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# Electronic Funds Transfer: A Technology in Search of a Market

Peter H. Schuck

# ELECTRONIC FUNDS TRANSFER: A TECHNOLOGY IN SEARCH OF A MARKET

PETER H. SCHUCK*

Many of the nation's bankers, businessmen, and banking regulators have a grand vision of the consumer's future. Just over the horizon, they fervently hope, is the cashless, paperless society, made possible by a massive electronic web linking retail establishments, employer payroll departments, government agencies, financial institutions, and other instrumentalities of payment and receipt. Fund transfers will move throughout this web more or less instantaneously and invisibly. Plastic will replace cash, electronic impulses will supplant paper, and all parties involved — consumers, merchants, bankers, regulators, and employers — will reap the advantages of this efficient, streamlined system. Electronic funds transfer (EFT) will be the classic case of a Pareto optimal solution to a problem — everyone can be made better off without anyone being made worse off.

This, at any rate, is the vision. But like most visions, the enthusiasm of the visionary conspires with the pristine purity of the abstract goals to produce a rather limited image of the world to come. This image tends to neglect those portions of reality which mar the vision. And when the vision is ultimately reified and made flesh, the persistent realities doggedly assert themselves, often in unpleasant and anti-social ways.

Consider, for example, the seat belt buzzer and interlock systems mandated by federal law at considerable expense to consumers. The vision that launched that technology, of course, was of a vast reduction in the number of deaths and serious injuries from automobile accidents. The zeal of the visionaries was fueled by the demonstrable ability of seat belts to prevent casualties and the very real social benefits that such prevention would produce. What they evidently failed to take into account, however, was that many drivers would not perceive the new technology as a benefit (despite mountains of data to the contrary) or would regard the benefit as outweighed by the cost, and would simply refuse to use the seat belts. And, despite truly

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* B.A., Cornell, 1962; J.D., Harvard, 1965; L.L.M., New York University, 1966; M.A., Harvard, 1969. Director, Washington Office of Consumers Union. The author's views are entirely his own and do not necessarily reflect the views of Consumers Union. This article is based on a speech, "EFT and the Consumer," presented by Mr. Schuck at a conference sponsored by The Federal Reserve Bank of Boston. The *Maryland Law Review* gratefully acknowledges the Bank's permission to include this material in this Symposium.

imaginative efforts on the part of the government to render non-use extremely difficult, that is precisely what has happened.[1]

The point of the seat belt example, of course, is not that it was a mistake to mandate these systems (though a cost-benefit analysis of this reform might well indicate that), but that an important piece of information, bearing directly on the issue of the social cost-effectiveness of the technology, was lost somewhere between the vision and the fact. And that stubborn bit of reality haunts the technology today, showing no signs of receding before the tide of well-intentioned reform. The wasted expense to those consumers who were obliged to purchase the systems, only to ignore or disconnect them, is a price of ignoring that reality.

Every commercial technology creates social costs just as surely as it generates efficiencies and other economic benefits. The automobile, for all of its virtues, has permanently disfigured the physical structure of our communities and distorted the social structure of our society. It has caused massive air pollution, taken millions of lives, and has probably contributed substantially to the degraded physical vigor of the population. These and other costs associated with automobile technology are, in the aggregate, very great indeed, and few of them were foreseen either by the promoters of the automobile or by its consumers. Had they been foreseen, the technology might have taken a radically different form, or alternatives to the automobile might have been preserved and developed, or both. In their roles as taxpayers, consumers, and voters, a more clairvoyant American people might well have insisted upon controlling and humanizing the automobile before the technology had become economically, politically, and socially institutionalized — in short, before it became too late.

EFT is not the automobile, of course, and an analogy between them cannot be pressed too far. In many ways, however, the case for asking the hard questions about EFT now rather than later, and for imposing such restrictions upon EFT as are necessary to make it acceptable to consumers, is far more compelling than with respect to the automobile at the comparable stage of its development. Perhaps the most important single factor distinguishing EFT from the automobile and from other "inevitable technologies" is one that is rarely mentioned: significant consumer demand for any extensive EFT system or, indeed, for any change in the present paper transfer system, apparently, does not exist. Indeed, consumers appear to be actively hostile to the institution of such systems.

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1. Robertson and Haddon, *The Buzzer-Light Reminder System and Safety Belt Use*, 64 AM. J. PUB. HEALTH 814 (1974).

The evidence for this proposition is, in a word, overwhelming. In 1970, a study conducted for the American Bankers Association to measure consumer, business, and banker attitudes toward EFT concluded:

> The fact that consumers do not regard checks as inconvenient leads to the finding that a revised payments system holds no benefits from the consumer's point of view.
>
> However, our findings go further. They show not only that the consumer sees nothing to be gained from a switch to electronic funds transfer. They show that the consumer will feel a definite loss.[2]

Consumer attitudes do not appear to have changed materially since 1970. Just two years ago, another study sponsored by the American Bankers Association yielded similar findings.[3] Significantly, this study excluded from its ambit all EFT systems except "direct pay deposit" (*i.e.*, automatic payroll deposit) and "prearranged transfers" (*i.e.*, transfers between a consumer's accounts in a single bank). Thus, the study not only excluded retail point of sale transfers but also excluded preauthorized payments between consumers and businesses, even payments which were fixed, periodic, and substantial, such as insurance premiums. In short, the EFT systems under consideration were exceedingly limited: they did not include any of those systems which would dramatically transform consumer styles of payment and receipt, which are thought to constitute the core of a mature EFT system.

Nevertheless, consumer opposition to even these limited EFT systems was evident. In the case of "direct pay deposit," the employees who favored this system apparently did so not because it reduced their utilization of checks, but primarily because it *increased* checking. The study notes:

> Where provided, free checking is clearly perceived as the major advantage by respondents. This is particularly true for those workers who may have been considering a checking account but have delayed the decision because of cost factors.
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> . . . .
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> For some employees, particularly blue-collar and lower echelon workers, direct pay deposit provides an initiation into the use

2. BRAND, GRUBER, STANDER AND COMPANY, ATTITUDES TOWARDS THE PAYMENTS SYSTEM: A DEPTH STUDY FOR THE AMERICAN BANKERS ASSOCIATION 15 (August, 1970) [hereinafter cited as *1970 ABA Study*].

3. BOOZ-ALLEN & HAMILTON AND NATIONAL ANALYSTS, MARKETING UPDATE: INSIGHTS INTO TWO PAYMENTS SYSTEMS PRODUCTS (October, 1973) (a study conducted for the American Bankers Association) [hereinafter cited as *1973 ABA Study*].

> of a checking account. *For these workers, the system comes to be desired because of the advantages inherent in the use of a checking account.* Convenience in paying bills is quickly discerned.[4]

It is ironic, to say the least, that a technology justified chiefly on the ground that it will end or reduce the necessity for paper, turns out to be valued by consumers precisely because, and to the extent that, it actually increases checking.[5]

Consumer hostility to prearranged transfers, even the very limited ones involved in the study, was also evident. The study noted that consumer acceptance of this system declined as one moved from automatic saving plans to prearranged payment of large, fixed payment bills for major expenditures (such as mortgages and auto loans) to prearranged payment of revolving credit and other bills which vary in amount.[6] Although the study does not indicate just how favorable or unfavorable consumer attitudes toward these systems were (the rankings were only comparative), it did characterize consumer views toward transfers or variable payments:

> Payment of revolving credit and other bills which vary monthly in amount is seen as neither particularly convenient nor in the consumer's self-interest. Indeed, it is generally viewed by consumers as limiting their ability to manipulate their own finances, to make discretionary expenditures, or to exert leverage in cases where they wish better service from a creditor. Restriction of these options is viewed as limiting the customer's ability to 'control his money'.[7]

Again, it is important to stress that these attitudes were elicited in a study that did not even include those payments the electronic transfers of which are generally believed to arouse the most hostility on the part of consumers — point of sale payments to non-bank sellers of goods and services.

A third, very recent study of consumer attitudes toward EFT has produced similar findings. Commissioned by the Special Committee on Paperless Entries (SCOPE committee) of the Virginia Bankers Association and published in June 1974, the study concluded:

> The most important attitudinal aspect of the present bill paying system is that customers are very satisfied with it. Eighty-two percent of customers strongly agree that they like the all-around

4. *Id.* at 37 (emphasis added).

5. Other advantages, as well as many disadvantages, of the "direct pay deposit" system were perceived by users, of course, but those who favored the system on balance apparently did so because it enhanced their access to checking. *Id.* at 37–38.

6. *Id.* at 50.

7. *Id.* at 50–51.

> convenience of a checking account. This strong favorability toward checking accounts increases among those customers who are heaviest users of checks — the better educated and higher income families. Nearly eight customers in ten disagree with the statement, 'It is difficult to keep my balance correct in my checking account.' This contrasts with attitudes toward the statement, 'Using a credit card makes paying bills much easier.' Only a slim majority (53 percent) agree with this statement, compared with the 94 percent who agree (either 'strongly' or 'somewhat') on the all-around convenience of a checking account.[8]

Consumers, it would appear, are not alone in harboring grave doubts concerning EFT. The 1970 ABA study discussed above indicated that neither the bankers nor the businessmen surveyed perceived EFT to be of particular benefit to them. Bankers, the study concluded, believed that implementation of EFT systems would entail substantial outlays without corresponding economic benefits. Checking accounts were seen as profitable banking services and the resulting paperwork, while worrisome, remained well within the banks' processing capacity. More rapid payment systems might be more "efficient," but they would also reduce, and perhaps wholly eliminate, much of the "float" which is so profitable to the banker. Unless the bank's depositors were predominantly corporate payees, whose accounts would receive more rapid in-flows than before, this feature might prove to be exceedingly costly. The 1973 ABA study noted that banks had not even vigorously promoted *in-bank* prearranged transfers.[9] Their enthusiasm for prearranged transfers to third parties, one can safely assume, would be considerably less robust due to the negative float implications to the banks in many or most such cases.

Business attitudes were rather similar. The costly changes in corporate payment processing and computer systems which EFT would entail were perceived as the principal disadvantage of the technology.[10] Elimination of float would be financially attractive to many businesses,[11] to be sure, but EFT would not necessarily accomplish that. The study found:

> As businessmen see it, the obstacle to quick payment is not the banking system. It is the amount of time the payer takes before

8. *Virginia's EFTS Study,* THE SOUTHERN BANKER, Aug., 1974, at 38, 39 (containing excerpts from VIRGINIA CONSUMER ATTITUDES TOWARD PAYMENT SYSTEMS, a study conducted by Opinion Research Corporation for the Virginia Bankers Association, June, 1974) [hereinafter cited as *Virginia Study*].

9. *1973 ABA Study, supra* note 3, at 48.

10. This objection was also noted in the *1973 ABA Study. Id.* at 34-35.

11. Direct pay deposit, of course, reduces the employer's float, a factor which inclines many, though not all, companies to reject DPD. *See id.* at 33-34.

> he decides to send the money. Compared to this 'decision time', the day or two of float is insignificant.[12]

And while pre-authorized debiting would eliminate the payer's decision time, businessmen felt that neither consumers nor business customers would acquiesce in pre-authorized debiting.[13] A period for payment, like a tax deduction, is an advantage not lightly relinquished once it is enjoyed.

Lest it appear that consumer disquiet concerning EFT simply reflects a Luddite mentality — a phenomenon that credit card companies and manufacturers of microwave ovens and fast foods have not discerned — it is well to touch upon the various benefits and costs to consumers of EFT. For obvious reasons, no effort is made to quantify these benefits and costs. The data required to do so not only does not exist, but in the nature of things can never exist. Moreover, the intensity of feelings about particular features of EFT will vary considerably from consumer to consumer. Indeed, what some will consider a benefit (for example, the convenience of not having to write checks) others will regard as a cost (loss of the sense of control derived from the act of check-writing).

Finally, one's evaluation of EFT will depend critically upon what kind of system one is considering, for the range of possibilities is broad and the difference between direct pay deposit, on the one hand, and point-of-sale EFT, on the other, is very great.

Nevertheless, when one canvasses the features of EFT from the "average" consumer's point of view, the opposition to it no longer seems very mysterious; rather, it appears to be rooted in the most hard-headed rational considerations of *homo economicus*.

## BENEFITS OF EFT

*Postage and Mailing Costs* — To the extent that EFT obviated the necessity for purchases of stamps and envelopes, an out-of-pocket cost to the consumer would be eliminated. Many banks, however, already provide pre-addressed, postage-free envelopes for deposits, withdrawals, and loan repayments by mail. Many commercial creditors do likewise. The costs of doing so, of course, are probably passed on to the consumer indirectly through increased prices for the product or service for which payment is made.

*Convenience* — With the advent of credit cards, banking-by-mail and card-actuated cash terminals, this virtue of convenience of EFT

12. *1970 ABA Study, supra* note 2, at 18.
13. *Id.* at 19.

assumes somewhat diminished significance, but it remains a clear benefit. The magnitude of the benefit will depend to a considerable extent upon the value that the consumer places on his or her time. For example, the Virginia study found that higher income consumers, being particularly mindful of the time consumed in paying bills, tended to stress this advantage.[14] Similarly, the aged and the infirm will tend to value the physical energy consumed in going to and from the bank or to cash facilities.

Verification of the consumer's identity and authenticity is apparently simpler under an EFT system than when a check is written. On the other hand, consumers who use EFT through point-of-sale terminals may find that the transaction requires somewhat more time than simply cashing a check.[15] On balance, as Governor Mitchell of the Federal Reserve Board has concluded, "convenience . . . has generated little spontaneous enthusiasm thus far."[16]

*Personal Security* — It is likely that a widespread EFT system would, by reducing the necessity to carry cash, lower the incidence of robbery and, therefore, of violence to the person. Similarly, forgery of checks would become a historical curiosity. However, the incentives for crimes against the system as a whole through unauthorized access to the computer program or unauthorized use of a consumer's card, are enormously enhanced, as discussed below.

*Interest on Demand Accounts* — While existing law prohibits financial institutions from paying interest on demand deposits,[17] the thrift institutions have managed to provide the near-equivalent of an interest-bearing demand account on a limited scale. In addition to the negotiable order of withdrawal (NOW) account operative in Massachusetts and New Hampshire, the First Federal Savings & Loan of Lincoln, Nebraska, has installed an EFT system with point-of-sale terminals in certain supermarkets and the mutual savings banks have created a Mutual Institutions National Transfer System (MINTS) to promote their participation in EFT development. The reason is clear: linking EFT to their interest-bearing time depositary accounts would confer an enormous competitive advantage on the thrifts over the commercial

14. *Virginia Study, supra* note 8, at 40.

15. *See An S&L Puts the Teller in the Supermarket,* BUS. WEEK, Apr. 20, 1974, at 88, 91, describing the operational EFT system in Lincoln, Nebraska.

16. Address by George W. Mitchell, *Recent Developments in Money Transfers,* EFTS symposium of the Atlanta Committee on Paperless Entries, Feb. 26, 1973, at 6.

17. The argument is often made, of course, that by providing funds transfer services, often at little or no cost, commercial banks are in fact paying depositors interest on their balances.

banks, for it would permit the thrifts to pay a premium interest rate (now five and three-fourths percent) on an account that would possess the transferability characteristics of a checking account. The legality of this innovation is presently before the courts on precisely this ground, among others.[18] If upheld, Congress will be under considerable pressure to restore the competitive equilibrium either by limiting the power of the thrifts or by permitting the commercial banks to pay interest on demand deposits.[19] If the latter, consumers will benefit greatly.

## COSTS OF EFT

*Control Over Personal Finances* — A major disadvantage associated with EFT is the consumer's loss of control over certain financial decisions. The ability to manipulate one's finances within broad limits, to determine which bills to pay when, and to exploit the benefits of float during the check-clearing process, are not only incidents of personal autonomy but can be of great economic value to the consumer.

Which of us has not practiced the art of "playing the float"? Of overdrawing on our account secure in the knowledge that the check that we deposit will clear before our own checks are presented for payment? Of holding off our creditors until our paycheck can be deposited? Of obtaining additional time for payment by post-dating our check? Indeed, it is probably no exaggeration to state that a substantial portion of the population manages to make ends meet only by resort to such fancy financial footwork. An EFT system based upon prearranged transfers completely deprives consumers of this kind of control; any EFT system, however, even one not involving prearranged transfers, will greatly diminish it.

To those who argue — with considerable justification — that such stratagems by consumers simply exploit an inefficient clearing process and impose unnecessary costs on the system as a whole, consumers can respond that while this may be true, they will not willingly, and could not rationally, relinquish such an advantage in the interests of the system as a whole, at least not unless they receive equivalent benefits in return.

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18. *See, e.g.,* Bloomfield Fed. Sav. & Loan Ass'n v. American Community Stores Corp., Civil Action No. 74-0-146 (D. Neb., June 11, 1975).

19. Both of these changes would be contrary to current legislative trends. The proposed Financial Institutions Act, an outgrowth of the recommendations of the Hunt Commission report, would retain the existing prohibition against the payment of interest on demand deposits, but would expand the powers of the thrifts. *See generally* THE REPORT OF THE PRESIDENT'S COMM'N ON FINANCIAL STRUCTURE & REGULATION (1971).

*Proof of Payment* — The cancelled check is a convenient and universally recognized proof of payment. It is widely used in the preparation of tax returns, the informal resolution of disputes, in formal legal proceedings, and in triggering a depositor's legal duty to detect forgeries or alterations and report them to the bank so that the bank's duty not to pay unauthorized items can attach.[20]

Indeed, so essential to consumer remedies is the cancelled check as proof of payment that any EFT system that hopes to gain consumer acceptance will have to invent some substitute for it. In a recent study, fully ninety-four percent of the consumers surveyed agreed that a cancelled check was the most reliable proof of payment.[21] Computer data certainly is no adequate substitute. Considerable doubts concerning its admissibility into evidence remain,[22] and such data is not easily accessable to consumers.

*Stopping Payment* — The right of consumers to direct a stop payment order to a bank[23] gives them enormous leverage in their dealings with merchants, landlords, and others with whom they do business, leverage that is often necessary to ensure that the consumer's legal rights are in fact protected. Abrogation of this right would fundamentally transform the economic bargaining power of consumers. If anything, the trend in consumer protection is in the opposite direction, as evidenced by the Federal Trade Commission's Trade Regulation Rule requiring a "cooling off period" for certain types of door-to-door sales transactions, within which the consumer may rescind the transaction.[24]

Any acceptable EFT system will have to accommodate this well-established safeguard for consumers. The California SCOPE guidelines confirmed it by requiring a depositor's bank to recredit a previous debit entry upon notification by the depositor that the debit was in error, so long as certain time limitations are observed.[25] These protections would have to be greatly strengthened in an EFT system which, unlike the original California SCOPE project, was not limited to prearranged transfers (which are far less likely to give rise to errors than on-line transfers effected at the point-of-sale).

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20. *See* UNIFORM COMMERCIAL CODE §§ 4-401 and 4-406.

21. *Virginia Study, supra* note 8, at 39.

22. *See* Survey, *Toward a Less-Check Society,* 47 NOTRE DAME LAW. 1163, 1265-83 (1972).

23. UNIFORM COMMERCIAL CODE § 4-403.

24. 16 C.F.R. § 429.1 (1974).

25. LOS ANGELES AND SAN FRANCISCO CLEARING HOUSE ASSOCIATIONS, SCOPE PROCEDURAL GUIDE 37-38 (1972).

*Security Against Theft or Error* — We are only beginning to recognize the vastly increased potential for theft of depositors' funds through misuse of an EFT system. Computer crime is facilitated by a number of unique features: the anonymity and remoteness of the thief; the reduction of numerous processing operations into an instantaneous transfer; the fact that the controls against theft are themselves susceptible to re-programming at the behest of the thief; the weakness of psychological and social inhibitions against "computer rape"; the inadequacy of typical computer security measures; and the delays in discovery of computer thefts.[26]

Existing safeguards against computer thefts are clearly ineffective. One student of computer crime notes:

> Donn Parker, after looking into the recorded cases of computer crime, concluded that hardly any were discovered through normal security precautions or accounting controls and that nearly all of them were uncovered by happenstance. Some experts estimate that the ratio of undiscovered to discovered crimes may be on the order of 100 to 1.[27]

He goes on to note the conclusion of RAND and other students of computer crime that "no major defense system has withstood a dedicated attack."[28] The Equity Funding imbroglio stands as eloquent witness to this proposition. In the halcyon day when the nation's banks are finally linked together in an integrated EFT network, the computer crimes of the past may well be recalled with nostalgia as quaint petty larcenies.

But criminal intent is not the only source of concern to consumers in a world of EFT systems. Human incompetence or error, once computerized, may be as difficult to detect and correct as computer crime is to solve. And errors there will surely be. One need only reflect on the Apollo tragedy to appreciate the vulnerability of complex interdependent systems to error, even under the best of conditions. By the same token, one need only reflect upon one's own experience with computerized billing to appreciate how incorrigible such systems can become.[29] Consumers confronted with a choice between having to persuade a banker that an error has been made and having to get a computer re-programmed may well prefer the former.

26. For a recent discussion of computer theft, *see* Porter, *Computer Raped by Telephone,* N.Y. Times, Sept. 8, 1974 (Magazine), at 33.

27. *Id.* at 34.

28. *Id.* at 43.

29. In the recent *Virginia Study,* seventy-seven percent of the consumers surveyed agreed that the more complicated a billing system is, the harder it is to get mistakes fixed. Fifty-nine percent disagreed with the statement that billing systems handled by computer are usually free from error. *Virginia Study, supra* note 8, at 39.

*Privacy* — The data on the susceptibility of computerized systems to criminal intrusions suggests another risk that seems to inhere in EFT — breaches of privacy. As the American Civil Liberties Union has pointed out, EFT will render a person's entire financial history, including the most intimate details, available "at the touch of a button."[30] The Association of Data Processing Service Organizations, Inc., agrees that this capability now exists.[31] The findings of a recent GAO study showing the extent to which government agencies have disseminated personal information in their files to credit bureaus and other third parties indicates that such concerns are well-founded.[32] And as the Watergate disclosures remind us, political incentives are as capable as economic ones of generating such intrusions. In contrast, the existing transfer system, though arguably inefficient in the narrow economic sense, is more difficult to abuse; the valued information is dispersed rather than being stored in one central location.

*Reduced Competition* — EFT raises a number of troublesome issues revolving around the question of competition in the banking industry. Governor Mitchell has identified one such issue — "whether paperless technology can make competing clearing systems economically feasible."[33] If the question is put another way — are the initial costs of EFT so great that the system can only be established if all or nearly all banks participate — the implications of this question for consumers become clearer. The comments on Regulation J submitted to the Federal Reserve Board by numerous banks, savings and loans, and credit unions indicate a widespread conviction that only the relatively large institutions can afford the equipment and software costs of an EFT system going beyond pre-arranged in-bank transfers and perhaps direct pay deposit. Whether these assertions are correct or are merely the cries of institutions unwilling to compete, remains to be seen. On the other hand, it appears that an advanced EFT system is economically viable only if a substantial proportion of the banking industry participates. In view of the apparent lack of consumer demand for EFT, the "critical mass" of institutions required in order to make EFT profitable may be unattainable in the absence of public subsidies

30. Comments of Robert E. Smith on Regulation J. (on file at the Federal Reserve Board).

31. Comments on Regulation J. (on file at the Federal Reserve Board).

32. GENERAL ACCOUNTING OFFICE, REPORT TO THE SECRETARY OF THE ARMY ON POSSIBLE IMPROVEMENTS IN ARMY PRACTICES OF PROTECTING INFORMATION PERSONNEL FILES FROM UNAUTHORIZED DISCLOSURE AND PROBLEMS IN CORRECTING PERSONNEL INFORMATION, August 5, 1974 (P-74-FPCD-101).

33. Address by George W. Mitchell, *Money Payments in Perspective,* Conference of the Charge Account Bankers Division, American Bankers Association, September 25, 1973, at 8 [hereinafter cited as Mitchell Sept. 1973 Address].

or governmental coercion in the form of regulatory standards. If history is any guide, either of these strategies will tend to reduce competition in the industry by forcing the smaller firms out of business and/or by immunizing firms from the discipline of market forces.[34]

In addition, an advanced EFT system will require joint cooperative arrangements on a long-term basis between large numbers of banking institutions. Observing that competition probably cannot be counted on "to play much of a disciplining role when transfer arrangements involve associations of banks," Governor Mitchell has concluded that continued Federal Reserve regulation of check clearing will therefore be required.[35]

Even in the absence of public subsidies, an advanced EFT system is likely to involve significant cross-subsidies among consumers. The suit filed in 1974 by Consumer Union against American Express Company involved the question of whether cash customers should be required to pay for credit card services which they do not enjoy. Similarly, a mature EFT system will mesh together into one system a number of banking services (credit, third party transfers, savings, cash) which are not purchased separately by, and provided separately to, the consumer. This "bundling" of services may be exceedingly difficult or expensive to "unbundle" for purposes of pricing; if so, many consumers will end up paying for more services than they want or use, while others will use more than they pay for.

If consumer sovereignty is to be a reality in EFT, it is imperative that an EFT network ensure that consumers, merchants, and businesses retain the freedom, as both a legal and practical matter, to hold accounts in whatever institutions they wish, and that those who wish to avoid use of EFT altogether be free to do so, so long as they are willing to pay the costs.

These principles have several corollaries. First, public policies which have the effect of coercing institutions to participate in EFT must be resisted, even if the result is that EFT cannot achieve the critical mass for its viability.[36] Secondly, the commercial banks cannot be permitted to exclude savings and loans and other thrift institutions from full participation in EFT.[37] Thomas R. Bomar, Chair-

34. If this is true, it does not necessarily mean that such regulation would not, on balance, be socially desirable.

35. Mitchell Sept. 1973 Address, *supra* note 33, at 8.

36. It is entirely possible that the market, if left undisturbed, will yield both an EFT system that is too limited to be economically feasible and a conventional paper transfer system whose unit costs will increase due to a loss in volume resulting from exploitation of EFT by large institutions.

37. The arguments in favor of such exclusion, relating to the differing regulatory requirements applicable to commercial banks and the thrifts are themselves only

man of the Federal Home Loan Bank Board, has noted one dramatic anti-competitive consequence of such an exclusion:

> It is well known that thrift institutions compete with commercial banks for savings. This competitive environment in the past has been enhanced by the fact that the employee, with paycheck in hand, can make the choice of where he will deposit his funds. Many presently choose to deposit all or a portion of their pay in savings and loan associations. Current information indicates that between 5 and 15 percent of savings deposits in savings and loans come from payroll checks carried or mailed by employees to savings and loan associations. Because only commercial banks are presently allowed to be designated as depositories in these new electronic systems, and since employers who decide to use the system can be expected to encourage their employees to participate, the opportunity for an employee to choose a savings and loan as his depository is effectively eliminated.
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> . . . .
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> . . . [S]avings and loan associations have thus far been systematically excluded from membership for the purpose of receiving [Automated Clearing House] deposits directly.[38]

And how, one wonders, will the forty percent of the population who do not now have checking accounts fare in a world of EFT systems?[39] Will more businesses refuse to accept cash, as some car rental agencies now do, insisting that customers participate in EFT in order to do business with them? Will participants in an EFT system, motivated by a desire to reduce their costs and/or maximize their cash flow, be able to use economic leverage to force non-participants into the system? These issues must be resolved before consumers can be certain that EFT systems will function in their economic interests.

Having pointed out some of the anti-competitive risks which EFTS could entail, it is also important to recognize that EFTS possess the potential to dramatically *enhance* competition in banking and consumer finance markets. Certainly, EFTS can obliterate

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plausible in the context of the over-regulated, anti-competitive system now in place. If the recommendations of the Hunt Commission are adopted and extended, any rationale for exclusion of thrifts from EFT systems will vanish. *See generally* THE REPORT OF THE PRESIDENT'S COMM'N ON FINANCIAL STRUCTURE & REGULATION (1971).

38. *Hearings on H.R. 11221 Before the Subcomm. on Bank Supervision and Insurance of the House Comm. on Banking and Currency,* 93d Cong., 1st Sess. 18–19 (1973). *See also* comments of Donald I. Baker of the Antitrust Division, U.S. Department of Justice, *id.* at 155–63.

39. The *Virginia Study* found that such persons, usually in lower economic brackets, gain "the emotional satisfaction of actually feeling and handling cash . . . and [are] unlikely to respond favorably to" an EFT system. *Virginia Study, supra* note 8, at 39–40.

many geographical restraints on competition and will probably hasten the repeal of state branching restrictions, which the Supreme Court has recently described as "a simple device to protect outlying unit banks from the rigors of regional competition."[40]

## CONCLUSION

Recalling once again that each consumer will balance these benefits and costs associated with EFT differently, and that EFT covers a wide variety of system types, it is nevertheless difficult to escape the following conclusion: on balance and given the existing set of incentives confronting them, most consumers will not willingly opt for EFT. That being so, it seems likely that EFT will either have to be forced upon them or will remain under-developed, at least until the costs of the existing transfer system press heavily upon consumers and until ways are found to overcome some of the more undesirable features of EFT.

Incentives to consumers could be rationalized considerably if the full costs of checking services were imposed on consumers, instead of being hidden in other bank charges. "Free" checking accounts, like "free" lunches, are a figment of the bank marketing executive's imagination. The process of "unbundling" banking services and pricing them at full cost would be vastly accelerated if banks could pay interest on demand deposits, thus encouraging them to impose service charges on check usage. This would undoubtedly reduce the flow of paper through the system.[41]

As noted above, some of the deficiencies of EFTS can probably be cured without great difficulty. For example, providing a stop-payment period, as the California SCOPE project has done, and furnishing proof of payment should be well within the capabilities of EFTS. Other obstacles, however, will remain formidable and perhaps insurmountable. The risks of computer crime, surveillance and the problem of diminished control over finances, for example, seem to be firmly associated with EFTS. These problems will simply have to be confronted and solved if consumers are to reap the benefits which EFTS promise.

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40. United States v. Citizens & S. Nat'l Bank, 95 S. Ct. 2099, 2117-18 n.30 (1975).

41. *See* Eisenmenger, Munnell & Weiss, *Pricing and the Role of the Federal Reserve in an Electronic Funds Transfer System,* in FEDERAL RESERVE BANK OF BOSTON, THE ECONOMICS OF A NATIONAL ELECTRONIC FUNDS TRANSFER SYSTEM, App. B, Oct. 1974.