A Public Policy Overview of Electronic Funds Transfer Systems

William R. Weber
A PUBLIC POLICY OVERVIEW OF ELECTRONIC FUNDS TRANSFER SYSTEMS

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Today the legal issues relating to electronic funds transfer systems (EFTS) are being joined on many fronts, generating a substantial amount of legislation, regulation and litigation at both the state and federal levels.1 Although specific legal problems associated with EFTS have been addressed by a number of commentators,2 a congressional perspective necessarily must be broader. From this perspective, a “legal issue” is any issue of concern to a lawmaking body. Since the business of Congress is to translate public interest into public policy, any observations about recent efforts at legislation, regulation and litigation must take into account one fundamental question: What is the appropriate role of government, particularly the federal government, in the development of EFTS?

I. EFT DEVELOPMENT—A BRIEF HISTORY

Much of the legislation and litigation to date has been in response to actions taken by the federal financial regulatory agencies, principally the

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1. For discussion of state legislation, see notes 11-30 and accompanying text infra. For discussion of federal legislation, see notes 83-96 and accompanying text infra. For discussion of federal regulation, see notes 31-40 and accompanying text infra.

Federal Reserve Board, the Federal Home Loan Bank Board, and the Comptroller of the Currency.

The first real government impetus toward the development of EFT came in November of 1973, when the Federal Reserve Board of Governors made public its proposed amendments to Regulation J, which governs the collection of checks through the Federal Reserve System. The Board stated that it intended to place a high priority on developing an electronic substitute for the nation's present payment system. The Board also broadly outlined the system it favored and invited comment on its proposal and the underlying policy issues. Essentially, it proposed to permit credit and debit transactions between parties via the Fedwire system.

Shortly after the Federal Reserve Board's proposal, the Federal Home Loan Bank Board (FHLBB) amended its regulations to allow federal savings and loan associations to participate in both on-line and off-line EFT systems. The FHLBB prescribed certain regulations applicable to all the federal savings and loan associations, and a "pilot" program of a point-of-sale (POS) system began in Lincoln, Nebraska. The quick success of this program helped EFT move from the drafting board into the community, and stimulated bank demands for parity with the savings and loan associations.

In response to national bank requests for authority to set up their own EFT systems, the Comptroller of the Currency issued an interpretive ruling in December, 1974. The Comptroller declared that customer-bank

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4. In setting forth its proposed system, the Board stated:
The context in which the proposed regulation is presented is set forth in the Board's statement of policy issued on June 18, 1971 (57 Federal Reserve Bulletin, June 1971 at 546-47). In that statement the Board assigned a high priority to the improvement of the Nation's payments mechanism and to the development of an electronic substitute for an overburdened check collection system.
7. 39 Fed. Reg. 23991-93 (1974). Among the provisions prescribed by the FHLBB are provisions relating to authorized financial services, access, confidentiality of account information, consideration of competitive implications, and adequate security devices and procedures.
9. 12 C.F.R. § 7.7491 (1974), as modified by 40 Fed. Reg. 21701 (1975). The Comptroller's ruling described customer-bank communication terminals (CBCT's), gave the Comptroller's version of the history and statutory background of the McFadden Act, 12 U.S.C. § 36(c) (1970), and went on to argue that CBCT's were not "branches"
communication terminals (CBCT's) were not bank branches within the meaning of the McFadden Act, which prohibits national bank branching where state chartered banks are prohibited from branching by state law. The Comptroller's ruling thus attempted to avoid the problem of developing an EFT system for national banks in states that have limited or unit branching. However, the ruling has generated a storm of controversy, the resolution of which will likely have a direct bearing on the ground rules for future EFTS development.

II. STATE ACTION

The Comptroller's ruling, when coupled with the FHLBB's rulings authorizing EFT experiments by federally chartered savings and loan associations, gave a competitive edge in EFT systems development to federally chartered deposit institutions. Naturally, state institutions were unwilling to stand still while the federal institutions increased their advantage. It is, therefore, not surprising that the vast majority of EFT-related statutes enacted by state legislatures were enacted during 1975.

The states have applied diverse approaches to EFTS regulation. If it may fairly be assumed that the states have a common desire to preserve competitive parity between federally and state chartered institutions, then it is interesting to observe the different approaches employed. Some states have incorporated fairly elaborate regulatory schemes in their EFTS enabling legislation. Others have given more of a blanket endorsement to

[Notes and references are not provided in the given text.]

within the federal definition of the word, and therefore were not subject to state branching law. The Comptroller placed heavy emphasis on the physical differences between a branch bank and a CBCT and argued that competitive considerations mandated the finding that CBCT's were not branches. 39 Fed. Reg. 44418-19 (1974). See notes 38-44 and accompanying text infra.


11. The two states which had spoken on EFTS prior to the Comptroller's ruling were Massachusetts and Washington. Oregon also passed EFTS legislation in 1973, ORR. REV. STAT. § 714.065 (1973), and amended it in 1975, ch. 193, § 2, Laws of Oregon (1975). At this time, the states that have passed EFTS-related legislation are: Alabama, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington and Wisconsin.


13. See, e.g., FLA. STAT. ANN. § 659.062 (Supp. 1975). The Florida statute includes provisions relating to advance notice, mandatory access, limitations as to services, applicability of branching law, considerations for the bank administrators to take into account when deciding on an EFT application, safeguards, a mandatory yearly report by institutions participating in EFT systems, and a fairly extensive definition of consumer rights.
EFTS development. Still others have banned EFTS development altogether until after consideration of reports by newly established study commissions.

One popular approach has been the passage of "wild-card" legislation whereby the state banking commissioner is granted whatever powers of regulation are necessary to provide parity between federal and state institutions. This development is particularly troublesome because it tends to bypass local jurisdiction and may have substantial consequences for the future development of the dual system of bank regulation and supervision which exists today.

Wild-card statutes, on the other hand, are not to be confused with statutes permitting a fair degree of regulatory flexibility, an important characteristic of effective EFTS legislation. Two of the first states to enact EFTS legislation, Massachusetts and Washington, have already seen their statutes become somewhat obsolete because they deal only with automated teller machines. Manned point-of-sale facilities, for example, are not covered by either state's legislation.

14. See, e.g., Va. Code 6.1-39.1 (Supp. 1976). The Virginia statute is limited to an amendment to the Code of Virginia, stating that the State Corporation Commission is given the authority to impose regulations, using as a standard the conditions, limitations, and restrictions imposed by federal statute or by the Federal Reserve Board.

15. See, e.g., UTAH CODE ANN. § 7-16-1 et seq. (Supp. 1975). The Utah statute specifically included a legislative finding that the establishment and operation of such systems will have a substantial impact upon the economy of this state and the depositor, customers and shareholders of financial institutions operating under the laws of this state, and may create competitive imbalance between state and federally chartered financial institutions or between various types of financial institutions or between financial institutions of this state and those based in financial centers of the United States outside the State of Utah.

Id. § 7-16-1(3) (Supp. 1975).

16. The following states have passed EFT legislation which could be characterized as wild-card legislation: Alabama, Louisiana, Maryland, New Hampshire, New York, North Carolina, North Dakota, Rhode Island, South Carolina, and Virginia. Other states have included in their more detailed legislation provisions which give the bank regulator the power to allow state institutions to maintain EFT parity with federal institutions. See, e.g., Pub. Act No. 75-373 § 8, State of Connecticut Public and Special Acts (1975). These wild-card statutes, however, are distinguishable from each other. Some states, while giving the state regulatory agency power equivalent to the federal agencies, have also attached specific guidelines. For example, North Dakota's EFT legislation for banks, N.D. CENT. CODE § 6-03-02(8) (Interim Supp. 1975), could be characterized as a wild-card statute, yet the statute mandates a number of specific requirements such as advance supervisory approval and compulsory sharing between banks. The statute also explicitly allows preauthorized loans, withdrawals and deposits from both manned and unmanned EFT systems. North Dakota has also passed special EFT legislation pertaining only to the Bank of North Dakota.

A number of states have passed legislation which contains specific guidelines for EFTS development. These include guidelines as to sharing, the need for advance regulatory approval, functions the EFT system may serve, and consumer protection safeguards. The relevance of these statutes is suggested by a recent study released by the Program on Information Technologies and Public Policy of Harvard University. The author of the study concludes:

To a large extent this legislation seems to have been developed in a vacuum, but state EFT laws are now among the most extensive legal pronouncements on the subject of EFT systems and, as such, might be expected to influence the thinking of those who are developing EFT systems and those who are drafting EFT legislation in other jurisdictions, state and federal. In short, state EFT laws are filling the vacuum they were created in.

If the author is correct, then several observations are in order. First, only a handful of states have made any attempt to establish specific guidelines with respect to consumer protection in EFT systems. To the extent that such matters as privacy and security have not been adequately addressed in legislation, it may be increasingly difficult to add consumer protection provisions after the basic EFTS enabling legislation is enacted. An additional concern is whether, in the absence of specific, legislated consumer protection guidelines, adequate protection against abuses can be obtained from regulation or litigation.

18. States which include provisions relating to sharing and access include: Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota and Washington.

19. Advanced supervisory approval for establishment of EFT systems is required by Connecticut, Georgia, Iowa, Maine, Maryland, Massachusetts, Nebraska, New Jersey, North Dakota, South Carolina, Washington and Wisconsin.

20. Such functions include accepting deposits, allowing withdrawals, dispensing pre-authorized loans, and transferring amounts from savings accounts to checking accounts.


22. See Prives, supra note 12.

23. Id. at 2.

24. See note 21 supra.


26. See Statement of Jonathon Brown, Hearings on S. 245, at 89. Concern over ade-
A second issue relates to the Uniform Commercial Code. Several commentators have concluded that state law relating to the clearing of commercial paper is not applicable to electronic funds transfer. Thus, revisions in the states' UCC law appear to be necessary.

A third issue relates to the development of EFT systems by nonfinancial institutions. Generally, states have not addressed the issue of a nonfinancial institution participating in EFT systems, and whether it would be regulated by state banking departments. It would seem anomalous to prescribe one set of regulations for an EFT system run by a bank and another for a comparable system run by a retailer. Thus, even though public identification of the system would be with the nonfinancial institution, the system may very well be regulated by a banking agency.

In addition to these considerations, EFT development must be considered in light of the needs of an increasingly mobile and sophisticated population moving freely within a national and even international financial marketplace. Notwithstanding the relevance of state law, one must wonder whether the wide diversity of state action alone gives rise to the need for a federal balance.

III. CONTRASTING FEDERAL APPROACHES: THE UNITED STATES AND CANADA

Numerous points of view have been expressed regarding the appropriate degree of government involvement in EFTS development at the present time. An interesting contrast of different political and philosophical approaches is provided by comparing developments in the United States with the approach adopted recently by Canada.

A. The United States' Approach—Pluralistic Growth of EFTS

The growth of EFT systems in the United States has received significant government input. That input, however, has been the result of anything but a cohesive, organized effort. Various federal regulatory agencies have

\footnotesize{quate consumer protection guidelines is most often expressed in terms of privacy and security of account information.

29. *Id.*
30. Presently, a number of states have prohibited out-of-state entry of EFT devices. See, e.g., FLA. STAT. ANN. § 659.062(9) (Supp. 1975); IOWA CODE ANN. § 524:1207 (1) (Supp. 1975); KAN. STAT. ANN. § 9-1111(2) (Supp. 1975).}
joined the EFT stampede. The agencies' positions have represented a wide spectrum of philosophical viewpoints within the federal government itself of the proper development of EFT systems.

On one end of the spectrum, the Federal Home Loan Bank Board and the Federal Reserve Board have proposed federally operated EFT systems. The Federal Reserve Board's proposed system was drafted to speed up its payments system between its member banks. The Board's original proposal has been amended, in part in response to the comments and criticisms leveled at it by the Department of Justice and others. The Board's proposed plan basically outlines the contours of a federally operated automated clearing house (ACH). Some critics of this system have argued such a federal system would constitute a de facto preemption of the ACH field.

Similarly, the Federal Home Loan Bank Board has stated its intent to implement a pilot switching system. This system has been characterized by the Justice Department as performing substantially the same functions as the systems that the private sector has developed. The Department also noted that the Bank Board's system differed from the one proposed by the Federal Reserve in that the Federal Reserve regards the transmission of information as ancillary to its primary purpose of clearing funds among member banks, while the clearing proposed by the Bank Board is provided essentially as a service that the Bank Board would like to provide for its members.

The administrator of the national banks, the Comptroller of the Currency, has been the government EFT lightning rod of late. Burdened by the

33. See Comments of Department of Justice, supra note 32. See also Hock, EFTS or EVE, in THE ECONOMICS OF A NATIONAL ELECTRONIC FUNDS TRANSFER SYSTEM 65, 78 (Federal Reserve Bank of Boston Conference Series No. 13, 1974).
34. See Federal Home Loan Bank Board, Qualified Vendors Sought to Assist the FHLBB System and their Member Institutions in the Development of an Electronic Funds Transfer Switch Capability (1975).
36. Id.
McFadden Act and consequent national bank subservience to state law, and faced with competition from the thrift institutions, the Comptroller issued his now famous "interpretive ruling" declaring EFT devices to be outside the perimeters of "branch banks" within the meaning of federal and state law. The Comptroller's legal arguments met with mixed success in the courts. Unfortunately for national banks, the United States District Court for the District of Columbia declared the Comptroller's ruling to be "without merit" and the Comptroller was forced to suspend his ruling. Thus, national banks' current attempts to implement EFT systems have been stymied, at least on a federal basis.

At the other end of the spectrum, the Justice Department has perhaps taken the lead in advocating a "hands-off" approach with regard to government involvement in EFT in its present stage of development. The Department criticized Congress in 1975 for its attempts to enact temporary EFTS legislation, and has consistently criticized the Federal Reserve Board's proposed amendments to Regulation J. It also strongly criticized the Federal Home Loan Bank Board's attempt to implement a pilot switching system accessible to savings and loan associations. In this latter criticism, the Justice Department had the support of the Chairman of the

39. The McFadden Act was passed in 1927. It provided that national banks, with the approval of the Comptroller of the Currency, could establish branch banks to the extent that state banks were allowed to branch. Since national banks had no statutory authorization to branch, the Act was basically in response to the competitive disadvantage national banks had been placed under by state banks which were allowed to branch. See Comment, Electronic Funds Transfer and Branch Banking—The Application of Old Law to New Technology, 35 Md. L. Rev. 88 (1975).
40. The Federal Home Loan Bank Board has no statutory equivalent to the McFadden Act. Thus, FHLBB establishment of EFT systems could be accomplished simply by amending their own regulations. See 39 Fed. Reg. 23991 (1974).
47. See Comments of the Department of Justice, supra note 32.
Senate Subcommittee on Financial Institutions, Senator Thomas J. McIntyre. In a letter to the Federal Home Loan Bank Board, Senator McIntyre concurred with the Justice Department's position that the Bank Board's proposed switching systems appear to perform substantially the same functions as do the systems the private sector has developed . . . . The EFT industry is still in its infancy. Its development is very sensitive to policy determinations made by the Bank Board, and other regulatory bodies. The mere presence of the Home Loan Banks as competitors may deter private businessmen from risking their capital—they may fear that the government agencies might soon pre-empt the field, either by pricing their service without regard for costs or by imposing an unduly strict regulatory scheme on private competitive systems in order to encourage use of government operated ones.49

In its comments to the Federal Reserve Board on Regulation J, the Justice Department observed that private efforts to promote EFT capability could be significantly injured by efforts to develop a government operated EFT system. They specifically objected to the system proposed by the Board, stating that "the mere presence of the Federal Reserve in the field of electronic clearing raises substantial questions of competitive impact."50

The Justice Department's opposition to government participation in EFT growth stems from the Department's faith in the free market system. The Department believes that competition provides incentives for maximum effective utilization of present systems and for development of better systems.51 A competitive market, the Department contends, will encourage entrepreneurs to invest in innovative and aggressive systems and their operators.

Thus, the Justice Department argues that government intervention amounts to a "freezing" of the industry for several reasons. First, if there is a prospect of government intervention, investors are less likely to risk capital in developing EFT systems, since the government system would probably be more comprehensive and less expensive.52 Secondly, private businessmen may also fear unduly strict regulation of private competition designed to encourage participation in the government systems.53 Finally, the Justice Department has argued, better policy would seem to indicate that the

50. Comments of the Department of Justice, supra note 32, at 6.
51. Id. at 106.
52. See Comments of the Department of Justice, supra note 32.
53. Id.
regulatory agencies should maintain a flexible monitoring system of EFT development, allowing day-to-day decisions to be made by the marketplace. The Department concludes that excessive government control at these preliminary stages is premature, and that a comprehensive system of regulation would have to be based on speculation at this point.\textsuperscript{54}

B. The Canadian Approach—Unified Development of EFTS

In contrast to the diverse approach of the various United States federal agencies, the Canadian government has adopted a more comprehensive approach to EFT systems management. In a recent policy paper on computer communications and the payments system,\textsuperscript{55} the Finance and Communications Ministers outlined three basic objectives of federal government policy. Recognizing that the evolution of EFTS will greatly affect the day-to-day transactions of individual consumers, the Ministers stated that the government must protect consumer rights, particularly the right of privacy, foster competition among financial institutions, and ensure maximum efficiency in the payments system.\textsuperscript{56} The paper concluded that these objectives could best be met by the establishment of a standardized, nationwide telecommunications system entitled a “common user communications network.”\textsuperscript{57} The system is to be available for sharing by all qualified users, bank and non-bank, on a fee-for-use basis.\textsuperscript{58}

In acting as it did, the Canadian government addressed the public interest implications of choosing between a payments system involving a number of private communications systems and one involving the common use of a standardized communications network.\textsuperscript{59}

These public interest implications included communications costs, which are of particular concern to small, outlying financial institutions,\textsuperscript{60} since the

\textsuperscript{54} Id.
\textsuperscript{56} Canadian Policy Paper, supra note 55, at 6.
\textsuperscript{57} Id. at 7. The conclusion was based on the recommendations of the Working Group of the Interdepartmental Committee on Computer/Communications. The Working Group was established by the Canadian government subsequent to the publishing of a “Green Paper.” See Eddy, supra note 55, at 54.
\textsuperscript{58} The paper additionally implied that this system would be the only EFT system permitted to deal with payment transactions. Canadian Policy Paper, supra note 55, at 7.
\textsuperscript{59} Id. at 10-25.
\textsuperscript{60} Id. at 16.
large fixed costs associated with private communications systems covering a large geographical area constitute a potential barrier to the entry of new competitors. The report was also concerned about smaller institutions having to rely upon large, competing institutions for provision of an essential service.\textsuperscript{61} Consideration was given to the extent to which competitive financial services would be reasonably available in all areas of the country. The report concluded that a national network would offer greater efficiencies than a series of private systems, particularly in remote and less populated areas.\textsuperscript{62} The report suggested that a common, standardized network would contribute to greater innovation between and among financial institutions, and would facilitate future application to nonbanking areas where the present incentive for development is not as great.\textsuperscript{63}

An additional consideration involved the potential difficulties of interchanging the hardware and software of different manufacturers.\textsuperscript{64} To the extent that a common network would require interface of the equipment of all suppliers, this would tend to relieve users of the burden of any potential wholesale equipment changeovers by a private system. Notwithstanding the preference for a common delivery system, however, the Canadian government did not preclude the use by individual institutions of private systems for purposes that are entirely internal to the institutions and unrelated to payments transactions.\textsuperscript{65}

The establishment of a common network, of course, requires the development of appropriate standards for the system. To facilitate this, the government established the Implementation Committee, composed of representatives from common carriers, computer manufacturers, deposit-taking institutions, retailers, and others as required.\textsuperscript{66}

\textsuperscript{61} Id.
\textsuperscript{62} Id. at 18.
\textsuperscript{63} An example of such innovation suggested by the paper was the direct deposit of employees' checks into their bank accounts by large organizations. \textit{Id.} at 13. Such a system has already been suggested by the United States Treasury Department for transmission of social security checks.
\textsuperscript{64} Id. at 17-18. The paper cited several specific industrial development advantages that the common user communications network would have. Since the proposed communication processing is to be provided by Canadian common carriers, it will provide a growth potential for the Canadian computer/communications industry. In addition, if a standardized interface is adopted, different suppliers could produce the same equipment, increasing competition to the benefit of all users. Finally, computer service and systems development companies, as well as Canadian computer users, would benefit. \textit{Id.} at 18-19.
\textsuperscript{65} Id. at 18-19.
\textsuperscript{66} Id. at 20-21.
Perhaps most significant of all, the Canadian government responded to the concern that ad hoc development of private competing networks would ultimately impair competition in the financial system. For example, it was pointed out that financial institutions were, at that time, unsure of the extent to which their own systems would ultimately have to be compatible with either a national network or with the systems of other institutions. This uncertainty would make present planning difficult and would inhibit EFT development. A common network would resolve uncertainty to a large extent and permit long-range planning decisions to go forward.

In the absence of government initiative, however, it was deemed unlikely that financial institutions acting in their own self-interest would support a common network. Institutions would naturally be reluctant to exchange internal information concerning customer services to the degree necessary for development of appropriate standards. In the absence of standards, interface between developing systems would be improbable. In addition, in order for a common system to be cost efficient, a large number of financial institutions must participate. Their willingness to do so would be inhibited if there were a risk that others would not participate in sufficient numbers to enable the network to achieve its full potential.

The Canadian policy paper went on to recognize the influence that EFTS will have on commercial practices and therefore on the necessary legal framework for the consumer. Of particular note, in addition to privacy, was the concern that consumers maintain the ability conveniently to switch their accounts from one institution or retailer to another, a traditional first line of defense for consumer rights. The Canadian Justice Department was given the leadership role in providing the government's response to the

67. Id. at 15. The Canadian paper stated that this was an immediate consideration because planning and implementation cycles required purchase decisions for new generations of computer hardware to be made now. Therefore, the paper stated that "it is incumbent upon the government to examine the impact of possible alternatives on the public interest." Id.

68. Id.

69. Although the paper made no specific suggestions, it did state:

A number of practical problems will arise in applying the existing legal framework to an increasing electronic payments system. Current paper-based payments instrument law (Bills of Exchange Act) is an inadequate framework for determining such things as when payment has legally been made. Furthermore, operating procedures of a more electronic payments system must provide a form of auditing for financial control and evidence in case of litigation, which are at least as useful as those in the current paper-based system. Id. at 24. These comments are analogous to those of commentators advocating the revision of the UCC to accommodate electronic payments. See Ege, supra note 27.


71. Id. at 25.
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legal and consumer issues raised by EFTS development.\(^72\) This delegation of authority is interesting in light of the contrast between the Canadian proposals and the viewpoints already expressed by our own Justice Department.

The United States Justice Department's basic premise is that competition should be a goal in itself, and will produce the best EFT systems.\(^73\) In Canada, the government was concerned that the ad hoc development of private networks would ultimately impair competition in the financial system. The Canadian model may not be entirely applicable to the United States since the Canadian banking system is much more concentrated than the United States' system.\(^74\) Yet the public policy issues Canada addresses are certainly valid. The United States Justice Department, on the other hand, has a tendency to look at EFTS solely from an antitrust perspective. It is possible, therefore, that were the Canadian policy to be initiated in this country, it would be construed as a threat to competition and, indeed, a freezing of private initiative.\(^75\) In any event, it is fairly clear that a comprehensive system of regulation is not in the political cards at the present time in the United States.\(^76\) Therefore, we are at least implicitly endorsing

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\(^72\) Id. at 26. The Department was encouraged to consult with all interested parties to the proposed network.

\(^73\) See Hearings on S. 245, supra note 25, at 106.

\(^74\) See, e.g., Eddy, supra note 55.

\(^75\) See Comments of the Department of Justice, supra note 32.


Two other bills have been considered and rejected. The Electronic Funds Transfer Moratorium Act of 1975, S. 245, 94th Cong., 1st Sess. (1975), was introduced by Senator William Proxmire. The Act was designed to halt all EFT development for a period of two years. It prohibited all financial institutions from entering into any contract which would involve electronic methods of funds transfer. Regulatory agencies were similarly prohibited from authorizing any EFT activity. The main rationale advanced was that in the absence of a legislated moratorium, Congress would be faced with a fait accompli: the National Commission's report would become a "sterile document," preempted by existing structures. See Supplementary Statement of Independent Bankers Association of America, Hearings on S. 245, supra note 25, at 137-38, 144 (1975).

Thereafter, the Electronic Funds Transfer Control Act of 1975, S. 1899, 94th Cong., 1st Sess. (1975), was introduced by Senator Thomas J. McIntyre, as a substitute for S. 245. S. 1899 prohibited interstate deployment of EFT facilities unless specifically authorized by the states involved. The bill allowed intrastate deployment of EFT facilities subject to the approval of the appropriate federal agency. Section 3 also stated that if a state had passed an EFT law, and it created safeguards or geographical limitations that were stricter than those contained in S. 1899, those state provisions would apply to federal institutions headquartered in the state. In the absence of state regulation, a minimum amount of federal regulation would apply. The federal agencies were directed
the development of competing private systems. This laissez-faire approach, however, does raise a public policy observation relating to the advent of the debit card.

C. Different Approaches—Bankcards and EFT

In addition to addressing the interfacing problems of a common users communication network, the Canadian policy paper focused on the transition of traditional credit card systems into credit/debit card systems, recognizing that if this type of card becomes an important means of payment, the relationship of various types of financial institutions to generally acceptable credit card systems has important competitive implications. The paper observed that the economies of credit card issuers and merchants, combined with a consumer preference for a smaller number of cards, will likely result in the survival of only a small number of generally acceptable credit card systems in Canada. Thus, the policy advocated by Canada is an integration of the credit or credit/payment cards into the common user communications network.

In contrast, the United States has no comprehensive program in preparation for credit/debit cards. The major credit card systems, which operate almost entirely outside of federal or state regulation, already have sophisticated nationwide electronic networks in place. For example, National...
BankAmericard, Inc. has established electronic data processing centers as switches for the clearing of its commercial paper, brought into member banks by merchants, back to the banks issuing the cards for billing to the consumer. The advent of the debit card as a non-credit payment instrument raises the prospect of the nationwide franchising of a private EFTS by the credit card giants. Thus, if EFTS development is left to the private marketplace, it seems valid to ask whether this will indeed result in a proliferation of competitive systems or whether it will simply encourage a monopoly by those systems already well entrenched.

IV. THE ROLE OF CONGRESS

Congress expressed its interest in EFTS in 1974 by creating the National Commission on Electronic Funds Transfer. The saga of the EFTS Commission is almost legendary. A 16-month delay and one legislated time extension heralded an inauspicious beginning. Whether the Commission will still be able to serve the purposes for which it was created depends to a large extent on several basic considerations. The first is whether the Commissioners will use the forum merely to advocate their own special interests, (evidence of which is already apparent in the Federal Reserve Board’s attempt to secure immediate Commission approval of its controversial proposals on Regulation J), or whether they will take off their respective special interest hats and lend their collective expertise to an objective analytical and investigatory effort. Second, with 26 Commission members, the staff will be required to synthesize a great deal of divergent opinion. Many of the Commissioners have superb staff backup and it will be an enormous undertaking to keep all of these forces moving in a common direction and on schedule. Third, and perhaps most important, the Commission must be sensitive to the problems faced by Congress in its attempts to translate the public interest into public policy. There will, therefore, be no purpose served in telling the Congress more than it ever wanted to know about technology. The question that Congress has asked and the question it wants answered is: What specific public policy objectives require federal legislative or regulatory action?

It has been suggested that public opinion, and industry opinion in particular, has already discounted the Commission’s efforts. Nevertheless,

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82. NATIONAL BANKAMERICARD INC., FACTS ABOUT BANKAMERICARD (1975).
if the above considerations are met, the Commission should regain whatever credibility it may have lost and, indeed, achieve its purpose.

There are, in addition, a number of other areas in which current developments directly affect the mandate of the Commission. The Privacy Protection Study Commission is a prime example. Even more significant, however, are developments already underway in the Congress itself. At this moment, there is more financial reform legislation pending before Congress than at any other time in recent memory. The Senate, in December 1975, passed the Financial Institutions Act. This Act represents the most comprehensive restructuring of American financial institutions in over 40 years. In the House, the proposed Financial Reform Act not only includes most of the Financial Institutions Act but also provides for a massive overhaul of the present financial regulatory system, a restructuring of the Federal Reserve System, and many other measures running the gamut of bank structure to regulation. Many of these issues are being considered individually by the Senate as well.

The significance of these measures to EFTS can perhaps best be summed up in one word: competition. Whether or not any or all of the proposed legislation will eventually be enacted, the message is clear that Congress is moving in the direction of more competition on many levels within the financial community. This is evidenced by the fact that the Financial Institutions Act passed the Senate by a vote of 79-14. It is also highlighted by the fact that NOW accounts are currently permitted, not just in Massachusetts and New Hampshire, but throughout New England.

91. State Taxation of Depositories Act, Pub. L. No. 94-222, 90 Stat. 197 (1976), amending 12 U.S.C. § 1832 (Supp. IV, 1974). Negotiable order of withdrawal (NOW) accounts essentially are "checking accounts" which also pay interest or dividends. NOW accounts were first introduced in 1970 in several Massachusetts savings banks. By 1973, numerous financial institutions in both Massachusetts and New Hampshire were offering them. In a compromise between prohibiting or sanctioning NOW accounts on a national scale, Congress passed an act which prohibited NOW accounts in all states except Massachusetts and New Hampshire. See Conf. Rep. No. 93-418, 93d Cong., 1st Sess. (1973).
A year ago, arguments against any EFTS moratorium legislation stressed that the EFTS Commission should not operate in a vacuum.\textsuperscript{92} Clearly, it is not. The Senate Subcommittee on Financial Institutions, under Senator McIntyre's chairmanship, has begun a broad inquiry into federal branching policy.\textsuperscript{93} This study is becoming increasingly significant in light of litigation over whether EFT devices are branches for purposes of the McFadden Act.\textsuperscript{94} The Subcommittee will be studying the history and background of the McFadden Act, the relationship of branching policy to the safety and soundness of our financial system, the relationship between bank structure and competition, including the ability of financial institutions to serve the public in terms of cost and services, the impact of branching restrictions on the availability of credit in smaller communities and rural areas, the relationship of branching laws to off-premises electronic banking facilities, and the relationship of federal branching policy to the dual banking system.\textsuperscript{95} While Senator McIntyre has indicated that he is launching this study with no preconceptions of what the outcome should be,\textsuperscript{96} it is clear that the result of the study will have a profound impact on future thinking about the role of geographic restraints on the availability of financial services.

V. CONCLUSION

The appropriate role of government, particularly the federal government, in the development of EFTS will derive from the resolution of a basic consideration: should private enterprise and marketplace considerations dictate EFTS development, or is government participation necessary in the interest of an orderly transition and protection of the rights of the parties involved? This is certainly a fundamental issue in the dispute between the Department of Justice, the Federal Reserve Board and the Federal Home Loan Bank Board. This issue is also the focus for the difference in attitudes currently prevailing in the United States and Canada. Its relevance to future developments within the EFTS marketplace remains to be determined.

At the present time, Congress is adopting a passive role while awaiting the reports of the National Commission on Electronic Funds Transfer. Eventu-

\textsuperscript{92} Hearings on S. 245, supra note 25.
\textsuperscript{96} Id.
ally, Congress will likely be the arbiter of many EFTS issues, particularly those relating to consumer protection, regulation of financial services offered by both bank and non-bank competitors, and federal branching policy. Indeed, EFTS represents an affront to a number of traditional distinctions, including those that have distinguished commercical banks from thrift institutions, banking from non-banking services, and geographic restraints embodied in our dual system of chartering and supervising financial institutions. As Congress attempts to formulate EFTS policy, the perception of what constitutes the public interest must be a dynamic one taking into account the recommendations of the National Commission on Electronic Funds Transfer and developments both within the private marketplace and those currently underway within the Congress itself.