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## ELECTRONIC MONEY IN THE 1990s: A NET BENEFIT OR MERELY A TRADE-OFF?

Mark E. Budnitz<sup>†</sup>

### INTRODUCTION

It is clear that there will be an increased use of electronic money in the 1990s. In addition to the continuing promotion of retail electronic fund transfers (EFT) by financial institutions,<sup>1</sup> the government will make a concentrated effort to implement a national system for the electronic transfer of government benefits payments (EBT).<sup>2</sup> It is less clear, however, whether this trend will result in a net benefit for consumers, retailers, financial institutions, and the government. Perhaps we will merely trade one set of costs and benefits for another set of comparable worth.<sup>3</sup> For every apparent benefit there is a countervailing cost. Due to the multiplicity of variables and the plethora of unknowns, precise quantification of costs and benefits is impossible. We can only guess, and try to determine what legal and operational safeguards need to be enacted.

Of particular concern is the failure of industry and government to adequately disclose to retail consumers essential information about the legal and other consequences of EFT. Many agree that

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1. *Rise in Electronic Transfers Still Disappoints Processors*, AM. BANKER, Mar. 11, 1991, at 3 [hereinafter *Electronic Transfers*].

2. Electronic Benefit Transfer (EBT) uses electronic fund transfer systems to deliver federal and state benefits such as Social Security, veterans' benefits, and food stamps to recipients. 1990 TREAS. FIN. MGMT. SERV., *From Paper to Plastic: The Electronic Benefit Transfer Revolution* 29-31 [hereinafter *EBT Revolution*]. Recipients can use automated teller machines (ATMs) to withdraw benefits. *Rise in Electronic Transfers*, *supra* note 1, at 5. In addition, point-of-sale (POS) terminals located in retail stores can be used to withdraw benefits and purchase groceries in programs where EBT replaces food stamp coupons. *Id.*; see *infra* notes 46-48 and accompanying text.

3. For a complete discussion of the concept of viewing the movement toward EFT as involving offsetting trade-offs rather than a net benefit, see E. SOLOMON, *EFT: A CONSUMER'S VIEW, ELECTRONIC FUNDS TRANSFERS AND PAYMENTS: THE PUBLIC POLICY ISSUES* (E. Solomon ed. 1987).

the government should interfere as little as possible in the financial marketplace through heavy-handed regulation and a flood of required disclosures. Free market mechanisms are the best way to ensure the flexibility and incentives to promote innovation in this relatively new field of technology. Since technological improvements never cease, industry needs to be able to respond by adapting those advances to the EFT environment. This free market scenario, however, can be justified only if consumers have the information necessary to make rational choices. Because so many questions about EFT remain unanswered, it may not be possible for anyone, much less consumers, to have adequate information upon which to make intelligent decisions. Assuming sufficient information is available, there is no assurance essential facts will be communicated to consumers. To date, government and industry have told the public only about the advantages of EFT. There is no hint that there may be disadvantages to EFT or that the consumer might be merely trading one set of costs and benefits for another set which is equally good and bad. Indeed, the federal government has become one of the principal promoters of the benefits of EFT, raising the question: Who is left to inform consumers of the risks and other costs? In addition, even well-informed consumers cannot participate in a truly free marketplace to the extent market concentration and social inequalities exist.<sup>4</sup>

### I. THE BENEFITS OF EFT

The benefits of EFT are well-known. EFT, including automated teller machines (ATMs), point-of-sale (POS) terminals, and electronic payment of bills, frees consumers of the need to carry substantial amounts of cash.<sup>5</sup> This decreased need for cash is

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4. P. HEYNE, *THE ECONOMIC WAY OF THINKING* 70 (3d ed. 1980).

5. EFT is an expansive system in which funds are electronically transferred between a depositor's bank account and ATMs, POS terminals in retail outlets, and payees in a pre-authorized debit and credit system. D. BAKER & R. BRANDEL, *THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS* ¶ 1.01 (2d ed. 1988). The EFT system is facilitated by the use of innovative bank cards, interbank wire services, and home banking terminals. *Id.* EFT technology is continuing to improve. *Id.* Since 1978, the United States Treasury Department has initiated efforts to convert many federal payments from the traditional check payment to EFT. *Id.* ¶ 5.03. EFT has continually grown in the government context with Social Security benefits accounting for most direct payments; however, almost all government related payments can be similarly

convenient and helps avoid loss, theft, and incorrect counting when paying for goods and services. ATMs are not only convenient since they allow twenty-four hour banking, they also are profitable to consumers because they allow them to keep their money in interest bearing accounts for a longer period of time. EFT technology has brought consumers the ultimate in convenience by allowing banking transactions to be conducted at home on a personal computer. Direct deposit is a safer and more convenient way to get wages into bank accounts and may result in the money earning interest sooner than if the employee has to deposit a paycheck. EFT is also advantageous to financial institutions if sufficient volume is obtained.<sup>6</sup> Processing cash and checks is very labor intensive and thereby costly; EFT is far more efficient and holds out the promise of being more profitable.

Retailers will benefit from POS.<sup>7</sup> They will be paid faster and with more certainty than when consumers pay by check or credit card. Theft and counting errors made by cashiers and others should be reduced.

EBT has far-reaching potential. The government and those receiving benefits will reap substantial benefits from EBT.<sup>8</sup> Welfare checks will no longer be stolen from mailboxes or from the recipients themselves. With reduced paper flow it will be far less costly for the government to provide benefits.

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transferred. *Id.* In addition, EFT allows consumers to pay bills electronically at home. The service is typically available to pay utility bills and mortgage payments. Credit card payments are sometimes included as well. Many companies are recognizing the large market for such services. Karen Gullo, *Am Ex, AT&T, and Prodigy Eye Bill-Payment Market*, AM. BANKER, July 8, 1991, at 1.

6. See Collie, *Banks Cash In on Public Assistance*, BANKERS MONTHLY, Feb. 1990, at 33. *But see* Pollock, *EFT Profits are Hard to Find*, BANKERS MONTHLY, May 1990, at 65 ("EFT programs to a large extent remain in their infancy, and it remains unclear whether they have been, or indeed ever can be strong moneymakers for financial institutions."). In addition to easing costly processing procedures, EFT increases the use of ATMs. Banks have recognized the opportunity to treat ATMs as a chargeable service, and have therefore increased service charges and transaction fees. *More Banks Charge for ATM Network Use*, AM. BANKER, July 25, 1990, at 10, col. 1.

7. See generally *Benefits Delivery Changed by Technology*, 1989 A.B.A. BANKING J. 62; *Use of "Plastic" May Change in the 1990s*, ATLANTA J. & CONST., Jan. 29, 1990, at D2; see also Jeanne Iida, *After Series of False Starts, Debit Cards Show Promise*, AM. BANKER, Aug. 19, 1992, at 1, col. 1 ("Debit card use at the point of sale is rising annually at nearly a 50% clip.").

8. See *EBT Revolution*, *supra* note 2; *Electronic Banking is Worth Plugging Into—Benefits are Shown in Social Security Project*, ATLANTA J. & CONST., Nov. 13, 1989, at B3.

Speed, safety, convenience, and lower costs are the systemic advantages of EFT. This is the story being promoted by government and industry. The problem is not that this is inaccurate; the problem is that it is only half of the story.

## II. THE COSTS OF EFT

Although some of the costs of EFT can be specifically identified, the impact of these costs to consumers cannot be readily ascertained because of the tremendous diversity of the consumer population. In addition, the type and extent of costs to consumers will depend upon several profound decisions made by industry and government in the 1990s. Great uncertainty exists as to what those decisions will be.

Among the costs associated with EFT as it expands in the next decade are the following. While EFT holds out the promise of cost savings for government and greater profits for industry,<sup>9</sup> the hardware and software are expensive.<sup>10</sup> Adding to the expense is the cost of backup facilities to ensure continuing operation in case of a natural disaster or other extraordinary disruption of service.<sup>11</sup> Whether the cost of converting to greater use of EFT is unduly onerous varies within each segment of the industry. Probably many financial institutions will continue to convert to EFT in a cost-effective manner. Obviously, however, many financial institutions lack the capital to absorb this expense, even if it will generate profits in the long-term. The startling absence of management competence, integrity, and honesty demonstrated

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9. Robinson, Book Review, 1989 ANTITRUST BULL. 235, 239 n.8 (reviewing D. BAKER & R. BRANDEL, *ELECTRONIC FUNDS TRANSFERS AND PAYMENTS: THE PUBLIC POLICY ISSUES* (E. Solomon ed. 1987)):

It is estimated that we spend some \$12 to \$15 billion yearly to process 38 billion paper checks though the electronic technology exists to accomplish the task for as little as \$6 billion. That \$6 to \$9 billion cost spread, of course, appears to be a strong inducement for private sector entry.

*Id.*

10. "ATMs are a necessary evil, because they are a cost drain on most banks." Pollock, *EFT Profits are Hard to Find*, BANKERS MONTHLY, May 1990, at 65, 69.

11. See Matt Barthel, *Wells Fargo Puts ATMs Through Big Crisis Test*, AM. BANKER, Nov. 18, 1991, at 3, col. 1 (backup systems often go untested until an emergency; ATMs are so visible to customers that most banks do not want to risk the possibility of a failed test); Iida, *Regulators Take a Hard Look at Disaster Plans*, AM. BANKER, July 17, 1990, at 1, col. 3 (Manufacturers Hanover allocates 5-6% of its \$60 million computer operating expenses to back-up services).

by so many officers of financial institutions involved in the savings and loan (S&L) scandal and the enormous cost to taxpayers should make everyone less sanguine about the ability of financial institutions to make the conversion to EFT efficiently.<sup>12</sup> Retailers switching over to POS also vary greatly in their financial capacity to buy equipment, train personnel, and absorb other related expenses.

It is impossible to ascertain the total cost of EFT and which parties will bear that cost due to various unknowns. For example, many financial institutions have entered into sharing arrangements and joint ventures as part of their deployment of ATMs. Recently, four superregional banks merged their ATMs and POS terminals, sending shock waves through the industry.<sup>13</sup> The consolidation seeks to reduce operating costs and increase product development while diverting business away from nonbank competitors.<sup>14</sup> It is not yet clear how far this will go, what entry, access, and pricing policies will be implemented in the 1990s, or what the precise antitrust restrictions may be.<sup>15</sup> Many of the controversies, however, are coming into focus. Companies that share ATM networks are susceptible to charges of antitrust violations when they collectively establish interchange fees and prohibit surcharges.<sup>16</sup> The government is reluctant to press charges when an established industry can rectify the situation on its own.<sup>17</sup> However, if firms fail to act government enforcement officials will likely step in. Because pricing policies are far from certain and antitrust implications are looming, long-range costs cannot be determined.

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12. See, e.g., McCarthy, *Florida Bank Regulators Begin Effort to Oust Chairman of CenTrust Bank*, WALL ST. J., Dec. 21, 1989, at A3 (Florida regulators allege the chairman of CenTrust ran the thrift as if it were his "personal piggy bank"); *S&L Failures Hit a New High in '89*, ATLANTA J. & CONST., Jan. 4, 1990, at D7.

13. Barton Crockett, *Four Giant Regionals to Link ATM Systems*, AM. BANKER, July 23, 1992, at 1, col. 4.

14. The companies contend that consumer payment systems should continue to be governed under the banks' auspices rather than nonbank companies. *Id.*

15. See SOLOMON, *supra* note 3, at 225; see also Kantrow, *Bankers Urge Card Giants to Settle Suit*, AM. BANKER, Oct. 2, 1989, at 1 (federal antitrust suit filed against Visa and Mastercard by 13 state attorneys general). See generally BAKER & BRANDEL, *supra* note 5, at pt. III.

16. Karen L. Grimm & David A. Balto, *How the Antitrust Laws Limit Pricing Policies of Shared ATM Networks*, BANKING L.J., Winter 1992, at 15.

17. Yvette D. Kantrow, *Interchange Fees: The Antitrust Watchdogs are Growing*, AM. BANKER, Aug. 31, 1992, at 7, col. 1.

Another unknown is the extent to which any cost savings will trickle down to the consumer. The finance charges on credit cards generally have remained at eighteen percent or more even when the market rates have fallen substantially.<sup>18</sup> In addition, only market forces in a very free market (no undue market power or concentration, adequate information, etc.) can ensure that savings from EFT will benefit EFT consumers. Examining the cost to consumers of EFT today cannot provide the answer. Short-term incentive pricing to build critical volume may not necessarily reflect the long-term pricing of a mature system.<sup>19</sup>

EFT results in some parties losing the float they enjoy when using other payment systems. Consumers who pay by EFT lose the float they enjoy when paying by check or credit card. Companies and the government lose float when they pay by EFT instead of by check. Related to float is the fact that until the drawee financial institution pays the check the customer can stop payment.<sup>20</sup> In credit card transactions the consumer can withhold payment.<sup>21</sup> In EFT the customer loses the right to stop payment.<sup>22</sup> For consumers who purchase defective merchandise loss of the right to stop or withhold payment can be very costly since the only remedy may be to hire an attorney and file an expensive lawsuit.

ATMs are touted for their convenience, but many consumers have been mugged at ATM sites and subjected to fraudulent practices whereby their funds have been withdrawn without their

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18. See SOLOMON, *supra* note 3, at 217; see also *Banks Accused of Gouging on Loan Rates*, ATLANTA J. & CONST., Apr. 5, 1991, at F3 (Consumer Federation of America reported that banks have not lowered interest rates on consumer loans, while at the same time the prime rate and the interest rate on consumer savings were declining). *But cf. Credit Card Rates Down—For Many*, ATLANTA J. & CONST., Sept. 4, 1992, at F1 (according to an industry newsletter, 77 of the top 100 card issuers have an interest rate under 16.6%).

19. In addition to the costs directly associated with consumer EFT, one authority has suggested the costs to banks resulting from huge wholesale wire transfer losses may be paid, in part, by retail consumers. See SOLOMON, *supra* note 3, at 213, 226.

20. U.C.C. §§ 4-303, 4-403 (1978).

21. 12 C.F.R. § 226(12)(c) (1990).

22. "As electronic payment systems effect final payments more rapidly, consumers' rights to stop payment on checks are increasingly threatened." *Consumer Protection and Payment Systems Regulatory Policy for the Technological Era*, 98 HARV. L. REV. 1870, 1876 (1985) (electronic transfer effectively "closes the stop-payment window"). *But see* BAKER & BRANDEL, *supra* note 5, at 12-13 (The EFT Act gives a recipient stop payment rights on pre-authorized debts relatively similar to the rule for checks in U.C.C. § 4-403).

authorization.<sup>23</sup> Absent intervention by the state attorney general, one bank's response was to tell consumers they had to bear the cost of falling prey to an ATM scam of which the bank was well aware.<sup>24</sup> Computer hackers emerged in the 1980s; they will not disappear in the 1990s.<sup>25</sup> EFT is subject to theft by insiders as well as thieves not connected with EFT providers.<sup>26</sup> In addition, bank employees make mistakes or fail to follow procedures,<sup>27</sup> and consumers may try to defraud banks by lying about the amount of cash they receive or deposit at ATMs.<sup>28</sup> Theft, fraud, and mistakes add to EFT costs.

Cost is a major issue in the provision of EBT. A report from the Department of the Treasury's Financial Management Service explores the contrasting perspectives held by the government, the private sector, and consumer groups on the costs of EBT and the allocation of those costs.<sup>29</sup> Various government agencies have different policies in regard to who will pay the costs of EBT. For instance, in EBT projects, the Food and Nutrition Services will issue 100% federal funding to states to pay for design and development costs.<sup>30</sup> Other agencies, such as the Financial Management Service and the Health Care Financing Administration, would institute a cost sharing program which allocates "among the program agencies, Financial Management Service (FMS), financial institutions, retailers, and recipients . . . costs associated with training, card issuance, personal identification number (PIN) encoding, and transaction fees."<sup>31</sup>

Banking associations hold positions contradictory to those of the government. The Independent Bankers Association of America concedes that banks might accept some EBT costs such

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23. Tietelbaum, *Violent Crimes at ATMs*, 44 BUS. LAW. 1145 (1989); Poulos, *As Use of ATMs Increases, So Does Fraud*, ATLANTA J. & CONST., Dec. 28, 1989, at C1.

24. See *Ognibene v. Citibank, N.A.*, 446 N.Y.S.2d 845 (N.Y. Civ. Ct. 1981); see also BAKER & BRANDEL, *supra* note 5, at S11-18 to S11-19 (cumulative supplement 1986).

25. E.g., *Diskette on Aids Dangers Destroys Data in Computers*, ATLANTA J. & CONST., Dec. 15, 1989, at A13; *Cobb Youth Tied to Massive Fraud by Computer Ring*, ATLANTA J. & CONST., May 26, 1989, at B1, B7; *Computers Get Coast-to-Coast Viral Infection*, ATLANTA J. & CONST., Nov. 4, 1988, at A1.

26. Poulos, *supra* note 23, at C1.

27. *McEvans v. Citibank*, 408 N.Y.S.2d 870 (N.Y. Civ. Ct. 1978).

28. Cf. *Porter v. Citibank*, 472 N.Y.S.2d 582 (N.Y. Civ. Ct. 1984).

29. See *EBT Revolution*, *supra* note 2, at 17-19.

30. *Id.* at 18.

31. *Id.*



as monthly operating expenses; however, it insists that the government should incur the more substantial product development costs.<sup>32</sup> In a relatively extreme viewpoint, the American Bankers Association stated "cost[s] should be born by the party that is receiving the benefit. In this case that would be the government."<sup>33</sup> The Consumer Bankers Association, in a 1991 policy paper, recommended that the government pay for "[b]asic account and transaction costs" and compensate banks for the "incremental costs" of providing EBT.<sup>34</sup>

Finally, the Center for Social Welfare Policy and Law opined that if participation in the EBT program is mandatory, under no circumstances should the recipient be responsible for transaction fees.<sup>35</sup> If the program is optional, the Center recommends a free limited number of transactions to ensure access to all recipients. If it is necessary to impose a fee on transactions above the number which would be free, recipients should be informed of the amount of the fee prior to agreeing to participate in the program so that their decision to use EBT is an informed choice.<sup>36</sup>

A natural disaster resulting in system-wide failure would be enormously costly to EFT. Relatively minor temporary disruptions occurred after the San Francisco earthquake of 1989. In part, careful advance planning prevented a major breakdown. However, dumb luck also played a major role. The telecommunications center of the region's ATM network somehow was not damaged even though it was only a few miles from the epicenter. A spokeswoman for the ATM system said: "This is the backbone of the California network. . . . If that went out, we would have lost the majority of the state."<sup>37</sup> An official from the Federal Reserve concluded: "They are very lucky."<sup>38</sup> Major earthquakes are rare; fires are not. A fire of undetermined origin at an Illinois Bell Telephone Company switching station in

32. *Id.* at 19.

33. *Id.* The ABA felt that recipients will shoulder the burden ultimately because the costs incurred in offering EBT will be reflected in the transaction price. *Id.*

34. Consumer Bankers Assoc., Electronic Benefits Transfer (EBT) Policy Paper (Mar. 1991) (unpublished manuscript) (on file with the *Georgia State University Law Review*) [hereinafter Consumer Bankers].

35. *EBT Revolution*, *supra* note 2, at 19. Rather, the fees should be paid out of the budget of the agency mandating participation. *Id.*

36. *Id.*

37. Cooper & Zuckerman, *Quake Closes Branches, Disrupts ATMs*, AM. BANKER, Oct. 19, 1989, at 1, col. 2.

38. *Id.*

Hinsdale, Illinois badly damaged vital telecommunications links between financial institutions and their data processing centers, customers, and the Chicago Federal Reserve Bank.<sup>39</sup> Illinois Bell estimated it would take more than a month to restore full and reliable service. One-third of the ATMs, 300 out of 900, were knocked out of action. One ATM officer commented: "We're helpless to some extent."<sup>40</sup> Bank officials said there were no steps they could have taken to prepare for this type of system breakdown. As the bankers pointed out, they were dependent upon Illinois Bell and that company's capacity to have backup facilities available.<sup>41</sup>

Government agency action can cause a breakdown in the payment system. In March of 1985 the Securities and Exchange Commission closed down an insolvent government securities dealer in Florida. This incident caused extreme financial difficulty for an Ohio financial institution which had invested heavily in securities in the Florida firm, resulting in panic-stricken depositors making a run on seventy-one state-insured Ohio thrifts. The State had to shut down the thrifts, and the Federal Reserve Bank of Cleveland returned wages and Social Security benefits which had been sent through the automated clearinghouse pursuant to direct deposit programs.<sup>42</sup> The federal government was caught flat-footed and did not know how it would get benefits to recipients. Large employers said they had no idea which of their employees had accounts at the closed thrifts. These employers did not intend to do anything until employees came to them and informed them they had not received their pay because of the closing of their thrifts. In addition to these system-wide incidents, there have been occurrences having a more limited impact, such as those involving computer breakdowns at individual banks and lost computer tapes.<sup>43</sup>

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39. Ringer, *Fire at Telephone Facility Disrupts Bank Services*, AM. BANKER, May 18, 1988 at 2, col. 1.

40. *Id.*

41. *Id.*

42. Weinstein, *Fed Returning Checks, ACH Items Sent to Shut Thrifts*, AM. BANKER, Mar. 21, 1985, at 1, col.

43. Groves, *Bank's Computer System Plays Hooky, Snarls Data*, L.A. TIMES, June 1, 1989, at pt. 4, p. 6., col. 5; Vollmer, *Banking Snafu Delays County Workers' Pay*, L.A. TIMES, May 30, 1987, at pt. 2, p. 6, col. 1.

These incidents raise questions for the 1990s: Can improvements be made to better prevent natural disasters and other occurrences from adversely affecting EFT systems?<sup>44</sup> Can better contingency plans and backup systems be designed? Can financial institutions or the government persuade third parties such as telephone companies to design better backup systems? Who bears the loss when the EFT system breaks down? The Electronic Fund Transfers Act provides that a financial institution is not liable if the failure to make a transfer resulted from an act of God or other circumstances beyond its control, the institution exercised reasonable care to prevent the failure, and if it exercised the diligence which the circumstances required.<sup>45</sup> Until case law interprets and applies these standards to specific situations it is impossible to ascertain the extent of financial institutions' exposure to liability.

Another EFT cost is the consumer's loss of privacy. As EFT increasingly pervades the payment system, the potential for privacy invasions by financial institutions, third parties supplied information by these institutions, outsiders such as "hackers," and the government continues to expand. In one instance, young computer hobbyists stole thousands of credit reports, including credit card numbers, by using a customer's password.<sup>46</sup> The juvenile hackers either stole the password or were aided by an insider and entered the system by simply calling the customer phone number. As the Office of Technology Assessment has noted, few legal safeguards exist to protect consumers from this threat.<sup>47</sup> The trend toward joint ventures and sharing makes the probability of the consolidation of financial information in just one or a few national data banks even more likely.<sup>48</sup>

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44. Measures taken by banks shortly before Hurricane Andrew struck ameliorated damage to ATMs. Kenneth Cline, *Hurricane Foils ATMs, Branches*, AM. BANKER, Aug. 25, 1992, at 1, col. 3.

45. 15 U.S.C. § 1693h (1982).

46. Bill Husted, *Police: Hackers Used Equifax Password*, ATLANTA J. & CONST., Feb. 18, 1992, at E1.

47. U.S. OFFICE OF TECHNOLOGY ASSESSMENT, *Selected Electronics Funds Transfer Issues* 29-30 (1982) [hereinafter OTA REPORT]. See generally *Bond Sales by Lincoln Savings Violated the Rules, Congressman Says*, ATLANTA J. & CONST., Nov. 28, 1989, at B2. (Privacy is invaded in non-EFT contexts. Lincoln Savings gave its customer records to bond salesmen working for American Continental, its parent. Congressman Gonzalez called this a "shocking violation of the customers' privacy."); Barton Crockett, *ACH Payment Seen Vulnerable to Fraud Losses*, AM. BANKER, July 29, 1992, at 1, col. 3.

48. See Mallory, *4 Major ATM Networks Merging*, ATLANTA J. & CONST., Jan. 10,

The problem with identifying these possible costs is that it is impossible to know how likely it is that they will be incurred or how great the cost might be. We do not know how many people will be mugged at ATM sites, how often privacy will be invaded, or how often natural disasters will disrupt EFT systems.

Another difficulty in determining the impact of these costs is the tremendous diversity in the consumer population. Computer banking at home is hardly an issue for the poor. But government use of computers to transmit benefits is vitally important to that population. Most people use ATMs with ease, but for the millions of Americans who are expected to receive government benefits through ATMs in EBT programs and who are illiterate, foreign-speaking, or disabled,<sup>49</sup> they may present formidable problems. The urban middle class has financial institutions, or at least ATMs, close to home and work. Persons in urban ghettos and rural areas often lack convenient facilities.<sup>50</sup> EFT costs can be compared to benefits only by also determining and contrasting the costs and benefits of the payment systems persons presently use. However, many people have no bank account and use only cash and money orders.<sup>51</sup> Many use checks, but not credit cards. Many who use credit cards use them as cash and check substitutes, never incurring finance charges. Recent reports have indicated that the number of people living in poverty will substantially increase in the 1990s.<sup>52</sup> This increase will most likely result in a divergence of educational and social class differences in the population. Consequently, people may continue

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1989, at B1; see also Kantrow, *Banks Join Cirrus, Plus Project*, AM. BANKER, Aug. 10, 1990, at 8, col. 3; Kantrow, *3 ATM Systems in Southwest Agree to Merge*, AM. BANKER, Dec. 19, 1989, at 1, col. 3.

49. David Teitelbaum, *Accessibility of ATMs to Handicapped Persons*, 44 BUS. LAW. 1154 (1989).

50. The increasing number of bank closings primarily in low-income neighborhoods has caused, *inter alia*, a shortage of ATMs in these areas. John Vaughn, *Banks Cash Out of the Ghetto*, 70 BUS. & SOC'Y REV. 40 (1989). In such cases, local businesses dependent upon community banking services are tacitly forced either to follow the banks or close their doors. *Id.* In a further show of economic discrimination, the same banks that pulled out of the low-income neighborhoods are offering additional new services in affluent neighborhoods. *Id.* at 40-41. Mr. Vaughn advocates increased regulation upon banks to encourage them to serve all communities by restoring branch banking. *Id.* at 42; see also Mark Leymaster, *Electronic Banking and the Poor: On the Short End of an Expensive Stick*, 14 CLEARINGHOUSE REV. 721, 728 (1980).

51. See *EBT Revolution*, *supra* note 2, at 7.

52. Carrie Teegardin, *U.S. Poor Increase By 2 Million*, ATLANTA J. & CONST., Sept. 4, 1992, at A1.

to need and use several types and combinations of payment systems, making cost comparisons difficult. For example, in 1990 Congress passed the Americans with Disabilities Act.<sup>53</sup> That law imposes substantial costs upon financial institutions which will have to convert ATMs so they are accessible to blind customers and those in wheelchairs.<sup>54</sup>

In the 1990s industry will make decisions which will have a substantial impact on EFT. It is unclear what the final restructuring of the financial services industry will look like after the S&L bailout.<sup>55</sup> It is not certain how far institutions will want to go in joint ventures and sharing arrangements or how far the government will let them go.<sup>56</sup> Financial and loss allocation arrangements among industry participants may change in the next decade. Perhaps technological advances and incentives will make home computer banking commonplace among the middle and upper classes by 1999.<sup>57</sup> In pursuit of that goal, several companies are developing advanced telephone systems for home banking. One prototype would incorporate a computer and screen into a telephone which would facilitate bill-paying, account inquiries, and home shopping.<sup>58</sup>

There is no way to predict what changes may occur in statutes and regulations. For example, the Federal Reserve Board may use its recently granted authority to completely regulate payment systems.<sup>59</sup> Case law may dramatically change the EFT picture if

53. 42 U.S.C. §§ 12101-213 (1991).

54. Matt Barthel, *ATM Access for the Blind Posing Toughest Problems*, AM. BANKER, (Dec. 24, 1991) at 3, col. 4.

55. "With the earth shifting beneath the entire financial institutions industry, when the dust settles we'll see who has the best underwriting standards." Trigaux, *Moment of Truth is Coming for Banks and Thrifts*, AM. BANKER, Dec. 26, 1989, at 1, col. 1 (quoting Bruce Haring, an analyst with Salomon Brothers Inc.). Bank and thrift mergers, both voluntary and involuntary, will "realign industry power and force some dramatic restructuring." *Id.* In the wake of such restructuring banks and thrifts will be implicitly forced to consolidate in order to improve performances and survive in the industry. *Id.*; see e.g., Barton Crockett, *supra* note 13, at 1, col. 4 (four superregional banks formed a joint venture to combine ATM and POS terminals).

56. For an extended discussion of the antitrust implications of sharing ATMs, see Grimm & Balto, *supra* note 16; see also Yvette D. Kantro, *Interchange Fees: The Antitrust Watchdogs are Growling*, AM. BANKER, Aug. 31, 1992, at 7, col. 1.

57. Allen, *Home Banking Gets Another Chance*, WALL ST. J., Dec. 7, 1989, at B1 (a device known as Minitel is used as a low cost computer substitute in France).

58. Jeanne Iida, *Chemical Eyes Tandem Home-Banking Project*, AM. BANKER, Aug. 26, 1992, at 3, col. 1.

59. Expedited Funds Availability Act § 609(b), 12 U.S.C. § 4008 (1988); see Robert D. Cooter & Edward L. Rubin, *Orders and Incentives as Regulatory Methods: The*

courts are receptive to private class action suits or aggressive actions initiated by state attorneys general.

It is safe to say the 1990s will see a significantly expanded use of electronic money. It is not yet certain that we will be better off as a result. The challenge for all those affected is to closely monitor developments and consider prompt legal measures as soon as substantial problems are identified.

### III. ELECTRONIC GOVERNMENT BENEFITS TRANSFER SYSTEMS

In the 1990s, recipients of government benefits will feel the impact of electronic money more dramatically than others. The 1980s was the decade of the direct deposit of Social Security, civil service, railroad retirement and veterans' benefits.<sup>60</sup> The federal government has targeted the 1990s as the decade for electronic transfer of other government benefits through ATMs and POS terminals.<sup>61</sup> The program commenced with agreements between the federal government and four states to conduct pilot projects.<sup>62</sup> Recipients of food stamps, aid to families with dependent children, Supplemental Security Income (SSI), and Medicaid are included. The government's objective is to expand the program nationally. Studies indicate that fifty percent of Americans with an annual income of less than \$10,000 do not have accounts with financial institutions.<sup>63</sup> This segment of the

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*Expedited Funds Availability Act of 1987*, 35 UCLA L. REV. 1115, 1148-49 (1988).

60. See BAKER & BRANDEL, *supra* note 5, ¶ 5.03. Since 1983, the Treasury Department has been instrumental in proposing legislation which would further the initiation of a widescale electronic transfer program. The proposals, in 1983 and again in 1985, would have required federal employees to receive their wages or salaries via electronic transfer. *Id.* Although Congress failed to advance the Treasury Department's proposals, the department will most likely continue to seek legislation concerning federal employee wages in the 1990s. *Id.*

61. Yvette D. Kantrow, *Electronic Transfer of Benefits Wins US, Bank Support*, AM BANKER, June 7, 1989, at 1, col. 1; see *Benefits Delivery Changed by Technology* 62 A.B.A. BANKING J. 62 (July 1989) (EBT project in New Mexico); see generally, Mark E. Budnitz, *The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action*, 43 MERCER L. REV. 827 (1992).

62. *EBT Revolution*, *supra* note 2, at 39-40.

63. STATES GENERAL ACCOUNTING OFFICE, GOVERNMENT CHECK-CASHING ISSUES 19-20 (1988); Kantrow, *supra* note 61, at 1, col. 1. A report on EBT by the Department of the Treasury Financial Management Service listed seven reasons why such a large percentage of households are "unbanked":

- 1) inaccessibility to and inconvenient hours of financial institutions;
- 2) distrust of, or lack of familiarity with, banking institutions;

population soon will be propelled from the unbanked to the electronically banked without going through the transitional stages, including the use of checking accounts, that the rest of those who use electronic money have experienced.

The benefits of EBT are many. Under the current system recipients' benefits checks often are lost, stolen, or destroyed. EBT is intended to ameliorate these problems. The current system is very expensive to operate.<sup>64</sup> The government believes EBT will be much less expensive since paper transfers will be eliminated.<sup>65</sup> Financial institutions and merchants hope EBT will provide the opportunity to build their customer base.<sup>66</sup> The potential benefit is enormous given the tens of millions of recipients and billions of dollars involved.

#### A. *Concerns of the Recipients of Government Benefits*

In addition to the advantages of EBT, many potential costs can also be identified. Furthermore, many fundamental decisions will have to be made before we can know what the essential features of EBT will be. The following is a brief sampling of some of the issues.

It is unclear whether recipients will have the freedom to choose between EBT or the paper system. Federal regulations require that participation in "experimental, pilot, or demonstration projects" involving recipients of Supplemental Security Income be voluntary.<sup>67</sup> The government could follow

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- 3) previous negative experience with balancing a checkbook resulting in overdrawn accounts, service fees, or closing of an existing account due to mismanagement;
  - 4) preferring to operate in all cash environment by keeping finances completely off the books;
  - 5) lacking enough funds to meet minimum balance requirements, bank fees, or justify use of an account;
  - 6) inability to read and therefore comprehend forms required to open an account;
  - 7) inadequate math and reading skills to manage an account.

See *EBT Revolution*, *supra* note 2, at 7.

64. See *EBT Revolution*, *supra* note 2, at 25-27. In the current check environment, charges for such items as envelopes, postage, printing, and storage must be incurred, whereas an EBT system would be devoid of such charges. *Id.* at 26.

65. See BAKER & BRANDEL, *supra* note 5, ¶ 5.03[4].

66. Collie, *Banks Cash In on Public Assistance*, BANKERS MONTHLY, Feb. 1990, at 33 ("Banks see a potential bonanza by helping the government issue benefits electronically.")

67. 42 U.S.C. § 1310(2), (2)(B) (1988) ("With respect to the participation of

the practice of some employers in the private sector,<sup>68</sup> however, and require recipients to receive other types of benefits via EBT, and even require receipt of SSI through EBT once demonstration projects are terminated and a permanent system is implemented.

In a recent advertising brochure for one of the pilot projects, the program is touted as fast, easy, and safe; the disadvantages of receiving a benefit check in the mail are highlighted; there is no hint of any downside to EBT.<sup>69</sup> However, the satisfactory resolution of many issues is necessary for the system not only to be efficient, but also to be effective. Questions initially arise as to the system's compatibility with the recipient. In order to be successful, the project must be flexible enough to meet various demands and satisfy relatively diverse user groups. These groups must fully understand how their benefits will be disbursed and how to operate the ATM and POS terminals; consequently, training is "absolutely critical to meet the objectives of EBT projects."<sup>70</sup> It is unclear who will absorb the cost of such training when EBT is implemented nationwide. As indicated earlier, that and other decisions regarding who will bear the costs of EBT have not yet been made and the various parties involved do not agree.<sup>71</sup>

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recipients of supplemental security income (SSI) in experimental, pilot, or demonstration projects . . . the Secretary may not require any individual to participate in a project; . . .").

68. Many in the private sector lack the freedom to choose whether to participate in EFT programs. In 18 states employers can require their employees to receive their wages via direct deposit. In three of those states, the employee can be fired if he or she refuses to authorize payment by this means, 53 BNA BANKING REP. 339 (Sept. 11, 1989).

69. Brochure for the SecureCard offered by the First National Bank of Maryland (on file with the *Georgia State University Law Review*).

70. See *EBT Revolution*, *supra* note 2, at 46. The Family Support Administration felt training is so important that it issued a directive stating: "[r]ecipients are to be notified in advance of EBT implementation, instructed in the use of POS/ATM devices, and provided with information as to the location of these devices and which of them provide full cash withdrawals." *Id.* at 47. Recipients in pilot projects have been trained in the complete use of ATM/POS terminals using audio-visual programs. *Id.* The audio-visual program is comprised of a slide presentation accompanied by an oral script. Additionally, simulation ATM/POS terminals are utilized at the training seminar to offer hands-on experience in their operation. The program must be somewhat altered in the case of non-English speaking recipients. Additional resources will have to be allocated to develop multilingual supplemental programs. See also OTA REPORT, *supra* note 47, at 19 (system needs to be designed so non-English clients can use it).

71. See *supra* notes 29-36 and accompanying text.



One particular concern is how such a machine-driven system can adequately serve recipients who are illiterate. An effective EBT program must somehow reach these recipients, perhaps with audio ATM/POS terminals, or by incorporating symbols into the terminal's display by modifying the software. Literacy programs, not directly associated with EBT, do exist and have been relatively successful in teaching basic reading and writing necessary to operate terminals.<sup>72</sup>

Perhaps the greatest uncertainty in the government's race for approval of EBT is hurdling the obstacle of effecting service to the disabled. These recipients present a formidable challenge to the feasibility of a successful EBT system. In July of 1990, President Bush signed the Americans with Disabilities Act (ADA)<sup>73</sup> which has the effect of mandating that EBT be accessible to the disabled. The ADA has great impact on financial institutions by outlawing discrimination against the disabled by public and private persons and accommodations.<sup>74</sup> Section 302(b)(2)(iii) requires a financial institution to provide "auxiliary aids and services"<sup>75</sup> enabling disabled persons to utilize the institution's financial services, unless the institution can show that doing so would fundamentally alter its service and create an "undue burden."<sup>76</sup> Undue burden is defined in the ADA regulations to mean "significant difficulty or expense."<sup>77</sup> Remodeling a single ATM to comply with the ADA could cost as much as \$10,000.<sup>78</sup> Notwithstanding physical accessibility to

72. *Center Makes Progress in Solving Adult Literacy Problems*, PROFILE, Nov. 15, 1989, at 2, col. 1.

73. 42 U.S.C. §§ 12101-213 (1990).

74. Harkin, *Our Newest Civil Rights Law*, TRIAL, Dec. 1990, at 56.

75. "Auxiliary aids and services" are defined in regulations promulgated pursuant to the ADA. 56 Fed. Reg. 35597 (July 26, 1991).

76. 42 U.S.C. § 12182(b)(2)(iii).

77. 56 Fed. Reg. 35594 (July 26, 1991). The regulations promulgated by the Justice Department define "undue burden" as "significant difficulty or expense" and provide a list of factors to be considered in determining whether an action would result in an undue burden. These factors include: the "nature and cost" of the action which would otherwise be needed to comply with the ADA; the impact of the action on the operation of the site, including the financial resources, number of people employed at the site, and safety requirements; relationship of the site to the parent corporation; the size and financial resources of the parent; and the type of operations of the parent. *Id.*

78. Barthel, *Bankers Cautious on Disability Act*, AM. BANKER, Nov. 5, 1990, at 3, col. 1 (quoting David Bucci, a director of marketing at the North Canton, Ohio-based Interbold).

ATM terminals, EBT must somehow demonstrate an ability to reach the forty-three million disabled Americans who lead isolated lives and do not go to places of public accommodation.<sup>79</sup> Mailing these people a plastic card with a secret number and a slick brochure is totally inadequate.<sup>80</sup>

An ancillary concern especially crucial to the disabled, yet applicable to all recipients, is whether EBT will be convenient to recipients. If the government chooses to make recipient participation in EBT voluntary it must be able to offer a convenient service to ensure sufficient numbers use EBT.<sup>81</sup> Although EBT is designed to operate through ATMs and POS terminals in stores, when problems arise recipients will need convenient access to an office of the financial institution disbursing the recipients' government benefits. It may be impossible to meet that need because financial institutions increasingly are closing their branches in low-income communities<sup>82</sup> and concentrating on wealthier neighborhoods.<sup>83</sup> Along with a paucity of branch banks, poorer neighborhoods also have relatively few ATMs<sup>84</sup> because many banks believe ATMs installed in low-income areas are not economically justifiable.<sup>85</sup> Contrary to that belief is the success of a New Jersey bank which placed a trilingual ATM in a working-class neighborhood. The machine performed over 4000 transactions in its early months proving that "minority and ethnic groups can be converted to active users of ATMs."<sup>86</sup> Whether or not this isolated success

79. *Id.*

80. As William Farrell, a fiscal management analyst with the Social Security Administration working on a pilot project in Baltimore, commented, "We are trying to crack a very difficult segment of the population." Kantrow, *Social Security to Try Debit Card*, AM. BANKER, Oct. 5, 1988, at 10, 12.

81. See *EBT Revolution*, *supra* note 2, at 48. "In almost all the neighborhoods on the Southside [of Atlanta] there is a need for good basic services like grocery stores—services many people take for granted." Michelle Hiskey, *For Poor, It's a Long Way to Grocery Store*, ATLANTA J. & CONST., Mar. 19, 1992, at B1.

82. Vaughn, *supra* note 50.

83. The same banks closing branches in low-income communities are opening new services in wealthier neighborhoods. *Id.* at 40-41.

84. *Id.* at 42. In addition to the small number of ATMs in poor neighborhoods, there are few POS terminals in most regions of the country. Consumer Bankers, *supra* note 34, at 3.

85. Leymaster, *supra* note 50, at 728. Another reason for few ATMs in poor communities is the perception that those areas are high crime areas. Consumer Bankers *supra* note 34, at 3.

86. Gross, *N.J. Bank Using Trilingual ATM in Urban District*, AM. BANKER, Dec. 11, 1979, at 3. Consumers reported that the ATM was popular because of its

will have an impact upon financial institutions remains to be seen. However, as a practical matter, convenience must remain a primary issue for EBT supporters.

Recipients need readily available POS terminals as well as ATMs. ATMs dispense cash only in multiples. Low income recipients need POS terminals in order to be able to withdraw every last dollar by the end of the month in order to pay for necessities. The frequency of store and bank closings, especially in poor communities, raises the fear that recipients will be left without any convenient access to their funds if the one bank or store in their neighborhood which participates in EBT suddenly leaves. Another issue related to convenience is the imposition of charges incurred for using ATMs of other banks. An ATM may be suitably located but because it is another bank's ATM the transaction fees may render the machine too expensive to use. Presently more than nine out of ten banks charge for such "foreign" transactions, with fees ranging from fifty cents to two dollars.<sup>87</sup> The convenience offered by ATMs does not come without a cost.

EBT recipients are issued plastic cards with which they gain access to their benefits through ATMs and POS terminals. These cards are in effect national identity cards, and as such spark privacy and security concerns.<sup>88</sup> It is possible that the possession of such a benefit card might stigmatize a portion of the population on social and economic grounds;<sup>89</sup> "our society

fast service. *Id.* "All that is required [to create active ATM users] is an aggressive marketing program and a strong selling effort by your branch personnel." *Id.*

87. Matt Barthel, *47% of Banks Now Charge for Using Rivals' ATMs*, AM. BANKER, Aug. 7, 1992, at 1, col. 3 ("ATMs are increasingly marketed as a convenience that customers should be willing to pay for.").

88. Recently, privacy concerns have been somewhat eased by the enactment of the Computer Security Act of 1987. Pub. L. No. 100-235 (1988). The Act governs "federal computer systems" which encompass data communication networks between computers and systems operated by private contractors for the federal government. *Id.* § 2(d)(2). The Act requires operating agencies to develop security systems to protect sensitive information. *Id.* § 4. The Act buttresses its mandate with an employee training program requirement which seeks to ensure that relevant employees are knowledgeable and properly trained to implement the security system. *Id.* § 5.

89. See generally *Automation of Public Assistance Programs: Increasing Access, Efficiency, and Utilization Through Automation*, Hearing Before the Domestic Task Force of the House of Representatives Select Committee on Hunger, 101st Cong., 1st Sess. 1 (1989) (to the extent welfare recipients are identifiable as such when they shop, they are stigmatized; this leads many not to participate in benefit programs at all) [hereinafter *Hearings*].

has had a long history of opposition to the concept of a universal identifier.<sup>90</sup> These concerns will be even greater if the government decides to issue a multifunctional card which accesses more than one benefit program. To prevent abuses, the government will have to develop a security system with safeguards to prevent benefit providers from gaining access to any information beyond what that provider must have to complete a transaction.<sup>91</sup>

A major area of controversy centers around the ownership of the accounts involved in an EBT system. Whether the accounts are recipient-owned or government-owned determines many aspects of responsibility, liability, and legal rights. If the accounts are recipient-owned, benefits are directly deposited into an account controlled by the recipient which contains no other kinds of funds.<sup>92</sup> Of primary importance regarding recipient-owned accounts are the provisions of Regulation E of the Electronic Fund Transfers Act of 1978.<sup>93</sup> Regulation E governs and regulates electronic transactions in *consumer*-owned accounts including a mandated error resolution procedure,<sup>94</sup> rules on liability for unauthorized transfers,<sup>95</sup> and consumer rights to receive documentation of transfers.<sup>96</sup> Regulation E works as a built-in contract whose terms cannot be negotiated, placing an uneducated recipient on a somewhat more equal bargaining level with the government provider.

The regulation E rules on the documentation of transfers illustrate the advantages to recipients of having a consumer-owned account, as well as the inadequacy of that regulation in the EBT environment. Regulation E guarantees that recipients are provided with necessary, but insufficient, information on their accounts. Section 205(a) requires the financial institution or a merchant to provide consumers with a receipt at the time they use an ATM or POS terminal, and specifies certain information

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90. Stone, *A National Identity Card?*, U.S. NEWS & WORLD REPORT, Vol. 89, Sept. 15, 1980, p. 88. See OTA REPORT, *supra* note 47 at 15.

91. See OTA REPORT, *supra* note 47, at 15 (restricting, for instance, food stores providing food stamp benefits from accessing Medicaid information).

92. See *EBT Revolution*, *supra* note 2, at 44.

93. 12 C.F.R. § 205 (1988).

94. 12 C.F.R. § 205.11 (1988).

95. 12 C.F.R. § 205.6 (1988).

96. 12 C.F.R. § 205.9 (1988).

that must be on that receipt.<sup>97</sup> Because recipients are on such a tight budget, one of the most important items of information recipients need is the balance in their account so they can be sure they have enough for necessities. Unfortunately, § 205 does not require receipts to contain that information. The outstanding balance as well as other needed information such as the amount of any fees and charges and the address and telephone number where recipients can notify the financial institution of errors is required only on the periodic statement.<sup>98</sup> It would be far more advantageous for recipients to receive this information at the time of the transaction, but at least the Regulation ensures it is provided at some time. However, the Federal Reserve Board has proposed not requiring institutions to send periodic statements to EBT recipients.<sup>99</sup>

The above discussion of the adequacy of Regulation E may be moot in relation to most of the EBT programs implemented so far, because generally the government owns the account in those operations.<sup>100</sup> In a government-owned account, funds are kept in a central data bank containing "authorization files" for each recipient; the ATM or POS terminal electronically communicates with the data bank and upon authorization disburses the allocated funds to the recipient.<sup>101</sup> If Regulation E applies only to consumer-owned accounts,<sup>102</sup> its protections are unavailable to recipients in programs where the government owns the account. For example, the recipient would not have the benefit of Regulation E's legally mandated error resolution procedure.<sup>103</sup> In its pilot projects, the government, despite being under no legal compulsion to do so, has provided a customer service staff which is available at a twenty-four hour, toll-free number.<sup>104</sup>

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97. 12 C.F.R. § 205(a) (1990).

98. 12 C.F.R. § 205(b) (1990).

99. The FRB has proposed amending Regulation E by providing that periodic statements would not be required for EBT recipients if they could obtain their account balances at ATMs or by phone, and could obtain written itemization of transactions for the past two months upon request. 58 Fed. Reg. 8714 (1993) (to be codified at 12 C.F.R. § 205) (proposed Feb. 17, 1993).

100. *EBT Revolution*, *supra* note 2, at 43.

101. *Id.*

102. *Id.* at 44. 12 C.F.R. § 205.2(b) (1988) defines the scope of the Act to include only consumer-owned accounts. The FRB proposes to amend Regulation E to include EBT transactions regardless of who owns the account. 58 Fed. Reg. 8714 (1993) (to be codified at 12 C.F.R. § 205) (proposed Feb. 17, 1993).

103. 12 C.F.R. § 205.11 (1988).

104. *EBT Revolution*, *supra* note 2, at 48. The staff will be responsible for (1)

Implementing this service on a national basis may require substantial expenditures. In addition, it is unclear whether this service can resolve many of the problems which may arise. For example, while the government's staff presumably can answer questions involving the recipient's continued eligibility and level of benefits, it probably cannot resolve the recipient's problems relating to the malfunctioning of an ATM. Presumably only the owner or operator of the ATM can remedy that type of difficulty, but that entity is under no statutory obligation to deal with recipient complaints since Regulation E does not apply, and that entity has no contractual relationship with the recipient.

The potential for error in the EBT system will be present whenever the government makes a change in the amount of benefits based on a change in eligibility or an alleged prior overpayment or underpayment.<sup>105</sup> While some changes are based on individual circumstances, others are nationwide, requiring adjustments to millions of accounts, either because of a universal change in authorized benefits levels or a change necessitated by a court decision.<sup>106</sup> Especially troubling is the position of the recipient when the government reduces or terminates benefits. Depending on the procedure employed, the recipient may or may not be notified and have an opportunity to object prior to the government seizing benefits before the recipient can withdraw them.<sup>107</sup> Assuming the government notifies the recipient of a change in the level of benefits, any

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providing information about benefits status, (2) assisting recipients with specific problems, and (3) receiving reports of equipment failure. *Id.* "Effective customer service procedures are absolutely essential components of a successful EBT program." *Id.*

105. See generally Leymaster, *supra* note 50, at 117 (discussing problems of recipients of Social Security benefits through direct deposit when the government takes back disputed amounts by means of recoupment or reclamation). An MIT survey of 50 large businesses found that their databases were less than 95% accurate. William M. Bulkeley, *Databases are Plagued by Reign of Error*, WALL ST. J., May 26, 1992, at B6. "As databases become larger, the chance of error goes up; our ability to deal with them goes down, because we haven't developed defense systems against anomalies and errors." *Id.* (quoting Kamran Parsaye, President of IntelligenceWare, Inc.).

106. *Sullivan v. Zebley*, 493 U.S. 521 (1990) (Social Security regulations for determining whether a child is disabled for purposes of qualifying for supplementary security income benefits were in violation of Social Security Act).

107. Leymaster, *supra* note 50, at 118 (if the government uses recoupment, the recipient is informed in advance and can contest the intended action; if the government seizes through reclamation, there is no prior notice).

discrepancy between the amount in that notice and the amount which the bank actually makes available will result in extreme consternation among recipients and many calls to the banks. Banks can be expected to refer recipients to the applicable government agency. Hopefully, that agency will be able to sort out and rectify the error. Based on the experience of one consumer law advocate's office with direct deposit of benefits, however, the government may be unable or unwilling to provide timely satisfactory resolution of these types of problems.<sup>108</sup>

Arrangements must be made between banks and the government to determine responsibility for a myriad of situations. For example, to which entity do recipients go when their benefit cards are lost or stolen? Who will replace the cards? How soon will the cards be replaced? How will recipients obtain their benefits before their cards are replaced?<sup>109</sup>

In addition to recipients' concerns about the ability of the government and the private sector to effectively communicate and coordinate, recipients also will have cause for concern when various government agencies try to coordinate their programs in order to use EBT for multi-benefit transfers. For example, attempts to integrate Aid to Families With Dependent Children and the food stamp program have proven difficult.<sup>110</sup>

The major justification for converting to EBT is the money it will save the government. However, savings will not occur unless large numbers of recipients either voluntarily join the program, or the program is imposed upon them. Requiring recipients to participate is troublesome, given the possible costs to recipients. Voluntary participation will produce the necessary volume only if many of the questions posed above are answered and recipient concerns are addressed in a satisfactory manner.

### *B. Private Sector Concerns*

Many banks and retailers in the private sector have expressed concern over EBT-related issues. One of their chief concerns is cost, including the issue of who will pay for extra ATM/POS

108. *Id.* at 113.

109. Regulations proposed by the FRB place these responsibilities upon the government. 58 Fed. Reg. 8714 (1993) (to be codified at 12 C.F.R. pt. 205) (proposed Feb. 17, 1993).

110. *Id.* at 72; *see also id.* at 10-11 (each federal agency dispensing benefits opposes other agencies' imposing on their "turf").

terminals which may be needed.<sup>111</sup> In addition, many bankers do not view EBT as a profit-making opportunity, and because concerns exist that fees will not offset costs, only a few banks and retailers have participated in EBT.<sup>112</sup> To the dismay of private sector participants, the Treasury's Financial Management Service (FMS) has stated that the FMS will not pay for any new terminal placement.<sup>113</sup> Only existing terminals will be utilized, unless retailers incur terminal placement costs.<sup>114</sup> In addition to new terminals, modifications to the existing terminals will most likely be required by the Americans with Disabilities Act of 1990.<sup>115</sup> These modifications will necessitate physical changes in the terminals' accessibility as well as software changes to facilitate service to deaf, blind, or illiterate recipients.<sup>116</sup> The cost of such modifications is likely to be substantial.<sup>117</sup>

Another concern shared by retailers and banks is long lines anticipated at ATMs and POS-equipped check-out lanes. While there is no legal obligation upon a retailer to equip every lane with a POS terminal, many agencies have recognized possible discrimination implications with singling out special lanes for benefit recipients.<sup>118</sup> The burden will rest upon the retailer to ensure that enough POS terminals are in place to avoid backup during the time benefits are issued, and concurrently avoid designating POS lanes in such a way as to violate nondiscrimination regulations.<sup>119</sup>

The physical safety of recipients utilizing ATM terminals is an issue that is very much in the public eye. Although studies have shown the rate of crime at ATMs has decreased,<sup>120</sup> the fact

111. *Hearings*, *supra* note 89, at 81.

112. Matt Barthel, *U.S. Tactic for Distributing Welfare Benefits Draws Fire*, *AM. BANKER*, Dec. 16, 1991, at 1, col. 1. These negative viewpoints may slowly change as several pilot EBT programs have realized some degree of success. Matt Barthel, *Electronic Welfare: Snubbed But Gaining*, *AM. BANKER*, Mar. 25, 1992, at 1, col. 3.

113. *See EBT Revolution*, *supra* note 2, at 73-74. Contrary to this position, the Food Marketing Institute opined that retailers should not pay for any additional costs for EBT transactions. *Id.* at 73.

114. *Id.*

115. *See* Pub. L. No. 101-336, 104 Stat. 327 (1990); *see also supra* notes 73-80 and accompanying text, discussing the ADA's impact upon ATM/POS terminal modifications; *cf.* Matt Barthel, *6 Inches Separate Bankers From ATM Rulemakers*, *AM. BANKER*, May 8, 1992, at 3, col. 1.

116. *See* Barthel, *supra* note 54, at 3, col. 4.

117. *See supra* note 78 and accompanying text.

118. *See EBT Revolution*, *supra* note 2, at 73.

119. *Id.*

120. Kantrow, *ATM Crime is Down in Past Two Years, Trade Group Finds*, *AM.*



remains that an ATM user is vulnerable. According to a government report, financial institutions shoulder the responsibility to "insure safety" for their customers.<sup>121</sup> Insuring safety is a very broad and vague mandate. There are measures banks can take in order to minimize the risk of crime: lighting the ATM terminal area, using surveillance cameras, installing "panic buttons," and promoting consumer awareness programs.<sup>122</sup> However, these steps cannot *insure* safety. After placing this responsibility upon the banks, the government report states if consumers use precaution and common sense, the process should be safe;<sup>123</sup> this statement leaves in doubt exactly what the financial institutions are obligated to do. In a long fought battle, the New York City Council passed a bill which forces banks to adopt strict security requirements for ATMs.<sup>124</sup> Crime deterrent measures such as video cameras, door locking mechanisms, and minimum lighting requirements will cost New York banks approximately fifty million dollars to install and sixty-one million dollars a year to maintain.<sup>125</sup> New York bankers are still fighting the bill, and it is not yet clear whether it will become a model for other cities.

Unauthorized withdrawals from ATMs present another set of concerns. Federal law affords recipients who use ATMs a degree of limited liability when an unauthorized withdrawal occurs, at least when the recipient owns the account.<sup>126</sup> An unauthorized use occurs, *inter alia*, when a customer is forced by a thief to withdraw funds.<sup>127</sup> If a customer voluntarily withdraws money

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BANKER, Dec. 7, 1989, at 1, col. 1. The incidence of criminal activity against ATM users has fallen from one violent crime in every 3.5 million transactions to one in every 9.9 million transactions. *Id.*

121. See *EBT Revolution*, *supra* note 2, at 49. "The financial institution which services the ATMs must be aware of its responsibility to insure safety and minimize risk to its customers." *Id.*

122. *Banking on ATM Security After Dark*, ATLANTA J. & CONST., Feb. 12, 1990, at B4.

123. See *EBT Revolution*, *supra* note 2, at 50.

124. Matt Barthel, *Banks Gird to Fight ATM Rules*, AM. BANKER, July 31, 1992, at 2, col. 3.

125. Matt Barthel, *How N.Y. Banks Botched Effort to Soften ATM Bill*, AM. BANKER, Aug. 11, 1992, at 1, col. 1.

126. 12 C.F.R. § 205.6 (1988). The FRB proposes to extend protection to government owned accounts. 58 Fed. Reg. 8714 (1993) (to be codified at 12 C.F.R. pt. 205) (proposed Feb. 17, 1993).

127. 12 C.F.R. § 205.2(1) (1988). Sometimes a whole company acts as the thief. In one instance, four firms pressured consumers into disclosing their card numbers, and

and is then robbed, the bank is not required to cover the loss, although typically a bank will do so.<sup>128</sup> Any loss not covered by the bank will probably be unrecoverable; the Treasury Department study declares: "Federal Government cannot be held liable for lost or stolen funds."<sup>129</sup>

The private sector also is concerned with what will happen during downtime caused by ATM/POS computer failure. When ATMs break down, recipients will flock to bank lobbies, causing inconvenience to them, other customers, and bank personnel. It is unclear how banks are supposed to handle recipient withdrawals under such circumstances. The EBT program contemplates withdrawals only at ATMs. Downtime can be handled in a somewhat more efficient manner at POS terminals. Retailers will be required to manually perform the transaction after verifying sufficient funds exist by calling an EBT center.<sup>130</sup> Some downtime provisions limit the cash amount available, but if an authorization number is received from the EBT center, there should be no limit except the account balance.<sup>131</sup>

The private sector needs answers to many other critical questions. For example, in order to assess the cost of the program, the government must tell financial institutions whether EBT accounts will be interest-bearing. Retailers need to know how much time they will be allowed to take to complete EBT transactions.<sup>132</sup> Since retailers will be expected to dispense cash to recipients, they want to know if the government will provide cash advances to ameliorate retailers' concerns about their ability to maintain sufficient liquidity.<sup>133</sup> Small retailers may be concerned that, if EBT becomes popular, they will be at a

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persuaded the consumers to deposit charges into foreign bank accounts. Barton Crockett, *Card Giants File Laundering Suit*, AM. BANKER, Aug. 25, 1992, at 3, col. 3. After the charges were deposited, the consumers could withdraw the funds as cash, and the "brokers" would take a cut. *Id.* "This is far and away the largest and most far-reaching international fraud we've ever uncovered," said an attorney for Visa and Mastercard. *Id.*

128. *Banking on ATM Security After Dark*, ATLANTA J. & CONST., Feb. 12, 1990, at B4.

129. *See EBT Revolution*, *supra* note 2, at 50.

130. *Id.* at 75 (Food and Nutrition Service opinion).

131. *Id.*

132. *Hearings*, *supra* note 89, at 144.

133. *Id.* at 145. In one pilot project, retailers were "generally unwilling" to distribute cash benefits. *Id.* at 29.

competitive disadvantage because they will not be able to afford the electronic equipment which is required in order to participate.<sup>134</sup> Everyone would benefit if the government would establish minimum performance standards for EBT systems so judgments could be made about the type of equipment that will be required and how much it will cost.<sup>135</sup>

To the extent these issues are not resolved, or are resolved in a manner the private sector regards as unsatisfactory, business will be reluctant to participate. Such reluctance could prove fatal to EBT, for as one official deeply involved in implementing EBT has said: "[T]he long-range affordability of cost benefit or cost savings . . . from this system, will occur only when it becomes part of a larger public/private network in which government is only one of many actors."<sup>136</sup>

### C. Government Concerns

Government promotion and implementation of EBT thrusts the government into a position of multifaceted conflict. On the one hand, Congress has authorized the executive branch to distribute huge amounts of money to low-income people because it recognized that the poor are in desperate need of money for necessities, and if we assist these citizens, society as a whole benefits in many respects, such as in lower crime rates and health costs. The welfare programs which will be included in EBT involve many people who are disadvantaged in several ways besides their poverty: they are the elderly, the sick, the disabled, the undereducated, and the very young. They need the government not only to dole out money, but to provide information and solve problems relating to their benefits.

On the other hand, agencies have an obligation to safeguard the public treasury by providing benefits only to those who are eligible and in the most efficient manner possible. EBT requires the government to accomplish these objectives by establishing a close and mutually satisfactory working relationship with the private sector. The private sector's agenda, however, is different from that of the government. The altogether legitimate goal of

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134. *Id.* at 5.

135. *Id.* at 82.

136. *Id.* at 29 (statement of Thomas J. Fashingbauer, Director, Human Services, Ramsey County Community Human Services Dept., St. Paul, Minn.).

business is profit. This is achieved by attracting the maximum volume of business, not from customers in general, but from the particular type of customers to whom each business is marketing its goods and services. Many businesses do not include recipients of government benefits in their marketing plans. One way to achieve necessary volume is to offer convenience in the form of short lines at ATMs, bank lobbies, and store check-out lanes. EBT may conflict with that strategy. Profit is also earned by low overhead costs. EBT may increase those costs by requiring purchases of electronic money transfer equipment and staff training.

It is unclear whether the government can satisfactorily perform its various roles. Can it distribute money electronically in a cost-effective manner? Can it require or strongly encourage unbanked and unsophisticated recipients to interact only through ATMs while providing service, security, and privacy to recipients? Can it overcome its own bureaucracy and inevitable turf battles to implement a multi-benefit EBT system? Can it make EBT attractive to the private sector by establishing noninterest bearing accounts, routing recipients away from business and to government agencies when problems arise, providing retailers with cash advances, conducting staff training and other functions, and still make EBT less costly than the present system?

Even more troubling than these issues is the impression that the government may not be sufficiently aware of what it should be concerned about. The Treasury's Financial Management Service states in a recent report: "FMS views the EBT product for direct Federal benefits as a private sector offering."<sup>137</sup> The consequences of this general approach are critical. It means the Financial Management Service does not favor government owned EBT accounts.<sup>138</sup> This is advantageous to recipients because if recipients have problems with financial institutions providing EBT, they have the protections provided by Regulation E. However, many problems may arise requiring recipients to deal with the government agency providing the benefit. For example, the financial institution may fulfill its error resolution procedures simply by informing the recipient that its investigation indicates

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137. *EBT Revolution*, *supra* note 2, at 21.

138. *Id.*

the error was not caused by the institution and that the recipient should talk to the welfare agency.<sup>139</sup> If the government's attitude is that EBT is a "private sector offering," recipients may find a welfare agency that tries to shuffle them back to the financial institution when they try to resolve their problems.

This government attitude also has costly consequences for the private sector. The Financial Management Service does not intend to pay for ATMs or POS terminals in future EBT programs.<sup>140</sup> Retailers who presently have POS equipment will not be compensated for participating in EBT,<sup>141</sup> and the Service does not commit itself to pay for modifications of existing ATM and POS equipment.<sup>142</sup> Financial institutions are responsible for insuring the safety of recipients.<sup>143</sup> These policy decisions are consistent with the government's need to make EBT cost effective. Those decisions and the attitude that EBT is a private sector offering, however, may not be consistent with the view that to be successful, EBT must attract substantial numbers of enthusiastic businesses who want to stay in EBT for the long term.

#### CONCLUSION

The slow growth of EFT services such as POS and home banking in the 1980s was disappointing to many. But hopefully, improvements will continue to be made, and when these and other forms of electronic money gain wider acceptance in the 1990s, they will be of higher quality, and be provided at lower cost with greater safeguards to more informed consumers in a competitive marketplace. Because of the high stakes involved and the possibility of widespread loss, developments in EFT should be monitored to determine where legal intervention is necessary to ensure minimum performance standards and adequate remedies. There is an urgent need for someone to come forward to provide the public with the information it needs to evaluate the

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139. Mark E. Budnitz, *Federal Regulation of Consumer Disputes in Computer Banking Transactions*, 20 HARV. J. ON LEGIS. 31, 76 (1983) (financial institution can limit its investigation to what occurred within its own four walls).

140. *EBT Revolution*, *supra* note 2, at 73.

141. *Id.* at 74.

142. *Id.* (The cost of modifications "would have to be evaluated to determine cost apportionment.")

143. *Id.* at 49.

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bewildering variety of payment system options now available. The development of EBT in the 1990s will be the greatest challenge the EFT industry has faced. A great deal of "pre-nuptial" planning will be necessary if this marriage of the private sector and government is to succeed financially and result in recipients receiving benefits in the supportive environment they deserve.

Electronic money in the 1990s promises substantial benefits, but also will result in much cost. Many fundamental decisions concerning the basic structure of the payment system will be made. Whether participants in the electronic payment system will be better off in this decade remains to be seen.

