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ELECTRONIC FUNDS TRANSFER: THE ROLE OF THE FEDERAL GOVERNMENT

Roland E. Brandel and Zane O. Gresham***

The financial industry in the United States is on the brink of a great revolution, a revolution resulting from fundamental changes in both the types of financial services available and the delivery mechanisms for those services. One stimulus is technological—the increasing application of electronic technology to the accomplishment of financial transactions. Generically this application of electronic technology is referred to as “electronic funds transfer” (EFT). The second force stimulating this revolution is legal—the changes being wrought in the nature and scope of activities in which financial institutions are permitted to engage. Distinctions among the various types of financial institutions are becoming blurred by statutory and regulatory modification of the powers of those institutions. Moreover, some nonfinancial institutions now provide many services which traditionally had been available only through financial institutions.

These interacting forces have created a dynamic situation in which the rights and responsibilities of users and providers of financial services are in flux. Serious value judgments must be made with respect to what services shall be offered, by what institutions, and through what means. This article addresses the possible role of the federal government in making and influencing those value choices. In addition, this article examines the impact that certain alternative courses of governmental action may have on the development of electronically aided financial services.

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I. OVERVIEW

Because domestic financial institutions comprise the quintessential federally regulated industry, the actions of Congress and the federal regulatory agencies will have a tremendous impact on disparate aspects of electronic funds transfer services. Governmental action will largely determine which institutions may enter the EFT field, the range of EFT activities that a particular institution may conduct, the organizational structure through which EFT services may be supplied to commercial users and consumers, the rights and obligations of commercial institutions engaging in EFT, and the rights of consumers with respect to EFT transactions.

There are three principal forms of federal action which will directly influence the development of EFT services. The first may be found in statutes enacted by Congress. These statutes define generally the powers of federally chartered financial institutions, establish the national policy with respect to competition in the private sector, define to a limited extent certain rights of consumers with respect to financial transactions and privacy of information, and regulate the use of telecommunications.

Subsidiary to these statutes is a second relevant form of governmental control: regulations promulgated by the various administrative agencies to which Congress has entrusted the articulation and enforcement of national policy which is broadly stated in the statutes. The regulations most crucial to EFT have been, and most likely will continue to be, promulgated by those agencies principally responsible for regulating the activities of financial institutions chartered or insured by the federal government. Through these regulations the agencies can define with greater specificity the powers of particular types of financial institutions, the manner in which those powers may be exercised, and the rules with respect to the manner in which financial institutions may deal with their customers. In addition, because EFT services will involve a major use of interstate telecommunications facilities, the Federal Communications Commission may assume a significant role in determining the course of EFT development.¹

A final form of federal activity which will have serious implications for EFT activities is the ownership and operation of EFT facilities by instrumen-

1. See, e.g., Lee, *Dialing for Dollars: Communications Regulation and Electronic Funds Transfer Systems*, 35 MD. L. REV. 57 (1975). Mr. Lee is a Commissioner of the Federal Communications Commission (FCC) and serves as its representative to the National Commission on Electronic Funds Transfers. The FCC's involvement in regulating EFT activities is only beginning and the issues that undoubtedly must be resolved in determining the proper role of the FCC in that regard are still to be settled.

talities of the federal government. Both historical precedents and recent developments indicate that there is a likelihood that federal agencies will attempt to extend their present roles as owners and operators of financial service facilities into the area of electronic funds transfers. If this entrepreneurial activity becomes at all extensive, it could provide the most significant governmental influence on EFT development.

Government action will exert a major influence on the type and rate of innovation in financial services that institutions may offer through the use of electronic technology. That influence springs not only from the pervasive authority which the federal government possesses over regulated financial institutions, but also from the characteristics of technological innovation. Four particular characteristics of technological innovation deserve special scrutiny in connection with a consideration of the federal role in EFT: (1) Innovation implicitly requires a break from traditional ways. Statutes and regulations must be flexible enough to permit deviations from the types of financial services presently offered and from the manner or mechanisms by which such services are performed; (2) risk-taking, and some failures, are inherent in the process of innovation. Some EFT efforts must be expected to fail, and such failures must be regarded as unavoidable concomitants to the developmental process; (3) only rarely does a sweeping and fundamental change in any industry occur in a quantum leap. A variety of efforts must be undertaken by more or less independent actors. The more successful of these should be emulated or expanded in order for there to be pervasive, rational change throughout an industry; (4) if innovation is to come from the private sector, there must be incentives to take the necessary risks involved in any attempt to develop a different service or operating system. Private enterprise must be assured that it will not be displaced by governmentally owned services or unduly hindered by stringent regulations, or it will not invest in the novel services and delivery mechanisms which electronic technology permits.

The foregoing indicates the manner in which the federal government could act to influence EFT development and the characteristics of innovation that must be considered in determining the manner in which the federal government should act. The remainder of this article examines in more detail the potential role of the federal government and the impact which its possible actions may have upon the development of innovative financial services.

II. THE POWER OF FINANCIAL INSTITUTIONS TO ENGAGE IN EFT ACTIVITIES

Federal law defines the powers of financial institutions organized under

the laws of the United States.² Federal law also regulates certain activities by state-chartered institutions that are insured by federal agencies,³ or are members of the Federal Reserve system⁴ or the Federal Home Loan Bank system.⁵ This authority enables Congress and the relevant federal agencies to control both the entry of financial institutions into electronic funds transfer activities and the range of such activities which may be conducted by the various types of institutions.

The introduction of EFT has accentuated the functional distinctions regarding the differences in ability to provide particular financial services that exist among the various types of financial institutions. While there appears to be no per se statutory restriction on the use by any financial institution of EFT technology, the lack of authority to offer one or more consumer financial services, or to establish new locations at which such services may be offered, could adversely affect the nature of a financial institution's participation in EFT activities or could preclude such activities altogether. Certain powers, such as third-party payment powers, consumer credit authority, savings deposit authority, and authority to establish additional locations at which financial services can be supplied may, therefore, be essential to retaining a competitive posture in an EFT environment.

Because the powers of financial institutions were defined for the most part before the potential for EFT was perceived, it is often difficult to determine what the precise bounds of such powers should be as they relate to electronic funds transfer. Through the regulatory authority conferred on them, government administrative agencies that regulate the various financial institutions have attempted to clarify, and in some situations have expanded, the permissible activities of the financial institutions subject to their respective jurisdictions. By permitting such institutions to perform functions equivalent to those previously reserved to commercial banks, the agencies have eliminated some of the traditional differences between institutions such as commercial banks, savings and loan associations and credit unions. This regulatory and legislative erosion of the distinctions among the various types of financial institutions has affected the EFT activities which such institutions may undertake. For example, some federal savings and loan associations and credit unions have acquired third-party payment powers in the form of negotiable order of withdrawal (NOW) accounts⁶ and share draft accounts.⁷

2. *E.g.*, 12 U.S.C. §§ 21-215 (1970) (National Banks); *id.* §§ 1464-68 (Federal Savings and Loan Associations); *id.* §§ 1751-90 (Federal Credit Unions).

3. *E.g.*, *id.* §§ 1811-31 (Federal Deposit Insurance Corporation); *id.* §§ 1724-30 (Federal Savings Insurance Corporation).

4. *Id.* §§ 221-522 define the scope of the Federal Reserve System.

5. *Id.* §§ 1421-49 define the scope of the Federal Home Loan Bank System.

6. 12 C.F.R. § 329.5(c)(4) (1976).

7. Pursuant to 12 C.F.R. § 721.3 (1976), the Administrator of the National Credit

These new powers create the possibility of related electronic payments services being offered by such institutions. Moreover, the expansion of consumer lending power for federal savings and loan associations⁸ and federal credit unions⁹ may presage grants of authority for such institutions to engage in credit card activities. Such a development would be significant because magnetically-encoded credit cards and on-line credit card authorization systems may provide a transitional vehicle for entry into EFT. Finally, with respect to limits on branching by financial institutions, the direct authorization by the Federal Home Loan Bank Board (FHLBB) of the establishment of "remote service units,"¹⁰ in truth remote retail banking facilities, and the experimental EFT programs permitted by the National Credit Union Administration¹¹ evidence the impact of federal regulation upon the power of various types of financial institutions to provide EFT services.

In an apparent attempt to counterbalance the expanded powers of federal savings and loan associations and credit unions, the Board of Governors of the Federal Reserve System has modified the restrictions imposed on commercial banks respecting the transfer of funds between demand and interest-bearing accounts.¹² A customer now may authorize his bank by telephone to transfer funds from his savings to his checking account. A further regulation promulgated by the Board of Governors permits preauthorized transfers of funds from savings to checking accounts, if not done to cover overdraft checks.¹³ The Board of Governors has issued for comment a proposed regulation that would allow a customer to authorize his bank to transfer funds automatically from his savings to his checking account in the event of an overdraft.¹⁴ This proposed regulation would permit commercial banks to provide a service similar to the NOW account. The preauthorized automatic transfer would result in payment of interest on funds which may be withdrawn on demand. The proposed regulation does keep commercial banks

Union Administration may approve pilot programs for federal credit unions. Under this provision, the South Providence Neighborhood Federal Credit Union, on February 14, 1975, requested approval of its "share draft" program. The proposed time period for the program was to be from April 1, 1975 to December 31, 1975. At the end of the evaluation period, the Administrator decided to authorize, on a case-by-case basis, other qualified credit unions to adopt the same or similar programs.

8. 12 C.F.R. §§ 545.9-1, 584.2-1(b)(1)(4), 584.2-1(b)(1)(5) (1976).

9. *Id.* § 700.1(j)(13) (1976).

10. *Id.* § 545.4-2 (1976).

11. *Id.* § 721.3 (1976).

12. *Id.* § 217.152 (1976).

13. *Id.* § 217.5 (1976).

14. 41 Fed. Reg. 12039 (1976).

at a disadvantage, however, as there is a forfeiture of interest when funds are transferred to cover an overdraft, although no such penalty is imposed upon a withdrawal from a NOW account.

In contrast to the free-ranging regulatory authority of the Federal Home Loan Bank Board, the Comptroller of the Currency is seriously restrained by the McFadden Act¹⁵ in attempting to authorize national banks to establish off-premises automated banking facilities similar to those established by federally regulated savings and loan associations and, to a more limited extent, by federal credit unions.¹⁶ The Comptroller's interpretive ruling of December 1974, that such off-premises facilities do not constitute "branches," and are, therefore, not subject to the strictures of the McFadden Act.¹⁷ The results of all but one of numerous law suits that have challenged the interpretive ruling have been adverse to the Comptroller's view, due to the courts' reading of the precedents under the McFadden Act.¹⁸ Since the Supreme Court has refused to review the lower court decisions regarding this interpretive ruling, national banks are confined by restrictive state law treatment of off-premises automated banking facilities while federal savings and loan associations have been permitted to establish "remote service units" free from such restrictions.

This anomaly was probably never contemplated, much less intended, by Congress in adopting the statutes governing these federally chartered financial institutions. The technology that makes EFT possible did not exist when those statutes were drafted and the expansion of the powers of savings and loan institutions to encompass many traditional commercial bank functions was no doubt beyond the ken of the Congress at that time.

A common feature of all the foregoing changes in powers through federal regulation is that they have been accomplished on a piecemeal basis. This step-by-step reduction in the distinctions among types of financial institutions

15. 12 U.S.C. § 36 (1970).

16. See notes 10 & 11 *supra*.

17. 12 C.F.R. § 7.7491 (1975). The interpretive ruling was suspended on October 21, 1975, in response to these numerous lawsuits challenging the Comptroller's interpretation. 40 Fed. Reg. 49077 (1975). For a discussion of the issues posed by the confrontation between the McFadden Act and EFT, see Comment, *Customer-Bank Communication Terminals and the McFadden Act Definition of a "Branch Bank"*, 42 U. CHI. L. REV. 362 (1975). See also Kirby, *Name's the Thing: Financial Communication Device, Not Automated Teller Machine*, 91 BANKING L.J. 135 (1974); Macartney, *Customer-Bank Communications Terminals and Branch Banking*, 7 ST. MARY'S L.J. 389 (1975).

18. See, e.g., *State of Illinois ex rel. Lignoul v. Continental Illinois Nat'l Bank & Trust Co.*, 409 F. Supp. 1167 (N.D. Ill. 1975), *aff'd*, 536 F.2d 176 (7th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3254 (U.S. Oct. 5, 1976); *Independent Bankers Ass'n of America v. Smith*, 402 F. Supp. 207 (D.D.C. 1975), *aff'd*, 534 F.2d 921 (D.C. Cir. 1976).

is inconsistent with the policy underlying the creation of the different institutions. Each type of institution was established to perform specific functions. The original role intended for each of them was delineated in the statutes under which each was organized and in the legislative history of those statutes. Savings and loan associations, for example, were created for the express purpose of serving as the primary lenders for residential construction and home buying.¹⁹ Credit unions were created to meet the credit needs of certain identifiable groups such as employees of a particular company or members of a particular profession or trade in a specific area.²⁰ It was because these institutions were intended to fulfill narrowly defined functions that they were given certain specific benefits, such as a differential in the interest rate they are permitted to pay on savings accounts.²¹ If the fundamental distinctions among types of financial institutions are to be eliminated, then it seems appropriate to reevaluate whether the different treatment of these institutions under various statutes ought to be continued.

Since the statutes defining the powers of financial institutions were enacted, not only have the powers of financial institutions changed dramatically, so also has the environment in which financial institutions operate. Such changes are apparent in the increasing economic interdependence of various regions of the nation, in the burgeoning of large multistate and nationwide commercial and industrial enterprises, in the concentration of productive capacity in such enterprises, in the heightened geographic mobility of individuals, and in the advent of electronic technology. These develop-

19. See, e.g., 12 U.S.C. § 1464(a) (1970). H.R. REP. NO. 55, 73d Cong., 1st Sess. 2 (1933), states:

The bill also provides for the Board to charter Federal savings and loan associations in communities now insufficiently served by any institution or other lender on homes, so that provision may be made for the financing of homes in more than 1,500 counties in the United States now having no such facilities. These associations are intended as permanent associations to promote thrift of the people locally to finance their own homes and the homes of their neighbors.

20. See, e.g., 12 U.S.C. § 1759 (Supp. V, 1975). In a report to accompany S. 1639, the House Committee on Banking and Currency stated:

The bill is designed to provide for the Federal incorporation and supervision of a credit union system which will make credit for provident and productive purposes more available to people of small means At a time when industrial recovery depends upon the buying power of the masses of the people, usurious money lending in total amounts which are now figured in billions of dollars annually, obviously destroys vast totals of buying power represented by the difference between what the average worker should pay for credit and what he does pay for credit.

Credit unions are socially desirable means of self-help among wage workers or farmers having a community of interest. . . .

H.R. REP. NO. 2021, 73d Cong., 2d Sess. 1-2 (1934).

21. Regulation Q, 12 C.F.R. §§ 217.1-6 (1976).

ments have altered the needs of individuals and industry alike for financial services and, accordingly, also call for a re-examination of the powers of the various types of financial institutions to provide the services that are needed today.

The recent history of efforts by federal regulators to interpret present law in light of EFT developments emphasizes the need for a major revision of the governing statutes. Federal regulators are struggling to determine the propriety of EFT activities of institutions under legislation that was developed in an era when the possibility of electronic funds transfers could not have been contemplated by Congress. The courts, in passing on these issues, have recognized that they are powerless to change the statutes even if they no longer reflect the economic and technological realities of the financial industry.²²

If there is to be, as it seems there must, significant revamping of the statutes governing the powers of financial institutions, such revisions should be based on a clear conception of the functions various types of institutions are to perform. Furthermore, the changes ought to come through comprehensive and balanced legislation rather than a series of disjointed enactments. These conclusions are reinforced by the findings of the Hunt Commission and recent hearings by the House of Representatives.²³ It is clear that such an approach is to be preferred to the ad hoc, independent initiative of federal regulators. It has been suggested, with some merit, that these regulators may be influenced more by the perceived needs and desires of the institutions they regulate than by consideration of the proper structure of the financial industry or the broad requirements of the public. Hence, a major task for regulators is to clarify, by unbiased and reasonable interpretations of existing statutes, what powers particular types of institutions possess to provide financial services. For Congress, on the other hand, the basic issue would seem to be whether or not existing statutes defining the powers of such institutions ought to be modified in light of the changes in the character of such institutions

22. See, e.g., *State of Illinois ex rel. Lignoul v. Continental Illinois Nat'l Bank and Trust Co.*, 409 F. Supp. 1167 (N.D. Ill. 1975).

23. The Commission on Financial Structure and Regulation (Hunt Commission) focused on problems relating to commercial banks, savings and loan associations, mutual savings banks, credit unions, life insurance companies and pension funds. A report released by the Commission warned against piecemeal legislative action. The report observed that in order to maintain competition on equal terms it will be necessary to adopt recommendations as a "package." This viewpoint was approved by a House Banking and Currency Subcommittee which held hearings on financial institutions and the nation's economy. See *Hearings on Financial Institutions and the Nation's Economy Before the Subcomm. on Financial Institution Supervision, Regulation & Ins. of the House Comm. on Banking, Currency & Housing*, 94th Cong., 1st & 2d Sess. (1976).

and the evolution of EFT. Congress has begun this task by establishing the National Commission on Electronic Funds Transfers.²⁴

The legal issues raised by the ongoing revolution in financial services are not limited to the laws defining the powers of financial institutions. Realigning the powers of financial institutions will control only a portion of the competitive environment with respect to EFT services. It may be that nonfinancial institutions will in fact pose a greater competitive threat to commercial banks than will other financial institutions. To the extent that financial services will be electronically based, the revenue derived by any institution from the provision of EFT services is apt to depend, at least in part, on the portion of the total technology and equipment that is controlled by that institution. For example, assume that a point-of-sale system requires as component parts point-of-sale terminals, communications facilities, a switch and a computer-based data facility for the maintenance of the customer account. Financial institutions alone may now perform the depository function; with EFT in existence they must struggle for a market share of the remaining point-of-sale components with a variety of other competitors. Every component of a point-of-sale system, including the data base that records the deposit account, is fair game for the competitive efforts of equipment and services companies, and the retailers in whose stores the terminals will be located. Such competitors have been active indeed in taking steps to gain a significant share of this market.

The entry of nonfinancial institutions, which are not subject to the same pervasive and detailed regulations imposed upon financial institutions, into the competitive arena requires a reconsideration of the regulatory scheme now applicable to financial services generally. The policy considerations that have been cited to support regulation of financial institutions may require that

24. 12 U.S.C. §§ 2401-08 (Supp. V, 1975). Section 2403 states that the function of the Commission shall be to

conduct a thorough study and investigation and recommend appropriate administrative action and legislation necessary in connection with the possible development of public or private electronic funds transfer systems, taking into account, among other things—(1) the need to preserve competition among the financial institutions and other business enterprises using such a system; (2) the need to promote competition among financial institutions and to assure Government regulation and involvement or participation in a system competitive with the private sector be kept to a minimum; (3) the need to prevent unfair or discriminatory practices by any financial institution or business enterprise using or desiring to use such a system; (4) the need to afford maximum user and consumer convenience; (5) the need to afford maximum user and consumer rights to privacy and confidentiality; (6) the impact of such a system on economic and monetary policy; (7) the implications of such a system on the availability of credit; (8) the implications of such a system ex-

nonfinancial institutions, to the extent that they become involved in providing such services, be similarly regulated. Alternatively, it may be determined that those historical policy considerations simply do not apply to EFT. In that event, financial institutions should be freed from the current restrictive regulation of their EFT activities. Which alternative ought to be followed is not clear. It is essential, however, that Congress decide whether such regulation ought to be extended to nonfinancial institutions or eliminated in part as to financial institutions.

III. COMPETITION IN EFT: THE ANTITRUST LAWS

Competition has been accorded a high value in the American legal system. It is a value that has been promoted primarily through passage of the federal antitrust statutes and their enforcement by federal agencies. This high value is based on the belief that free competition provides the best allocation and the most efficient long term use of resources as well as the widest range of services and products responsive to the needs and desires of individuals and commercial enterprises. Because of this strong policy, the antitrust laws have not been relaxed even when applied to those industries which are subject to pervasive governmental regulation. Indeed, the Supreme Court noted in *United States v. Philadelphia National Bank*²⁵ that because banking is a highly regulated industry, it is all the more critical to scrutinize the competitive implications of bank actions. The emergent state of development of EFT services, occurring in large part through the highly regulated financial industry, makes it especially important that competition be fostered to ensure that innovation is not hampered.

Applied to EFT, the antitrust laws will affect the manner in which institutions may provide services and the ownership and operation of facilities through which such services will be provided. Of the many EFT activities of financial institutions on which the antitrust laws may impact, three are of principal concern: the formation of cooperative or joint ventures for the provision of EFT services, the scope of activities of such a cooperative EFT enterprise, and the access by competitors to EFT services provided by such an enterprise.

The antitrust principles relevant to the organization of a cooperative EFT entity derive from section 1 of the Sherman Act:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal²⁶

panding internationally and into other forms of electronic communications; and (9) the need to protect the legal rights of users and consumers.

25. 374 U.S. 321 (1963).

26. 15 U.S.C. § 1 (1970).

The Sherman Act's retrospective, behavioral test has been applied in factual circumstances analogous to joint ventures among competitors, that is, mergers of competing corporations.²⁷ In such merger cases, the test of legality is whether the merger actually has restrained competition significantly. Any combination among competitors, such as a joint venture, will run afoul of section 1 of the Sherman Act if it impairs competition in a particular service which constitutes a separate "product line" and such impairment occurs in a distinct geographical market.

In addition to regulation by section 1 of the Sherman Act, the formation of a joint venture among competitors is subject to section 7 of the Clayton Act.²⁸ The Clayton Act prescribes a prospective, structural standard against which the propriety of cooperative action by competitors is tested. That part of section 7 to which banks are subject²⁹ provides:

No corporation engaged in commerce shall acquire, directly or indirectly, . . . any part of the stock or other share capital . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.³⁰

Unlike the Sherman Act, the Clayton Act does not require a showing of an actual, existing restraint of trade to establish a violation. The Clayton Act requires only a demonstration of a reasonable likelihood that a joint venture would significantly lessen competition or produce a tendency toward monopoly. As the Court has pointed out, section 7 was intended "to arrest incipient threats to competition" which the Sherman Act does not ordinarily reach.³¹

Vigorous competition in EFT is important to the development of efficient services in response to the requirements of the users of such services. Since any joint venture among competitors poses a risk of restraint of competition among the participants, it might be urged that no cooperative ventures ought to be allowed in EFT. That position is unreasonable as a policy matter and inconsistent with settled antitrust law. The Supreme Court has recognized that some joint ventures among competing firms may not reduce actual competition at all. Collective action is justified if individual entry into the mar-

27. See, e.g., *United States v. First Nat'l Bank and Trust Co.*, 376 U.S. 665 (1964).

28. 15 U.S.C. § 18 (1970).

29. Acquisitions of assets of another business by a corporation "subject to the jurisdiction of the Federal Trade Commission" are also subject to section 7 of the Clayton Act. However, the Supreme Court, in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), held that national banks are not subject to the jurisdiction of the Federal Trade Commission and, thus, that the asset acquisition provisions of section 7 do not apply to them. *Id.* at 335-49.

30. 15 U.S.C. § 18 (1970).

31. *United States v. Penn-Olin Chem. Corp.*, 378 U.S. 158, 170-71 (1964).

ket is foreclosed by prohibitive costs or risks, or economies of scale. In such circumstances, there is no existing or potential competition restrained by the joint activity. This rationale underlies the existence of bankcard joint ventures. The member banks individually could not have launched a state-wide bankcard program, much less a national program, because of the insuperable financial burden, risks of loss and need for standardized operating procedures and large-scale participation to make the program viable. A similar analysis would be applicable to other cooperative enterprises designed to provide viable EFT services if a certain scale of operation or geographical coverage is necessary, but is beyond the capability of a single institution.

Assuming a particular joint venture among competitors is justified under the antitrust laws, the scope of activities permissible for that enterprise remains a major issue. One antitrust commentator, in discussing one form of cooperative action by competitors, has observed:

From an antitrust standpoint, the principal distinction between a trade association and the individual business enterprise is that *the former is by its very nature a combination of competitors. An association is thus halfway toward a Section 1 violation of the Sherman Act, before it even acts.* What in many Sherman Act cases is a difficult question of proof for the plaintiff, establishing the existence of a contract, combination or conspiracy, is no problem whatever when a trade association is the defendant.³²

Except for activities that constitute per se violations of the antitrust laws, each activity undertaken by a joint venture that might restrict competition is subject to scrutiny to determine whether it is reasonable under the antitrust laws. One aspect of that inquiry will be a determination as to whether an individual competitor or smaller groups would undertake such activity. Any activity with an apparent anticompetitive effect that is not reasonable, in view of all the attendant circumstances, will constitute a violation of section 1 of the Sherman Act.

For a cooperative EFT enterprise to succeed, there must be considerable joint action among the participants. Such action must be carefully limited, however, to avoid violation of the Sherman Act. When concerted activities by competitors, such as statistical reporting, product standardization and certification, and industry research are measured against section 1, the crucial legal question is whether the activity actually produces an unreasonable restraint of trade. This analysis looks to the actual or, in some cases, the conclusively presumed effects of the joint venture's activities in the marketplace.

32. Dunkelberger, *The Lawyer's Role in Advising the Trade Association*, 10 ANTI-TRUST BULL. 583, 584 (1965) (emphasis added).

If the conduct at issue is not conclusively presumed to be anticompetitive and the joint venture's activities do not in fact produce unreasonable anticompetitive results, then there is no violation of the Sherman Act.

Using such an analysis, certain kinds of collective action by competitors have been approved by the courts in the face of challenges that they hampered competition in violation of the Sherman Act. For example, certification programs have been approved if the program was a reasonable effort to provide consumers with reliable information concerning the qualities of various products and there existed no malicious purpose to restrict competition in the establishment of standards.³³ Analogously, courts have upheld private standardization of product design as promoting interchangeability of parts, thus facilitating price comparison shopping and switching to different suppliers.³⁴

The operative principles in these cases appear to be that the challenged activity must benefit competition by facilitating price comparisons, making shifts from one supplier to another more feasible, promoting inter-connectibility, and not unduly impairing product innovation, market entry or production. Hence, EFT standards could be adopted if they would enhance competitive potential in EFT. This could be the case if such standards are necessary to permit EFT operations. In any event, standards would have to be designed to minimize limitations on product innovation and entry into the EFT market.

A cooperative EFT enterprise could undertake joint activities only if such activities do not impose an unreasonable restraint on competition. For example, even if commonly owned terminals would impair competition, such common ownership may be justified by sound practical or policy reasons, such as being essential to the establishment of a viable EFT enterprise. If such a justification were shown, a court might well conclude that such terminals may be owned in common.

Of course, the antitrust principles that apply to business generally, as well as those specifically applicable to joint ventures, will restrict the activities of a joint venture among competitors. So, for example, a joint venture is forbidden if there is an agreement with other businesses to fix prices,³⁵ allocate

33. *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 399 F.2d 155 (9th Cir. 1968).

34. See *Turner, Antitrust Aspects of Industry Cooperation and Product Standardization*, 1967 TRADE REG. REP. ¶ 50,171.

35. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Price fixing constitutes a per se violation of the Sherman Act. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

markets,³⁶ or restrict production.³⁷ Certain other limitations also will apply to its internal operations. It may not use its dominant market power with respect to one product or service to force a customer to accept or to purchase an unrelated good or service.³⁸ Such an abuse of market power is condemned as an anticompetitive "tying arrangement."³⁹

The third major area of concern is whether institutions that compete with the owners of a cooperative EFT venture have a right of access to the service provided by the venture. Under certain circumstances, it appears that they may. In *Associated Press v. United States*,⁴⁰ the United States Supreme Court held that, in the absence of alternative sources of a service, any organization composed of competitors must permit access to its service or facility to nonowner competitors on fair and equitable terms if the service or facility is reasonably necessary for the competitive health of such nonowners. Furthermore, if the excluded competitor can demonstrate that an ownership position in the joint venture is a prerequisite to its competitive viability, the joint venture may be compelled to admit the competitor to an ownership position.⁴¹

The *Associated Press* requirement of access does not imply that access so granted is to be allowed without charge. Indeed, it seems fairly clear that so long as the terms of access are fair and nondiscriminatory, reasonable charges for the service may be imposed. Courts have recognized that a cooperative enterprise could deny the benefits of access to its services by setting unreasonably high prices for such services and that this would have the same effect as an outright refusal to permit access to such services.⁴² Accordingly,

36. See, e.g., *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). Such arrangements are also per se violations of the Sherman Act.

37. Cf. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co.*, 341 U.S. 593 (1951).

38. See, e.g., *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958). Congress has adopted specific legislation to forbid tie-ins between certain credit and other financial services. See *Fair Credit Billing Act*, § 168, 15 U.S.C. § 1666g (Supp. V, 1975).

39. 356 U.S. at 5-7.

40. 326 U.S. 1 (1945).

41. See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945). See also *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). A greater showing of injury appears to be required to entitle a competitor to admittance into the joint venture. See *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

42. *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

the price established may not be set in such a fashion as to deliberately exclude a competitor from use of the cooperative services or facility.

A difficult antitrust issue has been created by the evolution of statutes in some states requiring all financial institutions that establish remote automated facilities to share such facilities with certain or all other financial institutions. Jonathan Rose, Deputy Assistant Attorney General of the Antitrust Division of the United States Department of Justice, has taken the position that such statutes will not immunize sharing of EFT facilities from attack under the antitrust laws. Rather, Mr. Rose has urged that, notwithstanding such statutes, the activities of the sharing institutions must be justified on the same basis as any other joint venture or sharing arrangement.⁴³

In espousing this position, Mr. Rose has concluded that the "state action" of enacting a simple compulsory sharing statute is insufficient to invoke the antitrust exemption carved out by *Parker v. Brown*.⁴⁴ The precise limits of the *Parker* exemption have never been certain. Recent developments have created doubts that a statute directing competitors to cooperate with one another, without establishing a regulatory scheme to ensure that this cooperation will not be exploited to the detriment of the public, will enjoy antitrust immunity.⁴⁵ The vigor with which the Antitrust Division pursues Mr. Rose's views in this regard, and the success which it enjoys in any litigation commenced to enforce that view, may influence significantly whether EFT ventures are organized as virtual public utilities or whether there will be competition in the establishment of basic EFT facilities, even within states that adopt compulsory sharing statutes.

IV. THE FEDERAL ROLE IN COMMERCIAL AND CONSUMER LAW

The primacy of the federal role is clear with respect to the antitrust laws and the articulation of the appropriate functional scope of the activities of financial institutions. However, the allocation by governmental rule of rights and responsibilities identified with payment and credit transactions has

43. Address by Jonathan Rose, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice, Conference on Developing Legal Issues Concerning EFT Systems, Washington, D.C., Mar. 4, 1976.

44. 317 U.S. 341 (1943).

45. See, e.g., *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110 (1976); *Hecht v. Pro Football, Inc.*, 444 F.2d 931 (D.C. Cir.), cert. denied, 404 U.S. 1047 (1971); *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir.), cert. denied, 404 U.S. 1047 (1971). For an excellent discussion of the difficulties that the doctrine of *Parker v. Brown* may create in reconciling state enactments with the national policy favoring competition, see Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U.L. REV. 71 (1974).

been traditionally a matter of state, not federal, law.⁴⁶ Articles 3 and 4 of the Uniform Commercial Code (UCC), enacted in every state but Louisiana, set forth most of the rights of parties who exchange value by means other than cash. The rules set forth in the UCC may be varied by agreement, except that banks are limited by the Code in the extent to which they can disclaim responsibility for lack of good faith or negligence.⁴⁷ Further, the Code specifically anticipated, as a source of law relating to funds transfer, federal governmental regulations issued by the Board of Governors of the Federal Reserve System. An example is Regulation J which sets forth the rules governing the collection of checks through Federal Reserve System facilities.⁴⁸ Under the Code, such rules have the effect of agreements that may vary the provisions of article 4.⁴⁹ Proposed amendments to Regulation J would cover items processed electronically through automated clearing houses.⁵⁰

It is likely, however, that the determination of rights among participants in EFT transactions will not result initially from governmental regulation, state or federal. It will occur, as in fact it is occurring today, through private agreements of the type contemplated by the drafters of the Code. An example of a creation of private law to define the legal characteristics of an innovative consumer value transfer service occurred when bank credit cards were introduced. Prior to the mid-1960's, bank charge card services were offered by a few individual banks to selected customers; merchants with which they had direct depository relationships and consumers for whom they maintained open-ended credit accounts. The resultant two party contracts defined the legal characteristics of the charge card service offered by each individual bank.

The creation in the mid-1960's of Interbank Card Association, regional bankcard associations such as Eastern States Bankcard Association and West-

46. There were those, however, who advocated a federal commercial code when the body of law that now constitutes the Uniform Commercial Code was being drafted. See generally Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 *LAW & CONTEMP. PROB.* 100 (1951); Schnader, *The Uniform Commercial Code—Today & Tomorrow*, 22 *BUS. LAW.* 229, 231-32 (1966).

47. UNIFORM COMMERCIAL CODE § 4-103(1) provides:

The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

48. 12 C.F.R. § 210 (1976).

49. UNIFORM COMMERCIAL CODE § 4-103(2).

50. Proposed amendments to FRB Reg. J, 38 Fed. Reg. 32952 (1973); revised proposed amendment to FRB Reg. J, 41 Fed. Reg. 3097 (1976).

ern States Bankcard Association,⁵¹ and National BankAmericard Incorporated introduced a new phenomenon: commonly identifiable bankcards issued by many institutions which could be honored under uniform terms and conditions throughout the United States and the world. The "law" applicable to bankcard transactions, as it is seen by any individual who uses or accepts credit cards as a method of payment, is still defined primarily by the bilateral agreement between the bank and the customer or merchant. However, the individual banks must now interface with each other and that, in turn, influences the content of such agreements. Just as the legal characteristics that define transactions found in articles 3 and 4 of the Code, the "legal" characteristics of credit card transactions were of necessity reduced to codifications by the multi-bank systems. Those codifications are found today in multi-lateral "operating rules" to which banks that participate in such systems are bound.⁵²

Since the bankcard service was innovative and rapidly evolving, the flexibility offered by the ability to make rules through private contract permitted adjustments to those relationships as experience indicated. If the government had attempted to dictate the governing rules prior to initiation of the new services, bankcard systems might have followed a different evolutionary pattern, which subsequently might have resulted in a less desirable service for the public.⁵³

51. There are now in excess of a dozen such regional groupings that process Master Charge transactions.

52. Examples of such bodies of private law are the Operating Rules of Western States Bankcard Association, and the rules issued by Interbank Card Association. These rules govern transactions that occur in a seven state area and transactions that involve interchange on a national basis, respectively. Although such rules by their terms bind only the participating bank members of the bankcard system, the banks in turn, as a practical matter, incorporate into their individual agreements with the consumers and merchants many of the operational requirements and allocations of rights contained in the rules.

53. The conclusion that private enterprise has done a better job than government would have may seem brash. It is premised first on the clear superiority, in terms of flexibility, of allowing such decisions to be made by private agreement. As a second premise, the conclusion postulates superior knowledge of operational, technical and marketing problems within private industry than would likely be found in either a state legislature or Congress. What is absent, of course, in private rule-making is the protection of the "public interest" that would be afforded by public officials. To some extent free market competition and enlightened self-interest mandates the inclusion of public interest considerations in the derivation of rules. A good example of that phenomenon is the inclusion of the right given to consumers to reverse preauthorized automated payments which was included in the initial rules of the California Automated Clearing House Association. See Homrighausen, *One Large Step Toward Less-Check: The California Automated Clearing House System*, 28 *BUS. LAW.* 1143, 1152-53 (1973). The fact that the government has not felt compelled to legislate comprehensive statutes to govern bankcard transactions is at least one further indication that the private law development process has worked well,

That experience now is being replicated in large part in the development of EFT services. For example, the rights and obligations of users of automated clearing houses are established by private agreements, the rules of the clearing houses, and the agreements between participating financial institutions and their customers. Nevertheless, the dialogue is intensifying on the subject of whether new governmental rules are necessary to regulate EFT transactions and, if so, whether those rules should be promulgated at the state or federal level. As indicated above, the Federal Reserve Board has proposed on two occasions amendments to Regulation J that would cover electronic transfer of funds on credit items and electronic transfer of funds on debit items.⁵⁴ Given the Federal Trade Commission's apparent current perception of its powers and responsibilities, it may arrogate to itself an early and active role in regulating EFT. A nongovernmental body, the Permanent Editorial Board for the Uniform Commercial Code, has created a committee, designated the "348 Committee," to determine whether changes should be recommended to articles 3, 4 and 8 of the UCC to accommodate the unique characteristics of EFT transactions. If the drafting of rules is needed, the process will be time consuming and apt to proceed more slowly than the introduction of technological innovation.

This article is not the appropriate vehicle for predicting what the characteristics of new laws directed at EFT will be. Still, a few observations may be offered. Articles 3 and 4 clearly are inadequate in themselves to deal with EFT transactions and additional legislation may ultimately be desirable, but the articles were drafted so as to be flexible and to allow the creation of payment mechanisms by private agreement and clearing house rule. They are, therefore, unlikely to restrict the development of EFT transactions. Moreover, because of the diverse nature of electronic transactions currently under discussion, it is unlikely that any one set of undifferentiated rules will adequately govern EFT transactions as a single generic category. For instance, the rules respecting preauthorized payments adopted by the various automated clearing house associations allow consumers an absolute right of return for any debit item which they assert to be an error.⁵⁵ This right goes beyond the traditional stop-payment right with regard to checks, and beyond the right a customer has to reverse an entry with his bank because an item has been improperly paid through forgery or alteration. It may well be that an absolute right of return would be inappropriate if the electronic funds transaction at issue was a point-of-sale transaction, one specifically authorized by the customer.

54. See note 49 & accompanying text *supra*.

55. California Automated Clearing House Association Operating Rules, Section VIII (A); National Automated Clearing House Association Rules, Section VIII(A).

The federal government will undoubtedly play a role in regulating EFT transactions. The only question is how comprehensive that role will be. Congress has already enacted policies that will affect EFT transactions to some extent and the instances in which federal regulation is being imposed on related transactions appear to be increasing. For example, Congress has already legislated with respect to bankcard transactions to dramatically alter the immunity of financial institutions from disputes arising out of the underlying transaction through which goods or services are provided. The doctrine of negotiability and holder in due course provide that immunity, and they have allowed holders and payors of checks to be uninvolved in the business transaction between the drawer and, typically, the payee. Although the bankcard transaction is in many respects functionally similar to the check as a payment transaction, the rights of the parties to the transaction were redefined by Congress in 1974 when it passed the "rights of credit card customers" provision in the Fair Credit Billing Act.⁵⁶ The provision allows a consumer to assert claims and defenses, arising out of a transaction in which a credit card has been used, against the bank that issued the bankcard to the consumer. Congress placed careful limitations upon the new right, however, in recognition of the unique characteristics of the transaction to which the legislation spoke.⁵⁷ The rule will apply to third party credit card transactions whether they are paper or electronically based. The existence of such legislation raises an inevitable question regarding the appropriate treatment of electronic debit transactions that are card activated and involve a subsidiary credit extension.⁵⁸ If an EFT transaction has no credit component, a dialogue will ensue regarding whether it should be analogized to a cash transaction or a check transaction. Cash payments are, of course, final when made. Proponents of the latter analogy will point to the power possessed by the con-

56. Fair Credit Billing Act § 170, 15 U.S.C. § 1666i (Supp. V, 1975); FRB Reg. Z, 12 C.F.R. § 226.13(i) (1976).

57. In the late 1960's and early 1970's, there were strident calls for the complete elimination of the loosely termed "holder-in-due course" protection for bankcard issuers. The concept of the compromise proposal embodied in section 170 of the Fair Credit Billing Act was first suggested in Brandel & Leonard, *Bank Charge Cards: New Cash or New Credit*, 69 MICH. L. REV. 1033, 1056-71 (1971). Prior to the adoption by Congress of the compromise, the State of California enacted a similar rule (CAL. CIV. CODE § 1747.90 (West 1973)) and the National Conference of Commissioners on Uniform State Laws included in its draft of the Uniform Consumer Credit Code a rule patterned after the California provision (UNIFORM CONSUMER CREDIT CODE § 3.403).

58. An example of such a transaction is an EFT debit transaction that substitutes for a check. If the checking account has an over-draft line of credit associated with it, a payment may result in an extension of credit if the account balance drops below zero.

sumer to stop payment prior to payment of a check,⁵⁹ and ask that a similar artificial right be created in EFT transactions.

Congress has also passed, in the Fair Credit Billing Act, a detailed statement of the rights of consumers and the duties of creditors in those situations in which errors appear in the periodic statement of account supplied by creditors.⁶⁰ Further, the Federal Reserve Board, when it promulgated extensive amendments to Regulation Z, included detailed an extensive requirements for the disclosure of specific items of information in a descriptive billing context.⁶¹ It is obvious, of course, that a periodic recordation of EFT transactions will be provided to consumers in a descriptive billing format. The present descriptive billing disclosure rules apply only to open-end credit transactions. However, because of the continuing integration of time, demand and credit accounts, the practical effect of Regulation Z is nowhere near as finite as it might appear at first glance, in terms of either direct application or indirect influence. The detailed disclosure and error resolution requirements contained in Regulation Z are apt to play a major role in shaping consumer expectations and the systems requirements for data accumulation, transmittal, storage and disclosure to the consumer in EFT transactions. Further, they may provide a pattern for future legislation. Additional specific subjects for legislative treatment are likely to be recommended to Congress by the National Commission on Electronic Fund Transfers.⁶²

Legislators and regulators ought to proceed carefully in the uncharted waters of EFT and regulate, at least initially, only where there is a clear and demonstrated need, and not because of a fear of some potential, ill-defined harm. Regulation will have an impact on the rights and obligations of consumers, on the operational characteristics of EFT systems and on the price of EFT services. It will be to the advantage of the public if facts with regard to the technical and economic considerations involved in regulating EFT transactions are known and not merely hypothesized, and if legitimate con-

59. See UNIFORM COMMERCIAL CODE § 4-303(1).

60. Fair Credit Billing Act §§ 161-63, 15 U.S.C. §§ 1666 to 1666b (Supp. V, 1975); FRB Reg. Z, 12 C.F.R. § 226.14 (1975).

61. 12 C.F.R. § 226.7 (1976). Descriptive billing is a term that identifies a billing process in which the original document produced at the time and place the transaction occurred, frequently bearing the customer's signature, is not returned to the customer. A paper receipt is frequently provided at the time of the transaction. However, the sole record of the transaction provided directly by the institution that maintains the account is a statement on which data, typically extracted from a computerized record, is printed. The alternative to descriptive billing is termed "country club billing." Under this billing procedure actual copies of the document evidencing the credit transaction are cleared through the banking system and are returned to the customer with his periodic statement.

62. The EFT Commission was established to study, *inter alia*, "the need to protect the legal rights of users and consumers." 12 U.S.C. § 2403(a)(9) (Supp. V, 1975).

sumer expectations and apprehensions can be dealt with after some experience with an operating consumer service. When regulation comes, it should be promulgated at the federal level and the rules should preempt any state laws dealing with the same subject matter. The high mobility of our population and the close interconnection and interfacing of interstate institutions in our economy require no less.⁶³ The essential ingredient, uniformity, can otherwise be achieved only by a state by state adoption of a model or uniform act. That road to uniformity is slow, tortuous and uncertain. Some states may vary the model act to the point that its value as a uniform law would be vitiated.

V. PRIVACY AND SECURITY

Privacy is one aspect of the operation of electronic funds transfer services that will most certainly be the subject of federal regulation. The protection of the individual's privacy has been the focus of increasing attention in the past five years. Major studies⁶⁴ on the subject have been and are in the process of being conducted.⁶⁵ Legislation at both the federal and state level has already been enacted;⁶⁶ much additional legislation has been introduced⁶⁷

63. Senator William Proxmire, then Chairman of the Subcommittee on Consumer Affairs of the Senate Banking, Housing and Urban Affairs Committee, and now Chairman of the full committee, argued the necessity of congressional action to assure uniformity at the federal level with respect to matters covered by the Fair Credit Billing Act. 119 CONG. REC. 4586-603 (1973). Unfortunately, uniformity was not achieved. The present rule regarding the relationship of federal to state laws with respect to consumer legislation (Fair Credit Billing Act § 171, 15 U.S.C. § 1666j (Supp. V, 1975); Equal Credit Opportunity Act Amendments, 15 U.S.C.A. § 1691 (1976)) presents an undesirable model if what is sought is understandable, comprehensive and consistent rules to which American business can adhere and consumers can relate. The rule mandates federal preemption only if a state law is inconsistent and if the state law does not give greater protection to consumers. The philosophy embodied in the provision may be superficially acceptable since it seems to offer the possibility of greater protection for consumers at the cost of consistency from state to state. The superficial desirability wears thin when the difficulty of attempting to apply Congress' rule to specific issues becomes apparent.

64. *See, e.g.*, HEW, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS (1973) (Official Report of the Advisory Committee on Automated Personal Data Systems to the Secretary of HEW); J. Rule, Value Choices in Electronic Funds Transfer Policy, Oct. 1975 (Office of Telecommunications Policy Study).

65. Both the Privacy Protection Study Commission (5 U.S.C. § 552a (Supp. IV, 1974)) and the National Commission on Electronic Funds Transfer (12 U.S.C. § 2401 (Supp. IV, 1974)) are studying various aspects of privacy.

66. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (1970); Fair Credit Reporting Act, 15 U.S.C. §§ 1681 to 1681t (1970); CAL. CIV. CODE §§ 1785.1, 1786 (West Supp. 1976); Massachusetts Fair Credit Reporting Law, MASS. GEN. LAWS ch. 93, §§ 50-68 (as added by Acts 1971, ch. 805); N.M. STAT. ANN. ch. 50, art. 18 (1953), *as amended* by Laws 1969, ch. 259; Credit Data Reporting Act, N.Y. GEN. BUS. LAW ch. 300, § 370 *et seq.* (McKinney 1970).

and even the constitution of one state, California, has been amended to secure the right of privacy to its citizens.⁶⁸ The judiciary has also been creating protections where legislators have not acted.⁶⁹

The technology that can permit electronic funds transfer is the same technology that could theoretically permit the instantaneous aggregation of formidable quantities of information about the lives and habits of individuals. Those who understand the technological potential of electronic systems, but who do not always seem to understand the economic limitations on that potential, worry about the capability that technology provides to follow the movements and habits of individuals on an instantaneous basis through the economic transactions in which that individual participates. It is technologically feasible to determine from where and at what time persons make telephone calls, to what telephones those calls were made and to whom the calls were made. It is possible to determine on what days an individual patronizes particular stores and it may be possible to determine what goods or services were purchased. Plans have been advocated to record automatically the passage of automobiles at toll collection stations. Such a system would allow the monitoring of the location of vehicles and the times they were at particular locations. Adjustment of computerized fare collection programs now installed in public transportation systems, such as that used by the Bay Area Rapid Transit System in San Francisco, could allow similar monitoring of the movements of individuals by recording the boarding and destination stations of individuals and the time of entrance and exit from the system. The above examples demonstrate that in an increasingly complex and technological society records can be kept of transactions that were unrecorded in the past. People are not only concerned about the recording of monetary activity, but the recording of activities that transcend financial matters and include nearly all aspects of their lives. They are concerned about the accuracy of the information that is recorded and the uses to which it might be put.

The mere existence of such vast quantities of information about individuals produces apprehension. That apprehension can be reduced through three fundamental controls: limitations on data collection, methods to insure accuracy, and limitations on access. Congress has already begun to legislate with respect to each of these controls.

67. *E.g.*, H.R. 1984, 94th Cong., 1st Sess. (1975); S. 3057, 94th Cong., 2d Sess. (1976).

68. CAL. CONST. amend. art. I, § 1 (1974).

69. *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958); *United States Servicemen's Fund v. Eastland*, 488 F.2d 1252 (D.C. Cir. 1973);

In 1970 Congress took the first step in controlling personal information flow by passing the Fair Credit Reporting Act.⁷⁰ With regard to financial information, the Act controls primarily credit bureau type activities which, in the language of the Act, are termed "consumer reporting agencies." The Act attempts to regulate the content, currentness and accuracy of data collected and stored and the purposes for which persons may have access to such information. A primary technique for insuring accuracy is the guaranteed accessibility by individuals to their own files so that the contents might be verified. The provisions of the Fair Credit Reporting Act would apply to the EFT environment without amendment.⁷¹

The use which government might make of personal information in its possession is one of the public's greatest fears, and one to which Congress directed its attention through the passage of the Privacy Act of 1974.⁷² The Act provides standards to ensure the relevancy and accuracy of information maintained by government agencies and to control the purposes for which the information may be stored and disclosed. Although under the provisions of the Act citizens have no control over the compilation of data by an agency, such data cannot be disclosed to any other person or agency without the written request or consent of the individual concerned. This prohibition on dissemination, however, is weakened by broad exceptions, the scope of which are yet to be determined. Like the Fair Credit Reporting Act, the Privacy Act insures that citizens have the ability to inspect their files to ensure accuracy.

The government's access to information maintained by the private sector is also a serious concern. A major issue at the early hearings of the Privacy Protection Study Commission, for instance, was the lack of protection for citizens in those situations where the government seeks access to information maintained by the private sector of the economy.⁷³ Serious questions exist as to whether governmental access to personal information in the hands of certain private third parties should be permitted. In our highly complex society some third parties are injected into what previously was a private transaction only because such third parties own and maintain the complex, expensive

Valley Bank v. Superior Court, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975); Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

70. 15 U.S.C. §§ 1681 to 1681t (1970).

71. Attempts to amend the Act, for other reasons, have been made since 1973. *E.g.*, S. 2360, 93d Cong., 1st Sess. (1973).

72. 5 U.S.C. § 552a (1970). That law applies only to personal data systems operated or controlled by federal agencies or instrumentalities.

73. *See* American Banker, Feb. 25, 1976, at 8, col. 1; American Banker, Feb. 13, 1976, at 1, col. 1.

technological devices through which the transaction must be accomplished. As institutions within the private sector become more sensitive to these issues, they are resisting requests by governmental agencies for access to personal data on customers. The response of financial institutions to judicial process that compels disclosure is another matter. Absent action by legislatures or state courts that guarantees to consumers the right to prior notification and opportunity to resist such orders, financial institutions have no choice but to comply with judicial and administrative orders that frequently do not allow for such due process rights.⁷⁴

A related concern is that of security of the information and the "value" that is being conveyed by EFT systems. A criminal with a good technological background need no longer raise a sweat lifting bags of greenbacks from a Brink's truck. It would be physically less demanding and far more lucrative to steal by diverting the stream of value transfer from an EFT system. The concern for security is one that should be shared by the individual customer who will be inconvenienced or harmed by the diversion of either information or value and by the financial institution whose continued viability might be threatened.

The regulators of financial institutions impose security requirements on financial transactions accomplished through their regulated institutions as a major aspect of their administrative responsibility. The concern for security is expressed by the careful manner in which financial institutions are regulated generally to ensure the safety of deposited funds and through specific legislation such as the Bank Protection Act.⁷⁵ The Comptroller of the Currency has issued proposed guidelines that deal extensively with suggestions for the security of EFT systems,⁷⁶ and other federal regulatory bodies no doubt will establish similar controls as they deem appropriate.

Although the need for proper security in EFT is unquestionable, it is important to ensure that the rules to be adopted will, in fact, provide the necessary protection without unduly restricting the development of new uses of electronic technology. Regulations adopted to protect security and privacy

74. See generally Note, *Government Access to Bank Records*, 83 YALE L.J. 1439 (1974). In *United States v. Miller*, 96 S. Ct. 1619 (1976), the Court recently held that the validity of a subpoena directed to a bank to obtain copies of checks could not be challenged by a depositor, because a depositor has no constitutionally protected interest in records maintained by the bank. The *Miller* case renders it unlikely that the federal judiciary will be a source of new law to protect individual rights in financial records in the near future. Compare *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974) and *Valley Bank v. Superior Court*, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975).

75. 12 U.S.C. §§ 1729, 1881-84 (1970).

76. COMPTROLLER OF THE CURRENCY, EFTS GUIDELINES (Apr. 1976).

will affect the design of EFT systems and the costs of the financial services offered through EFT. In some instances, policies based on privacy and security considerations in EFT transactions will be antithetical to other strongly held policies in the EFT area. For example, in an earlier discussion, we touched on the importance which the Federal Reserve Board and some state legislatures are attaching to the adequacy of information disclosed on descriptive billing statements that recount electronic transactions. To the extent that the Board is successful in expanding the quantity of information required to be accumulated and stored, it has created not only the possibility but the likelihood that such information will be available to institutions for purposes extraneous to the transaction itself. Furthermore, the type and quantity of information that the law allows to be maintained and shared among credit-granting institutions will significantly affect the accuracy of creditworthiness evaluations, the costs of extending credit, and therefore the price to consumers. Difficult decisions will have to be made as these conflicting societal needs become more fully appreciated.

VI. OPERATION OF EFT FACILITIES BY FEDERAL AGENCIES

The United States Government traditionally has avoided participation in the nation's economy as a direct provider of goods and services. Services that have tended towards a natural monopoly or tightly controlled oligopoly have been regulated, but not operated, by the government.⁷⁷ Where governmental subsidization has been judged to be necessary, the subsidy has either been granted directly to the beneficiaries⁷⁸ or has been funded through independent corporations.⁷⁹ Even basic infra-structures of the economy, such as communications services, are either privately operated or are provided through quasi-public companies such as the United States Postal Service and the Communications Satellite Corporation (COMSAT).

In contrast to this general pattern, the Federal Reserve System, the Federal Reserve Banks, the Federal Home Loan Bank Board (FHLBB) and the Federal Home Loan Banks have taken significant steps in the direction of establishing governmentally owned and operated components of EFT systems. For instance, the Federal Reserve System, through its Reserve Banks, has been operating automated clearing houses on behalf of banks in the

77. The telephone industry, for example, is regulated by the Federal Communications Commission (Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 15, 47 U.S.C.)); and the airlines industry is regulated by the Civil Aeronautics Board (Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (codified in scattered sections of 49 U.S.C.)).

78. *E.g.*, Health Insurance for the Aged Act, 42 U.S.C. §§ 1395-96 (1970) (Medicare).

79. *E.g.*, Legal Services Corporation Act, 42 U.S.C. § 2996(b) (Supp. IV, 1974).

United States since late 1972, when the Federal Reserve Bank of San Francisco began performing data processing and communications functions for the automated clearing house facility established by the California Automated Clearing House Association.⁸⁰ Various Federal Reserve Banks now operate automated clearing houses in more than 17 locations.

The operational participation of the Federal Home Loan Bank System and the Federal Reserve System is not a new phenomenon. They already operate certain payment system services, some in competition with private enterprise, the classic example of which is the provision by the Federal Reserve System of check clearing services for commercial banks. The Federal Reserve System has not limited itself to paper-based services. It has established the "Fedwire" and the associated Culpepper Message Switching Center. In addition, the various Federal Home Loan Banks throughout the United States now provide general computerized recordkeeping and transaction-recording services to aid their member savings and loan associations.

Considerable criticism has been directed at the Federal Reserve System because of the operational role it has assumed; criticism that is equally applicable to the activities of the Federal Home Loan Bank System. The difference in the degree of criticism directed at the two agencies is due in part to the public forum for criticism provided by the Federal Reserve Board. No such specific opportunity for public comment has been afforded by the FHLBB. In November 1973 the Board of Governors of the Federal Reserve System issued proposed amendments to Regulation J.⁸¹ At that time, the Board of Governors requested public comment on who should own and operate electronic payment facilities. The more than 200 responses from private industry and governmental agencies indicated an overwhelming opposition to governmental agencies acting as owners and operators of EFT systems as a matter of policy.⁸² A further argument was advanced that the Federal Reserve, as an agency whose functions are specifically delineated by statute, does not possess the legal power to engage in EFT activities.⁸³

80. See Homrighausen, *supra* note 53, at 1143-46.

81. 38 Fed. Reg. 32952 (1973). Present FRB Regulation J, 12 C.F.R. § 210 (1976) sets forth the rules for the collection of paper items, including checks. The proposed amendments set forth rules to govern the electronic transfer of both credits and debits.

82. See Brandel & Gresham, *Electronic Payment: Government Intervention or New Frontier for Private Initiative*, 29 BUS. LAW. 1133 (1974), for a sampling of many of the issues raised by private institutions opposed to a Federal Reserve System operational role. See generally Comments of the United States Department of Justice in the Matter of Proposed Amendment of Regulation J and Related Issues Before the Board of Governors of the Federal Reserve System, May 14, 1974.

83. Citicorp, Comments on the Federal Reserve Board's Revised Proposal to Amend Regulation J 8-11, Mar. 1976.

The responses from various elements of the banking industry were not uniform; some were not even internally consistent in the policies advocated. Segments of the banking industry, for instance, took the position that Federal Reserve Banks' operation of automated clearing houses (ACHs) was desirable, but that Federal Reserve operation of facilities involving point-of-sale transactions was anticompetitive and undesirable. Furthermore, the banking industry in at least two cities, Cleveland and Atlanta, continued to press the Federal Reserve Board to permit the Reserve Banks in those cities to operate electronic facilities to support bank-owned point-of-sale transaction services.⁸⁴ In response to these views, the Board declined to permit the Reserve Banks to operate an electronic switch for point-of-sale systems in Cleveland and Atlanta. Further, in its release accompanying revised proposed amendments to Regulation J, dated January 19, 1976, the Federal Reserve System, which had made no overt efforts to expand its operational role in EFT since late 1973, except in its operation of ACHs, disclaimed the applicability of its regulations to point-of-sale systems or consumer bank communications terminals.⁸⁵

In March 1975, the FHLBB issued a request for detailed systems specifications for the construction of a nationwide electronic funds transfer system. That activity was followed by an announcement of the Federal Home Loan Bank in San Francisco in September 1975 that it intended to operate an EFT program called "ASSIST" on behalf of the Savings Association Central Corporation, an organization comprised of 13 of the largest savings and loan associations in the State of California.⁸⁶ Shortly thereafter, the Antitrust Division of the Department of Justice communicated a strongly worded statement to the Chairman of the FHLBB suggesting that the operation of any such facilities by a Home Loan Bank would be inappropriate.⁸⁷ The ASSIST plan was shelved in early November 1975.⁸⁸ No reasons were publicly given, but the Board may simply have viewed as impolitic the continuation of the project in the face of strong Justice Department opposition. If the Home Loan Bank had proceeded as planned, commercial banks might well have encouraged, instead of opposed, Federal Reserve System operational services. They may have had no choice if savings and loan associations had gained a significant competitive advantage through governmentally subsidized services.

84. See 6 Payment Systems Newsletter, Jun. 1974, at 1.

85. 41 Fed. Reg. 3098 (1976). The regulations themselves do not make it clear, however, that they cannot be so applied.

86. CAL. SAV. & LOAN J., Oct. 1975, at 14.

87. Letter from Thomas E. Kauper, Assistant Attorney General, Antitrust Division, United States Department of Justice, to Garth Marston, Acting Chairman, FHLBB, Oct. 16, 1975.

88. CAL. SAV. & LOAN J., Dec. 1975, at 11.

Protests by the Justice Department, the White House Office of Telecommunications Policy and private industry have resulted in both the Federal Reserve System and the FHLBB slowing markedly what was feared by many to be a premature and undesirable entry into the electronic transfer environment. Such entry might well have foreclosed private initiative, producing an artificial distortion of marketplace forces during the nascent stage of EFT development.

The development of an electronic payments system serving the needs of a broad user population at maximum efficiency requires an environment in which flexibility, diversity and specialization of functions are fostered and the necessary evolutionary growth in alternative mechanisms is allowed to occur at a pace dictated by market forces. The innovative and competitive characteristics of private industry are suited to produce an electronic payments system tailored to the most efficient delivery of the services that are desired by institutional and consumer users. Private enterprise possesses the necessary range of financial and technological capabilities that are not apt to be found in any single institution, private or governmental. Moreover, competitive interaction fosters anticipation of user demand and would go far in insuring that services and systems will be ready when the demand occurs.

Although no monopoly can be viewed as desirable in the emerging EFT environment, a federal agency may be the least desirable monopolist of all.⁸⁹ Characteristically, governmental bureaucracies seem to respond to incentives different from those that influence private sector decisions. In contrast to the private sector, even risk taking that proves successful is not rewarded highly in government. A bureaucrat is more likely to give greater weight to the dangers posed by any innovation to his agency and his career and conclude that they significantly outweigh the potential enhancement in efficiency or service which the innovation might achieve.

Further, the public welfare is served best by determining the desires of the public through their free market dollar votes *and* their political votes. Consumers, regulatory agencies and users of EFT systems, such as commercial banks, may all have differing opinions as to how the public weal and their own interests might be best served. The multitude of voices to be heard on any issue should be, and clearly has been, productive of invaluable discussion

89. A similar conclusion appears to have been reached in most countries that have established automated facilities. See 8 Payment Systems Newsletter, Mar. 1976, at 6. Although the Canadian government has taken the position that Canada should have a single common user communications network, it has not yet decided who should own and control that network. See generally INFORMATION CANADA, TOWARDS AN ELECTRONIC PAYMENTS SYSTEM (1975).

and public resolution of policy and operational direction. The federal government, of course, will exert significant influence on EFT systems as a regulator. It may be a major user of such services, as it is today the primary user of ACHs.⁹⁰ If it were also to own and operate EFT facilities, too much decisional power would be concentrated in a single institution and this would effectively stifle differing views.

Fears expressed in 1973, as to the necessity for governmental intervention because private industry was not sufficiently innovative or was unwilling to assume the risks necessary to implement EFT services, or that smaller banks would be unable to participate, seem groundless in retrospect. Individual banks,⁹¹ large and small,⁹² and joint ventures of banks⁹³ in all parts of the country have introduced electronically based consumer services. The same is true of nonbank depository institutions.⁹⁴ Major regional automated clearing house associations in Chicago and New York have chosen to operate their own facilities even though the service has been available from local Federal Reserve Banks at no direct cost to the commercial banks.⁹⁵ Both National BankAmericard, Inc.⁹⁶ and Interbank Card Association⁹⁷ have in operation

90. Statistics published in NACHA Quarterly Update Bulletin of the National Automated Clearing House Association, Jan. 1976, at 5, indicate that approximately 45% of the credit transactions processed by automated clearing houses were governmental in origin. In correspondence between the Office of Telecommunications Policy (OTP) and the Department of the Treasury, OTP has requested that Treasury consider using private agencies to transmit governmental payments. Citicorp, *supra* note 83, App. III.

91. See, e.g., 8 Payment Systems Newsletter, Mar. 1976, at 3, 4 (Continental Illinois Bank & Trust Co. and First Nat'l Bank of Chicago); 5 Payment Systems Newsletter, Nov. 1973, at 1 (First Nat'l City Bank of New York).

92. See, e.g., 5 Payment Systems Newsletter, Jan. 1973, at 1, 3 (Hempstead Bank, Long Island, N.Y., and City Nat'l Bank & Trust Co., Columbus, Ohio). A survey conducted by the Comptroller of the Currency indicated that as of November 18, 1975, more than half of all electronic funds transfer systems installed by national banks have been deployed by small banks. American Banker, Dec. 26, 1975, at 1, col. 1.

93. See, e.g., 7 Payment Systems Newsletter, Apr. 1975, at 7 (Credit Systems, Inc.).

94. See, e.g., CAL. SAV. & LOAN J., Sep. 1975, at 18 (California saving and loan associations' formation of Savings Association Central Corp.); 7 Payment Systems Newsletter, Jan. 1974, at 1 (Transmatic Money Service System offered by First Federal Savings and Loan Association of Lincoln, Nebraska); 5 Payment Systems Newsletter, Feb. 1973, at 3 (mutual savings banks MINTS program).

95. 7 Payment Systems Newsletter, Nov. 1975, at 2. Such a decision by regional clearing house associations is a powerful statement as to the importance with which private banks view their ability to compete freely.

96. The BankAmericard Service Exchange (BAS) programs, BASE I, II and III, are described in 6 Payment Systems Newsletter, Jan. 1974, at 6, and 5 Payment Systems Newsletter, Sep. 1973, at 1.

97. Interbank's on-line authorization service (INAS) is described in 6 Payment Systems Newsletter, Jan. 1974, at 7, and 5 Payment Systems Newsletter, May 1973,

systems that allow for computer-to-computer communications and the truncation of paper in nationwide interchange. Those systems may well provide the basic communications links for future point-of-sale and consumer bank communications terminal services.

Importantly, this substantial progress has not been made at the sacrifice of flexibility and diversity—two essential conditions to successful innovation. The multiplicity of projects differ one from another. Some programs, because they will not satisfy user needs at an appropriate price, will undoubtedly fail or will be significantly altered to meet user requirements. But the end product of such competition will likely be superior services at the lowest possible cost for the consumer. Such a result would be far less probable if the Federal Reserve Board or the FHLBB interfere operationally or by rule-making and places constraints on innovation. Only with great luck could government planners anticipate all problems and opportunities so as to design the best system in the first instance. Once in place, a governmentally owned national monopoly would be slow to change and probably impossible to displace. There is little incentive for innovating to increase efficiency if there is no limitation of resources and little reward for reducing the cost of expanding the quality or kind of services.

The facts are, of course, that while the phenomenon of governmental agency ownership of EFT systems has been slowed, the Federal Reserve System continues to assume an important role in its operation of automated clearing houses. Further, the Federal Home Loan Banks provide electronic services to savings and loan associations. Any component of an electronic payment system that is owned and operated by a governmental agency is likely to become a near monopoly unless the services that component provides are priced at their true cost. If the agency charges nothing, or less than actual costs for its services, users will perceive a lower cost associated with use of the services than their true economic cost. They will, therefore, continue to utilize it, regardless of available alternatives that are less costly and more efficient but carry a higher price to users. An inefficient system could exclude more efficient alternatives from developing, thus resulting in the expenditure of more resources than necessary to accomplish the desired function.

Governmental subsidization of EFT facilities would render it difficult, if not impossible, for private industry to compete in the provision of those services. This artificial restriction on competition would severely curtail innovation in the development of services and technology, and virtually insure that

at 4; its electronic transfer service (INET) is described in 6 *Payment Systems Newsletter*, Jul. 1974, at 4.

electronic payment systems would configure themselves to a public utility model, regardless of the benefits, or lack thereof, to the public. The size of government and its ability to create systems without the private market penalties associated with poor decisionmaking are factors in themselves that operate to restrict private competition in any activity government undertakes.

If the government charges for its services, and sets its prices so that they are based on the services' true cost, the pernicious effects of government's operational role on private competition may be somewhat reduced. The Board of Governors of the Federal Reserve System took a major step in that direction when it announced that it was in the process of formulating a price schedule based on fully allocated costs for the electronic clearing and transfer services and for the check clearing services it currently offers. Such pricing, if implemented, will represent an essential step in reducing the possibility that an artificial monopoly in EFT services will arise. The establishment of appropriate prices based on costs, however, may not be an easy task for the Board.

Even fully allocated cost pricing for "the service" may not be sufficient to insure minimal governmental interference with the private sector of the economy. It would be undesirable to treat a set of services as a single package, available only on an "all or nothing" basis. Component parts of the service should be offered and priced separately so that the private sector could provide for itself those components it can produce most efficiently, and purchase only those components that the government is able to offer most economically. For example, in the automated clearing house context, access to the Federal Reserve System's courier service might be separately priced and offered to privately operated automated clearing houses.⁹⁸ Care should be taken to insure that the pricing of one component service does not operate to subsidize any other component service. Such an unbundling of prices, the antithesis of the tie-in of products allegedly attempted by companies with a controlling share of a market, would have a beneficial effect on the rapidity of growth, price and health of EFT systems.

Another type of tie-in that exists peculiar to the relationship between the Federal Reserve System and its member banks is the mandated reserve balance. The Federal Reserve Board indicated in the explanatory material accompanying the January, 1976 Regulation J proposal that "consideration would have to be given to the burden of required reserves maintained by member banks" in setting the price schedule. If a concession on pricing is given to member banks, they will perceive utilization of the Federal Reserve

98. The Federal Reserve Banks of New York and Chicago have proposed to offer such a courier service to the privately operated New York and Chicago Automated Clearing Houses, provided these institutions do not discriminate against thrift institutions

System's electronic payments service as a significant means through which they can receive economic benefits from the reserve accounts they are required to maintain. This tie-in will distort the economic basis on which choices between alternative electronic payment services are made. Private industry does not have the right, as does the Federal Reserve, to demand that income producing assets of banks be left in its care without compensation. Hence, while the Federal Reserve can offer to return part of the economic benefit it earns annually from those assets, without consequence to itself, private industry can obviously offer no similar economic subsidy. The distortion will make it difficult for private industry to attract member banks as customers, even though the private services may be superior in quality, breadth and economic efficiency. The public will, in the end, have to pay for any resulting inefficiencies. Moreover, unless each member bank's use of the Federal Reserve services is in proportion to the size of its reserve, service price concessions will result in the subsidization of services provided to some member banks by other member banks.

The Board's desire to encourage banks to become members of the Federal Reserve System for purposes of monetary policy, and its at least partially related desire to provide some economic benefit for the maintenance of reserves, should not be accomplished by providing "free" or subsidized services. Rather, member banks should be directly compensated for the loss of earnings occasioned by maintenance of reserve accounts with Federal Reserve Banks. One alternative, which the authors suggested in 1973, would be to pay interest on reserves.⁹⁹ Milton Friedman, the eminent economist, has made that same suggestion before the House Committee on Banking, Currency and Housing during hearings conducted as part of that Committee's study of Financial Institutions and the National Economy.¹⁰⁰ The American Bankers Association, the voice of commercial banking in the United States, has taken a position in favor of the payment of interest,¹⁰¹ and First National City Bank, the nation's second largest bank, has requested the Board to consider such a move.¹⁰² The suggestion was reflected in an explanatory statement by Congressman Reuss, Chairman of the House Banking, Currency and

in policy or operations. Pricing for courier services is still under study. *American Banker*, Oct. 6, 1976, at 1, col. 3.

99. Brandel and Gresham, *supra* note 82, at 1146.

100. Testimony of Milton Friedman, *Hearings on Financial Institutions in the Nation's Economy (FINE) Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Currency and Housing*, 94th Cong., 1st and 2d Sess., pt. 3, at 2153-54, 2161-62 (1975-1976).

101. Letter from Willis Alexander, Executive Vice President of the American Banker's Association to Theodore Allison, Secretary, Board of Governors of the Federal Reserve System, Mar. 19, 1976, at 9.

102. Citicorp, *supra* note 83, at 7.

Housing Committee, that related to major financial institution reform legislation.¹⁰³ The statement suggested that legislation would be appropriate to require the Federal Reserve Board to institute a study into the desirability of paying interest on reserve accounts.¹⁰⁴

There seem to be few, if any, legitimate goals that are better achieved through government, rather than private, operation of EFT facilities. Some financial institutions that have perceived governmentally provided services as "free," have supported operational roles for agencies. In particular, those banks who receive no economic return on their required reserves may have viewed the "free" services as an equitable return on their reserves. Nevertheless, private sector operation of EFT facilities is more consistent with our general economic and political principles. Subsidiary problems, such as an economic return on required reserves, should be dealt with as a separate matter.

VII. CONCLUSION

It has been a principal thesis of this article that the development of electronic funds transfer services must be recognized as one of the major components of the revolution now occurring in the provision of financial services, and not as an isolated phenomenon. Shifts in power among the different types of financial institutions, and the injection of nonfinancial institutions into activities hitherto regarded as reserved to financial institutions, serve to complicate analysis and proper regulation of the application of new technology to the provision of innovative financial services. These facts underscore the need to approach the federal government's role in EFT from a perspective that accounts for the multifarious forces in operation in the emergence of EFT.

A second thesis of this article has been that electronic funds transfer activities must be regarded as nascent. As such, they require breathing and growing room. For the federal government to move too precipitously or too heavy-handedly in imposing detailed regulations on the innovative financial services which EFT promises, would deny to all the benefits of innovation that a certain degree of regulatory restraint would allow. On the other hand, certain basic principles governing the rights and responsibilities of various parties in connection with EFT may have to be established soon. Such basic principles include, for instance, establishment of the comparative competitive posture of financial institutions and nonfinancial institutions in their EFT ac-

103. *Explanation of Proposed Financial Institution Act of 1976*, Daily Report for Executives, Feb. 6, 1976, at B-1, col. 3.

104. On March 20, 1976, a bill that would require payment of interest on reserves was introduced in the House of Representatives. H.R. 12865, 94th Cong., 2d Sess.

tivities. Furthermore, during this formative stage, the antitrust laws will serve to prevent abuses of economic power in the development and operation of EFT services.

Ultimately, it may prove necessary for there to be extensive and detailed regulations covering EFT activities in order to protect the rights of consumers and to preserve the security and integrity of the nation's financial industry. If such regulation should prove to be necessary, the interstate and interdependent nature of EFT systems dictate that the federal government assume a preemptive role. At present, however, federal intervention in an entrepreneurial role or through overly detailed and stringent regulations must be regarded as an unnecessary burden upon the development of beneficial financial services.

(1976). The objective of the bill was the stimulation of residential construction through a mandatory credit allocation scheme, rather than the alleviation of the basic unfairness referred to herein.