1976), *cert. denied*, 429 U.S. 871 (1976); Colorado *ex rel. State Banking Bd. v. First Nat'l Bank*, 540 F.2d 497 (10th Cir. 1976); Missouri *ex rel. Kostman v. First Nat'l Bank*, 405 F. Supp. 733 (D. Mo. 1975), *aff'd*, 538 F.2d 219 (8th Cir. 1976), *cert. denied*, 429 U.S. 871 (1976); Ohio *ex rel. O'Donnell v. Smith*, No. C-1-75-153 (S.D. Ohio, May 10, 1976) (partial summary adjudication). The sole decision in which no illegal "branch" banking was found was Oklahoma *ex rel. State Banking Bd. v. Bank of Oklahoma*, 409 F. Supp. 71 (N.D. Okla. 1975).

6. *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 862 (1976) [herein after sometimes cited as *IBAA v. Smith*]. The Comptroller rescinded his CBCT ruling, though he disagreed with the court's conclusion. 41 Fed. Reg. 36,198 (1976).

7. 396 U.S. 122 (1969).

8. *Id.* at 133-34.

used to receive or disburse funds must be considered a "branch" within the meaning of the McFadden Act.<sup>9</sup> Since the court's ruling in 1976, national banks' CBCTs have been subject to the statutory restrictions on traditional brick and mortar branches, including state statutory capital and surplus requirements.<sup>10</sup>

As a result of the court's ruling in *IBAA v. Smith*, national banks have been placed at a competitive disadvantage vis-a-vis thrift institutions and state-chartered banks in some states. Unlike national banks' CBCTs, remote terminals operated by federal savings and loan associations (S&Ls) and federal credit unions are governed by rules separate and distinct from those governing branching.<sup>11</sup> In addition, most states have enacted legislation enabling state-chartered financial institutions to operate remote electronic terminals under rules less restrictive than those governing

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9. 534 F.2d at 951. The Comptroller of the Currency, however, has taken the position that in cases where a national bank uses a remote terminal owned by another institution and pays only a transaction fee dependent upon actual customer use of the terminal, the terminal is not "established" by the bank and, therefore, is not a "branch" within the meaning of the McFadden Act. If the national bank pays a fee for use which is the equivalent of "rent," however, the terminal will be considered to be a branch, and thus subject to federal and state statutory restrictions on branching. Interpretive letter from Richard V. Fitzgerald, Dir., Legal Advisory Serv. Div., Office of the Comptroller of the Currency (Aug. 30, 1978); Interpretive letter from John E. Shockey, Chief Counsel, Office of the Comptroller of the Currency (Aug. 1, 1978). It should be noted that the Comptroller's interpretation has not been at issue in any judicial decisions. Thus, a national bank which relies on the Comptroller's interpretation and uses off-premises terminals in a state where CBCTs are considered branches, and where branching is restricted, may face a possible challenge from state banking authorities. For example, in a September 1979 opinion, the Louisiana Attorney General specifically ruled that a CBCT used by a bank's customers to perform routine banking transactions constitutes a branch whether or not the CBCT is shared, and regardless of which institution controls the device. La. Dep't of Justice, Att'y Gen. Opinion No. 79-579 (Sept. 10, 1979).

10. These restrictions include the following:

(1) geographical restrictions: national banks may establish branches only at locations where state law expressly permits state banks to establish branches; (2) capital and surplus requirements set forth in federal law: the aggregate capital of a national bank and its branches may be no less than the aggregate minimum which would be required for the establishment of an equal number of national banks; (3) capital and surplus requirements set forth in state law: a national bank may not establish a branch outside of the city or town in which its main office is located unless it has the combined amount of capital stock and surplus required by state law for the establishment of branches by state banks; and (4) application requirements: prior approval of the Comptroller of the Currency is required for establishment of a branch. 12 U.S.C. §§ 36(c), 36(d) & 51 (1976). The policy of the Comptroller of the Currency is to impose only one capital requirement for all branches established within the same city, town or village. *See* 41 Fed. Reg. 48,333, 48,334 (1976).

11. *See* text accompanying notes 22-43 *infra*.

brick and mortar branches.<sup>12</sup> This inconsistency between the various laws and regulations governing remote terminals has resulted in some anomalous situations. For example, where different types of financial institutions share the same EFT terminal systems, the services which each financial institution is authorized to offer its customers will sometimes be different.

The inconsistency between federal law governing national banks' CBCTs and state law governing state-chartered banks' remote terminals creates a potential for substantial inequality in those states which prohibit or restrict branching, but permit state-chartered banks to operate remote terminals under rules less restrictive than those governing brick and mortar branches. Some states which prohibit or restrict branching have enacted legislation authorizing state-chartered banks to establish and operate remote terminals without regard to state statutory restrictions on branching.<sup>13</sup> The question which arises in such states is whether national banks are authorized to operate terminals to the same extent as their state-chartered competitors, or whether national banks' CBCTs—which must be considered “branches” under the McFadden Act—are subject to state statutory restrictions on branching. Though three years have passed since the *IBAA v. Smith* decision, the question remains unresolved.

The court in *IBAA v. Smith* recognized the potential for inequality between national and state banks in states which restrict branching but define remote terminals as non-branches and authorize terminal deployment without regard to statutory restrictions on branching. The court held that the definition of a national bank's branch is a question of federal law and must be determined without regard to state law.<sup>14</sup> In dictum, however, it suggested that in a state which prohibits branching but permits state-chartered institutions to establish remote terminals as non-branches, the Comptroller should be permitted to “consider and follow” the state EFT law and authorize remote terminal deployment by national banks.<sup>15</sup> This suggestion is certainly justified by the underlying principle of “competitive equality” between national and state banks,<sup>16</sup> and is entirely consistent with the remainder of the court's ruling. Because a remote terminal is a “branch” for purposes of the McFadden Act,

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12. See text accompanying notes 44-48 *infra*.

13. See, e.g., N.D. CENT. CODE §§ 6-03-02(8), -13, -14, -19; OKLA. STAT. ANN. tit. 6 §§ 102, 415(A), 421(A), 422(A) (West).

14. *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921, 933 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 862 (1976).

15. *Id.* at 948 n.104.

16. See text accompanying notes 7-8 *supra*.

state statutes governing remote terminals should be considered laws authorizing the establishment of "branches."

Although the Comptroller of the Currency has suggested that state legislation authorizing state-chartered banks to establish remote terminals should be "construed as authorizing branch banking as it is perceived under the McFadden Act,"<sup>17</sup> he has taken no formal position on the issue. Only one court has squarely addressed the question. In *State Bank of Fargo v. Merchants National Bank & Trust Co.*,<sup>18</sup> a federal court considered the status of national banks' CBCTs under North Dakota law, which restricts branching but permits state-chartered banks to establish remote facilities as non-branches and without regard to geographic restrictions on branching.<sup>19</sup> The court ruled that for purposes of the McFadden Act, North Dakota's EFT statute qualified as a state statute authorizing branching insofar as CBCTs are concerned, and that national banks, with the Comptroller of the Currency's approval, may operate CBCTs in North Dakota under the same laws and regulations applicable to state banks under the state EFT laws and regulations.<sup>20</sup> This decision is not controlling in other states, however, and a court considering a similar situation in another state could conclude that a national bank's CBCTs are subject to state statutory restrictions on branching, even though its state-chartered competitors' remote terminals are subject to separate and more liberal rules.

The McFadden Act was enacted in 1927, well before remote electronic terminals were even contemplated, and the court in *IBAA v. Smith* was faced with the difficult task of applying an outdated statute to the modern-day environment. It is, therefore, not surprising that the court's decision has resulted in a confusing and often illogical combination of federal and state laws. The task of updating existing laws to accommodate new technology belongs to Congress, not the courts.

Congress has yet to address even the most fundamental issues raised by EFT. National banks' CBCTs continue to be subject to the statutory restrictions established in 1927 to govern brick and mortar branches, while remote terminals deployed by federally-chartered thrift institutions and state-chartered depository institutions in the vast majority of states are governed by legislation or regulations which specifically recognize the differences between electronic ter-

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17. Letter from John C. Heimann, Comptroller of the Currency, to First Nat'l Bank & Trust Co. of Okmulgee, Okla. (Feb. 1978).

18. 451 F. Supp. 775 (D.N.D. 1978), *aff'd*, 593 F.2d 341 (8th Cir. 1979).

19. N.D. CENT. CODE §§ 6-03-02(8), -13, -14, -19.

20. 451 F. Supp. at 777.

minals and full-service branches. In 1977, the National Commission on Electronic Fund Transfers recommended specific legislative action to resolve the uncertainties and inconsistencies in this area,<sup>21</sup> but Congress has yet to act.

## 2. Federal Savings and Loan Associations

The scope of a federal savings and loan association's authority to offer terminal-based EFT services has also been the subject of recent controversy. As in the case of national banks' operation of CBCTs, the uncertainty has stemmed from the fact that federal law does not explicitly authorize remote terminal deployment by federal S&Ls, leaving regulators with the task of deciding whether, and to what extent, these depository institutions will be permitted to take advantage of modern technology to offer new services to consumers. The differences between the controversy raised by national banks' CBCTs and that raised by federal S&Ls' remote terminals highlight the fact that the new issues raised by EFT simply do not fit into the existing legal and regulatory mold.

Unlike the controversy which has surrounded national banks' CBCTs, the issues raised in connection with remote terminal deployment by federal S&Ls have not focused on the question of whether "remote service units" (RSUs) constitute branches, but on the question of whether the use of remote terminals by customers of federal S&Ls violates the federal statute prohibiting federal S&Ls from offering checking accounts.<sup>22</sup> Thus, in the case of *Independent Bankers Association of America v. Federal Home Loan Bank Board*,<sup>23</sup> the Court of Appeals for the District of Columbia invalidated Federal Home Loan Bank Board (FHLBB) regulations authorizing federal S&Ls to operate RSUs on the ground that such terminals permit the withdrawal of funds from an interest-bearing account "by a device functionally equivalent to a check."<sup>24</sup>

The court in *IBAA v. FHLBB* considered the FHLBB's RSU regulations, which authorize federal S&Ls to operate and establish electronic terminals under rules separate and distinct from those governing S&Ls' branches and satellite facilities.<sup>25</sup> Under the RSU

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21. See text accompanying notes 52-56 *infra*.

22. 12 U.S.C. § 1464(b)(1) (1976).

23. FED. BANKING L. REP. (CCH) ¶ 97,785, at 83,547 (D.C. Cir. 1979), *cert. denied*, — U.S. — (1979) [hereinafter sometimes cited as *IBAA v. FHLBB*].

24. *Id.* Though the court set January 1, 1980, as the effective date of its decision, federal legislation has been enacted postponing the effective date of the decision to March 31, 1980. Act of December 28, 1979, Pub. L. No. 96-161, §§ 101-03, 93 Stat. 1233 (1979) (to be codified in 12 U.S.C. §§ 371a, 1464(b)(1), 1752, 1828(g)(2)).

25. 12 C.F.R. §§ 545.4-2 (as amended in 44 Fed. Reg. 36,012 (1979)), 545.14 (1979).



regulations, a federal S&L may establish or use RSUs anywhere in the state of its home office or in the "primary service area, as determined by the Board, of any of its out-of-State branches,"<sup>26</sup> and to "participate in RSU operations with other financial institutions as the Board may approve."<sup>27</sup>

In the same decision, the court also declared illegal those federal regulations which authorize banks and federal credit unions to offer two other new consumer financial services: National Credit Union Administration ("NCUA") regulations authorizing federal credit unions to offer share drafts,<sup>28</sup> and Federal Reserve Board and Federal Deposit Insurance Corporation ("FDIC") regulations authorizing Federal Reserve member banks and FDIC-insured banks to offer automatic funds transfer services.<sup>29</sup> The court, however, did not discuss any of the specific financial services involved, nor analyze the explicit wording of any of the federal statutes involved. For example, the court did not explain why the withdrawal of funds by use of an RSU should be considered functionally equivalent to a withdrawal by check. Instead, the court simply stated that none of the services in question were explicitly authorized by statute, and that the methods of funds transfer permitted under the regulations "have outpaced the methods and technology authorized" by statute. The court refused to "rewrite the language of statutes which may be antiquated," and specifically called upon Congress to fulfill its responsibility to address squarely the new issues raised by recent technological advances.<sup>30</sup>

The court in *IBAA v. FHLBB* was faced with the difficult task of judging the legality of payment mechanisms in which financial institutions have made substantial investments and upon which consumers have rapidly grown to rely, but which are not specifically authorized by statute.<sup>31</sup> While arguments can be made that the court should have reached different conclusions, it cannot be denied

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26. *Id.* The Federal Home Loan Bank Board's general policy is to permit federal savings and loans to branch only within the state in which their home office is located. 12 C.F.R. 556.5(b) (1979). The FHLBB is currently reexamining that policy, however, to determine whether branches across state lines within the Washington, D.C. Standard Metropolitan Statistical Area (SMSA), and eventually in other SMSAs, should be permitted. 44 Fed. Reg. 36,057 (1979).

27. 12 C.F.R. § 545.4-2(b) (1979).

28. *Id.* § 701.34 (1978).

29. 12 C.F.R. §§ 217.5(c); 329.5(c)(2) (1979).

30. *Independent Bankers Ass'n of America v. Federal Home Loan Bank Bd.*, FED. BANKING L. REP. (CCH) ¶ 97,785, at 83,547, 83,548 (D.C. Cir. 1979), *cert. denied*, — U.S. — (1979).

31. *Id.*

that the court was justified in calling upon Congress to squarely address the issues raised by modern technology, rather than leaving it to federal regulations to update existing law in a piecemeal fashion.

Congress is currently considering legislation intended to reverse the court's decision in *IBAA v. FHLBB*.<sup>32</sup> Unfortunately, however, on the issue of the authority of federal S&Ls to deploy RSUs, the proposed legislation merely provides that the statutory provision at issue in the court's decision, *i.e.*, the statute prohibiting federal S&Ls from permitting the withdrawal of funds by check from an interest-bearing account,<sup>33</sup> does not prohibit the Federal Home Loan Bank Board from issuing regulations authorizing federal S&Ls to operate RSUs.<sup>34</sup> The proposed legislation fails to explicitly authorize federal S&Ls to deploy RSUs, and leaves the scope of federal S&Ls' authority to operate remote terminals to be determined by the Federal Home Loan Bank Board. Thus, the proposed legislation fails to address the inconsistencies between the rules governing the authority of S&Ls, national banks, and federal credit unions to establish and operate remote electronic terminals.

### 3. Federal Credit Unions

The National Credit Union Administration (NCUA) has interpreted the incidental powers clause of the Federal Credit Union Act<sup>35</sup> as authorizing federal credit unions to establish and operate remote electronic terminals.<sup>36</sup> The NCUA's EFT regulations are broad, and contain no restrictions on the types of services that may be offered through remote terminals, nor any geographic restrictions on terminal locations.

The NCUA's EFT regulations raise the same question as do the FLHBB's RSU regulations and as did the Comptroller of the Currency's CBCT ruling: to what extent may a federal regulator authorize depository institutions to offer new services which are not explicitly authorized by statute? In contrast to the interpretive rulings and regulations of the Comptroller of the Currency regarding the powers of national banks, which have on several occasions been successfully challenged,<sup>37</sup> until recently the NCUA's regulations

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32. H.R. 4986, 96th Cong., 1st Sess. (1979).

33. 12 U.S.C. § 1464(b)(1) (1976).

34. H.R. 4986, 96th Cong., 1st Sess. § 106(c) (1979).

35. 12 U.S.C. § 1757(15) (1976).

36. 12 C.F.R. § 721.3 (1979). *See also* National Credit Union Administration Instruction No. 4000.4 (Dec. 3, 1975).

37. *See, e.g.*, *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976); *Independent Bankers Ass'n of America v. Heimann*, — F. Supp. — (D.D.C. 1979); *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972); *Georgia Ass'n of In-*

have generated little controversy.

At the same time the Court of Appeals for the District of Columbia invalidated the FHLBB's RSU regulations, it also narrowly construed the scope of the NCUA's authority to interpret the incidental powers clause of the Federal Credit Union Act.<sup>38</sup> In its broad decision, the court held that the NCUA exceeded its authority in issuing regulations permitting federal credit unions to offer share drafts.<sup>39</sup> The court ruled that federal credit unions may not offer share draft services because share drafts "are the practical equivalent of checks," and the Federal Credit Union Act does not authorize, either expressly or by implication, checking powers for federal credit unions.<sup>40</sup>

Until Congress takes action to explicitly authorize transaction accounts or remote terminal deployment by federal credit unions, the legality of credit unions' operation of remote terminals could be in doubt. Though the court's decision is limited to share drafts and does not cover credit union EFT services, its broad and general conclusions could be interpreted to deny credit unions the authority to establish and operate remote terminals.

As already noted, the court in *IBAA v. FHLBB* invalidated the FHLBB's RSU regulations on the grounds that federal S&Ls' RSUs permit withdrawal of funds from an account "by a device functionally equivalent to a check."<sup>41</sup> If withdrawal of funds through credit unions' remote terminals were also found to constitute withdrawal by a device "equivalent to a check," then operation of remote terminals by credit unions would fall within the court's conclusion that federal credit unions lack statutory authority to offer checking services.<sup>42</sup> On the other hand, credit unions' remote terminals could be analyzed along the same reasoning used by the federal courts in considering national banks' CBCTs, and characterized in terms of a point of delivery for services, such as a branch,<sup>43</sup> rather than in terms of the definition of a "check."

It is unfortunate that the scope of authority of federally-chartered depository institutions to offer EFT services must be judged by circuitous reasoning under statutes enacted years ago to gov-

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dependent Ins. Agents, Inc. v. Saxon, 268 F. Supp. 236 (N.D. Ga. 1967), *aff'd*, 399 F.2d 1010 (5th Cir. 1968).

38. American Bankers Ass'n v. Connell, FED. BANKING L. REP. (CCH) ¶ 97,785, at 83,547 (D.C. Cir. 1979), *cert. denied*, \_\_ U.S. \_\_ (1979).

39. *Id.*

40. *Id.* & n.2.

41. Independent Bankers Ass'n of America v. Federal Home Loan Bank Bd., *id.*

42. *Id.*

43. See text accompanying notes 2-21 *supra*.

ern "checks" and "branches." The authority of federal regulators to interpret these statutes has been narrowly limited by judicial decision, and thus, the task of reviewing existing laws to accommodate EFT has passed to Congress.

## II. STATE-CHARTERED DEPOSITORY INSTITUTIONS

The authority of state-chartered depository institutions to operate and establish remote electronic terminals varies greatly from state-to-state. Unlike federal legislators, the legislators of most states have squarely addressed the new issues raised by EFT. Thirty-three states have enacted legislation and/or adopted regulations governing remote terminal deployment,<sup>44</sup> and proposals to authorize electronic terminal operation and use are being considered in additional states.<sup>45</sup>

In contrast to the body of laws and regulations governing feder-

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44. ALA. CODE §§ 5-1-37 to -39, and Ala. Banking Dep't Elec. Fund Transfer Regs.; ARK. STAT. ANN. § 67-367; COLO. REV. STAT. §§ 11-6.5-101 to -111, 11-48-101 to -107, and Colo. Div. of Banking Elec. Funds Act Regs.; CONN. GEN. STAT. §§ 36-193a to -193h; FLA. STAT. ANN. § 659.062 (West), and Fla. Dep't of Banking & Finance, Div. of Banking, Regs. ch. 3C-12; GA. CODE § 13-203.2, and Ga. Dep't of Banking & Finance Rules, Banks, ch. 80-1-1; HAW. REV. STAT. § 403.47.1 (wild card statute); IDAHO CODE §§ 26-305, -1856, -2150; ILL. S.B. 905 & 906, 81st Gen. Assembly (1979) (*amending* ILL. REV. STAT. ch. 16-½, par. 105, § 5; IOWA CODE ANN. §§ 524.1212, 527.1-.12 (West); KAN. STAT. §§ 9-111, 17-5565 to -5569; Ky. Dep't of Banking & Sec. Admin. Regs., 808 KAR 1:060; ME. REV. STAT. tit. 9-B, §§ 131, 331-34; MD. ANN. CODE art. 11, § 105 & art. 23 § 161VW; MASS. ANN. LAWS ch. 167 § 65 & ch. 93C §§ 1-7; 1978 Mich. Pub. Act Nos. 322 & 327; 1978 MINN. LAWS ch. 469, §§ 47.61-.74, and Minn. Dep't of Commerce, Banking Div., Rules Relating to Elec. Funds Transfer Terminals, 4 MCAR §§ 1.0226-.0231; MONT. REV. CODE ANN. §§ 5-1701 to -1721; NEB. REV. STAT. §§ 8-101, 8-157, 21-1773(13) and Dir. of Banking & Fin. Rules 43-47; N.H. REV. STAT. ANN. § 384-B:7 (wild card statute), and N.H. Bd. of Trust Co. Incorporation, Rules for Remote Service Units; N.J. STAT. ANN. §§ 17:9A-1, -19, -20, :12B-8, -24; N.M. STAT. ANN. §§ 48-25-1 to -18; N.Y. BANKING LAW §§ 105-2, 240-a, 396-a, and N.Y. State Banking Bd. Gen. Regs. ch. 1, § 73; N.C. GEN. STAT. §§ 53-62(d), 54.33.3(4), and N.C. Banking Comm'n Regs., Automation & Data Processing, 3C.1O51-.1502; N.D. CENT. CODE §§ 6-03-02, 6-09-34, and N.D. Dep't of Banking & Fin. Inst. Regs. for the Establishment of Customer Elec. Funds Transfer Centers; OKLA. STAT. ANN. tit. 6, §§ 102, 422 (West); OR. REV. STAT. §§ 714.200-.270, and Or. Commerce Dep't, Banking Div., Admin. Rules §§ 805-16-210, -220; R.I. GEN. LAWS §§ 19-29-1, -2; S.D. COMPILED LAWS ANN. §§ 51-20A, .6A; TENN. CODE ANN. § 45-401 (wild card statute); 1978 Tenn. Pub. Acts ch. 708; 1979 UTAH LAWS ch. 7 (*amending* UTAH CODE ANN. §§ 7-16-1 to -18); VA. CODE §§ 6.1-39.1, 39.2 & -195.35, and Va. State Corp. Comm'n, Elec. Funds Transfer Regs.; WASH. REV. CODE §§ 30.43.010-.050; WIS. STAT. §§ 186.113(15), 215.13, 221.04, and Wis. Regs. *Banking* § 14, *S&L* § 26, *CU* § 63.

45. For example, legislation has been passed in Texas proposing to amend the prohibition against branching contained in the state constitution, art. 16, § 16, in order to authorize banks to establish and operate unmanned remote electronic terminals. Tex. Sen. Jt. Res. No. 35 (May 1979). The proposed constitutional amendment will be submitted to voters in the November 1980 election.

ally-chartered depository institutions' terminals, under which each type of institution is subject to substantially inconsistent rules, the trend at the state level has been toward uniform authority for state-chartered banks and thrifts to establish and operate remote electronic terminals. Such uniform legislation is part of a broader trend currently underway at both the federal and state level—the movement toward increased homogeneity between banks and thrifts.<sup>46</sup>

The trend at the state level toward uniform authority for banks and thrifts to operate remote electronic terminals has been accompanied by a trend toward permitting terminal deployment under rules less restrictive than those governing branching. The vast majority of states with EFT legislation classify terminals as non-branches and authorize remote terminal deployment under rules substantially more liberal than those governing branches. Of the thirty-three states with EFT legislation and/or regulations, twenty-two either contain no geographic restrictions or explicitly authorize statewide deployment.<sup>47</sup>

Though most of the state EFT statutes permit statewide remote terminal deployment, few authorize operation of terminals across state lines. If a consumer can cash a check or make third party payments by check in any state without regard to where his account is held, it is unclear why he should not be able to accomplish the same transactions by electronic means. Legislation enabling consumers to use electronic terminals to the same extent as they use paper-based payment services was specifically recommended by the National Commission on Electronic Fund Transfers.<sup>48</sup>

### III. THE NEED FOR MORE UNIFORM AND LIBERAL RULES GOVERNING REMOTE TERMINAL DEPLOYMENT

One of the primary issues to be resolved in regulating EFT is the extent to which statutory restrictions should be placed on the offering of terminal-based EFT services away from the premises of a depository institution.<sup>49</sup> The National Commission on Electronic Fund Transfers, a body created by Congress to review the issues

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46. See text accompanying notes 72-73 *infra*.

47. Alabama, Colorado, Connecticut, Florida, Hawaii, Idaho, Kansas, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Washington and Wisconsin. See note 44 *supra*.

48. The Commission's recommendations in this area are discussed in detail in the text accompanying notes 52-56 *infra*.

49. See NATIONAL COMM'N ON ELECTRONIC FUND TRANSFERS, EFT IN THE UNITED STATES: POLICY RECOMMENDATIONS AND THE PUBLIC INTEREST 75 (1977) [hereinafter cited as FINAL REPORT].

raised by EFT and recommend specific legislative action,<sup>50</sup> conducted an in-depth study of the questions raised by remote terminal deployment. In making its recommendations, the Commission's primary goal was to enable financial institutions to better serve the needs of their customers, while avoiding "disruption or discontinuity in the orderly evolution of EFT or the paper-based payments system."<sup>51</sup>

The Commission's basic recommendation was that legislation be enacted giving federally-chartered depository institutions uniform authority to operate and establish remote electronic terminals, and that rules governing off-premises deployment of terminals be subject to separate and less restrictive rules than those governing traditional "brick and mortar" branches.<sup>52</sup> In making its recommendations, the Commission distinguished between the various functions performed through a terminal: deposit-taking, information services such as check guarantee and authorization, debits to an account (cash withdrawals and payments to third parties), and extensions of credit such as cash advances pursuant to a preauthorized line of credit and credit purchases.<sup>53</sup>

Balancing the need to serve consumers with the need to prevent undue injury to any group of financial institutions, the Commission concluded that geographic restrictions should be placed only on the deposit-taking function.<sup>54</sup> Significantly, the Commission recommended that no geographic restrictions be placed on the availability of the debit functions, *i.e.*, payments from a deposit account, and that merchants not be limited geographically in selecting the financial institution to receive credits to the merchant's account generated as a result of customer payments through an EFT terminal.<sup>55</sup> Specifically, the Commission's recommendations regarding geographic restrictions were as follows:

- federally and state-chartered institutions should be authorized to offer terminal-based services statewide,
- federally and state-chartered depository institutions should be authorized to offer the deposit-taking function through EFT terminals across state lines to serve "natural market areas," but only after the states involved have enacted reciprocal legislation, and

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50. 12 U.S.C. §§ 2401-03 (1976).

51. FINAL REPORT, *supra* note 49, at 78, 85.

52. *Id.* at 77-78.

53. *Id.* at 81-89.

54. *Id.* at 84-89.

55. *Id.* at 86-87.

- Congress should establish a date after which federally-chartered depository institutions would be authorized to cross contiguous state lines to offer EFT deposit services in "natural market areas," regardless of state law.<sup>56</sup>

Legislation was proposed during the Ninety-fifth Congress to implement the Commission's recommendations.<sup>57</sup> Though the proposed bill received strong support from federal regulators, including the Comptroller of the Currency, Federal Reserve Board, FDIC, Federal Home Loan Bank Board, National Credit Union Administration and the United States Department of Justice,<sup>58</sup> no legislation was enacted.

Legislation establishing uniform rules for federally-chartered depository institutions, as recommended by the Commission, would resolve the uncertainty and competitive imbalance created by existing law. Congress has already declared that competition among financial institutions on equal terms should be encouraged.<sup>59</sup> As recognized by the Commission, and often emphasized by the Department of Justice, competition between depository institutions results in innovation and improved services for the consumer.<sup>60</sup>

Geographic restrictions on remote terminal deployment will be the subject of substantial controversy when Congress considers legislation governing remote terminal deployment by federally-chartered financial institutions. The Commission's basic recommendation—that federally-chartered institutions be authorized to offer terminal-based services, other than deposit-taking, without geographic restriction—is a logical extension of existing rules governing the paper-based system. Thus, consumers should be able to accomplish by electronic means what they can already accomplish by the use of a check, *i.e.*, obtaining cash and making third party payments without regard to where their account is held.

Authority to cross contiguous state lines to offer all terminal-based services within natural market areas should also be given to federally-chartered financial institutions. Such authority would re-

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56. *Id.* at 85.

57. S. 2293, 95th Cong., 2d Sess. (1978).

58. *Hearings on S. 2293 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing & Urban Affairs*, 95th Cong. 2d Sess. 195-201, 421-30, 452-61, 478-87, 496-99, 505-08 (statements of the United States Dep't of Justice; Gov. Philip E. Coldwell, Bd. of Governors, Federal Reserve System; George E. LeMaistre, Chairman, Federal Deposit Ins. Corp.; John G. Heimann, Comptroller of the Currency; Lawrence Connell, Administrator of the National Credit Union Admin.; J. J. Finn, Secretary, Federal Home Loan Bank Bd.) [hereinafter cited as *Hearings*].

59. 12 U.S.C. § 2403(a) (1976). *See also* FINAL REPORT, *supra* note 49, at 78.

60. *See id.* at 78; *Hearings*, *supra* note 58, at 196-98.

move the inconvenience encountered by consumers who live, work and shop on a daily basis within a natural market area which crosses state lines. The consumer's desire and need for this convenience is demonstrated, for example, by the overwhelming support voiced in response to the Federal Home Loan Bank Board's recent proposal to authorize federal savings and loan associations to branch across state lines within the Washington, D.C. metropolitan area,<sup>61</sup> including support of the United States Office of Consumer Affairs.<sup>62</sup>

The primary goal of legislation in the EFT area should be to ensure that consumers are able to take advantage of the potential convenience and increased efficiency made possible by modern technology. *Any* restrictions on remote terminal deployment necessarily limit full achievement of this goal. Therefore, in the absence of an overriding need for geographic restrictions on terminal deployment, such restrictions should not be imposed by law. Where restrictions are found to be necessary, they should be drafted to leave financial institutions with as much freedom and flexibility as possible.

Statutory restrictions on branching, as well as those on types of services which may be offered by different types of financial institutions, are designed primarily to protect institutions from failure by insulating them from competition.<sup>63</sup> As noted by the United States Supreme Court, antibranching laws are a classic example of market division which would constitute a *per se* violation of the antitrust laws if accomplished by private agreement.<sup>64</sup>

The patently anticompetitive policies underlying the antibranching laws should not be further extended to remote electronic terminals. Remote terminals, used by an institution's existing customer base to accomplish routine transactions, serve an entirely different purpose than do full-service branches. Experience has demonstrated that the smaller financial institution does not need the type of "protection" in the area of remote terminal deployment that it currently has in the area of full-service branches. An FDIC study found that of all banks operating cash dispensers, forty-five percent had assets under \$50 million; and banks with assets less than \$50 million increased their number of ATMs at a more rapid rate than

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61. 44 Fed. Reg. 36,057 (1979). See note 26 *supra*. The Bank Board received 2,317 letters from individual consumers and 5,713 postcards in favor of its proposal. *Id.*

62. Statement of the United States Office of Consumer Affairs In the Matter of Contemplated Rule Making on Limited Area-wide Branching in Interstate Metropolitan Areas, Federal Home Loan Bank Bd. Docket No. 79-142 (May 4, 1979).

63. See *United States v. Citizens and S. Nat'l Bank*, 422 U.S. 86, 118-19 n.30 (1975).

64. *Id.* at 118.



larger banks.<sup>65</sup> Another FDIC study found that improvements in market share of smaller banks with cash dispensers or POS terminals were relatively greater than those of larger banks.<sup>66</sup> The National Commission on Electronic Fund Transfers investigated the impact of EFT on competition for funds, and "found no evidence to suggest that EFT has caused significant competitive impact as measured by changes in market share of deposits among depository institutions."<sup>67</sup> It concluded that the size of a depository institution does not necessarily carry with it significant advantages in the competition for EFT deposit-based services.<sup>68</sup>

#### IV. CONCLUSION

At both the federal and state levels, there is a movement toward increased awareness of the needs and desires of today's consumer. The emphasis is gradually turning away from insulating the smaller, special-purpose institution from competition, and toward responding to the consumer's demand that he be given the benefit of innovations and efficiencies which result from competition between institutions to serve his needs. Increased consumer demands are illustrated, for example, by the support recently voiced by consumer groups in favor of liberalization of the Regulation Q restrictions on the payment of interest on different types of accounts,<sup>69</sup> and in favor of repealing the long-standing prohibition against the payment of interest on demand deposit accounts.<sup>70</sup>

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65. D. Bell, *Contrasts Among Banks with Retail Electronic Banking Machines and All Insured Banks* (FDIC Exec. Summary No. 77-3, 1977).

66. G. Gilbert & D. Walker, *The Influence of Electronic Funds Transfer Systems on Changes in Bank Market Shares* (FDIC Working Paper No. 77-2, 1977).

67. FINAL REPORT, *supra* note 49, at 109, 113.

68. *Id.* at 113.

69. 12 C.F.R., Part 217 (1979). Congress first gave federal regulators the authority to impose restrictions on payment of interest on different types of accounts as a temporary measure in 1966. Act of Sept. 21, 1966, Pub. L. No. 89-597, § 7, 80 Stat. 823 (1966). This "temporary authority" has been extended continuously since that time, and will expire on December 15, 1980, unless Congress extends it again. See Pub. L. 95-630, § 1601, 92 Stat. 3641, 3713 (1978). Consumers have been urging liberalization of the Regulation Q restrictions so that "small savers" can earn higher rates of interest. See, e.g., Hutnyan, *Thrift Leaders Tell Congress It is to Blame for the Plight of Small Saver*, Am. Banker, Mar. 22, 1979, at 1, col. 3.

70. In all but eight states, depository institutions are prohibited from permitting account holders to make third-party payments by transferable instruments drawn on interest bearing accounts. 12 U.S.C. § 1832 (1976), as amended by Pub. L. No. 95-630, § 1301, 92 Stat. 3641 (1978), and Pub. L. No. 96-161, § 106, 93 Stat. 1233 (1979). Consumers have voiced strong support in favor of repealing this prohibition. See, e.g., *Administration Supports NOW Accounts Nationwide*, WASH. FIN. REPS., June 18, 1979, at A-27.

Legislators are recognizing that the traditional restrictions on market area and product offerings by different types of financial institutions are not well suited to today's environment. Thus, Congress has directed federal regulators to reassess the applicability of the McFadden Act to today's banking industry,<sup>71</sup> and more liberal rules governing geographic restrictions on banking are likely to be the long-term result. In recent years, Congress has expanded the lending and investment powers of thrift institutions,<sup>72</sup> and federal legislation authorizing all federally-chartered depository institutions to offer interest-bearing transaction accounts can also be expected in the near future, resulting in further homogeneity between banks and thrifts.

The trend toward relaxation of the traditional restrictions governing the financial services industry will continue, and as part of that trend, legislation can be expected along the lines recommended by National Commission on Electronic Fund Transfers, enabling federally-chartered depository institutions to establish and operate remote electronic terminals under uniform rules less restrictive than those governing branching. There is no reason to delay enactment of such legislation. Congress has already recognized that EFT has the potential to provide substantial benefits to consumers,<sup>73</sup> and it is time for Congress to resolve the uncertainties and inconsistencies created by existing law so that consumers will be able to take advantage of these benefits.

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71. International Banking Act of 1978, Pub. L. No. 95-369, § 14, 92 Stat. 607 (1978).

72. See, e.g., Pub. L. No. 95-22 §§ 302, 303, 91 Stat. 49 (1977); Pub. L. No. 95-630, § 1701, 72 Stat. 3641 (1978).

73. 15 U.S.C. §§ 1693(a) *et seq.* (1978). This legislation establishes consumer rights and liabilities in EFT transactions. *Id.* §§ 1693-93r.

