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THE RETAIL MERCHANTS' PERSPECTIVE TOWARDS EFTS

Clifford R. Schuman*

This Symposium and its sponsors are to be commended for so forcibly but palatably bringing to the attention of the Bar and public not only the tremendous actual and potential impact of EFTS on our national economy but also, and more unusually, the inevitable accompanying legal problems.

Now let me tell you something about the National Retail Merchants Association (NRMA). It is a voluntary, non-profit trade association composed of approximately 30,000 department, specialty, variety and chain store outlets, with an aggregate annual sales volume exceeding 80 billion dollars. These firms employ more than 2 million people. The business of NRMA's members thus consists of selling merchandise and services to most of our nation.

NRMA has been the electronic funds transfer systems (EFTS) leader for the general merchandise creditor, and I am proud to have been its principal spokesman in expressing and championing the retailer's viewpoint.

You may find it hard to believe today but earlier the general merchandise retailer had a hard time having the banks or anyone else even recognize that it had a point of view, either legal or economic, on EFTS.1 I was alone and

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1. Basically, EFTS concerns the payments mechanism. Its initial objective is to eliminate the need and flow of paper—checks, for example—as the method of effecting debits and credits, by substituting for that paper what may conveniently be called electronic notations. On the surface, this change appears to be solely a banking function which is highly desirable. However, EFTS has developed far beyond its initial simple goal, and the ways in which it is expanding greatly interest and concern the national economy, consumers, retailers and others.

EFTS has four principal components:

a. electronic bill payment (pre-authorization);

b. direct deposit of payroll (DDP);
stared at when, a few years ago, I began to attend meetings of the Special Committee on Paperless Entries (SCOPE) on the West Coast and the Committee on Paperless Entries (COPE) in Atlanta. Now invitations to present the retailer's point of view at annual meetings and forums come from national and state bank and thrift industry groups, Columbia University's Arden House, credit unions, credit bureaus, and the Federal Deposit Insurance Corporation (FDIC), among others. No longer is the retailer a voice crying in the wilderness, urging the banks to be realistic about EFTS or else risk failure.

Exactly what are the retailer's legal and, inevitably, economic concerns about EFTS? The general merchandise retailer today believes more strongly than ever that the caveat about the dangers potentially lurking in EFTS' progress, first voiced by the President's National Commission on Consumer Finance in its 1972 yearend report, could still prove prophetic. The Commission there warned that the commercial banks' expanded and dominant role in credit cards, coupled with the banks' potential control of EFTS and, by extension, ownership of the credit information system, could lead to an oligopoly, unfairly restraining competition in the market for consumer credit.\footnote{c. truncated checks, \textit{i.e.}, the initial use of a paper check whose details are thereafter placed upon tape with its own identifying serial number, the check not again appearing in the stream of commerce; and\footnote{d. point-of-sale (POS)}

Industry, administrative agencies and state legislatures have concentrated principally on pre-authorization, DDP and POS.

2. A group of California commercial banks located in Los Angeles and San Francisco began exploratory work for SCOPE in 1968, but it was not actually operative until October 16, 1972. SCOPE aimed initially at reducing the flow of paper checks through the development of electronic funds transfer systems. More specifically, its original primary objective was the study, development and formulation of uniform standards and procedures for the exchange of paperless entries between banks. \textit{See Los Angeles & San Francisco Clearing House Ass'n, SCOPE Procedural Guide, Special Committee on Paperless Entries, Aug. 18, 1970, at iii.}\footnote{It utilizes local Federal Reserve Bank computer facilities for its Automated Clearing House (ACH) operation.}

3. COPE is the acronym for a project sponsored by five major Atlanta commercial banks along the lines of SCOPE (See note 2 \textit{supra}). The project began operations on May 15, 1973, and ceased to exist in September 1974. This was not long after June 13, 1974, when the Federal Reserve Board rejected its request that the Board fund and run COPE's proposed electronic switching and processing center point-of-sale activity. \textit{See American Banker, Jun. 17, 1974; id., Sep. 12, 1974.}\footnote{Like SCOPE, it utilized Federal Reserve Bank computer facilities for its ACH function. One of COPE's significant contributions was its development of a local ACH, the Georgia Automatic Clearing House project—an important precursor of the present National Automated Clearing House (NACHA) project.}

4. \textit{See National Commission on Consumer Finance, Consumer Credit in the United States (1972).}\footnote{Id. at 213.}
The Commission viewed such prospective concentration of credit granting facilities in the banks as detrimental to the consumer seeking credit. It characterized this as "an intolerable result in consumer credit" and elaborated by saying:

Finally, the emergence of the electronic funds transfer system means that whoever controls and operates that system will also have a record of credit extensions and payments. Consequently, if commercial banks continue to enlarge their share of the consumer credit market and if the bank card-EFTS becomes a reality, commercial banks will not only control the funds transfer system but they will own the major portion of the available credit information. Moreover, banks will be under no obligation to share credit information with competing firms whose own credit information will become progressively less reliable as banks enlarge their share of the market. In short, if the banks' current dominant role in credit cards is coupled with control of the EFTS and, by extension, ownership of the credit information system, those banks dominating these systems will be in a position to exercise significant control over the market for consumer credit. If only two credit card plans emerge as part of EFTS, a large and growing portion of consumer credit in the United States will be controlled by a two-party oligopoly with a potential for restraint of competition in the market for consumer credit.6

Thus alarmed, the Commission recommended "[T]hat Congress consider the need for future regulation of the system to assure users and consumers the full benefits of effective competition."7 This recommendation is in accord with the general philosophy of the retailer regarding EFTS. The retailer has always favored free and competitive development, unhampered by governmental leanings toward any one segment of the national economy, and subject to the application of antitrust brakes where necessary to curb any potentially monopolistic domination by any one such segment.

The retailer's first opportunity to express publicly this basic legal point of view to a responsible governmental agency came in March 1974. Responding to the Federal Reserve System's request for comments on its initial proposed changes in Regulation J, NRMA's position paper, of which I was an architect, said, in part:

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6. Id. (emphasis added).
7. Id. at 212.
In summary, NRMA recognizes that the proposed changes in Regulation J have the understandable purpose of attempting to reduce the increasing volume of checks which physically require processing by banks as part of the payments mechanism. However, NRMA urges the Federal Reserve System to bear in mind the consequences upon other segments of the national economy if the System elects to aid the commercial banks, or for that matter, banks in general, respecting EFTS in any of its phases, whether nationally or locally. If it so elects and is ultimately so authorized, NRMA believes that every possible safeguard must be taken both in concept, technology and practice, to protect the competitive opportunities for receiving credit currently available to the consumer, not the least of which are credit facilities offered by general merchandise retailers to their customers. Absent such safeguards, the unfavorable impact of a bank-controlled, government-sanctioned and government-aided EFTS system not only on the consumer but on the retailer conceivably could be substantial and certainly would be unfortunate, unfair and arguably unlawful...

Safeguards are also needed in other respects where the consumer is not directly involved but, rather, banks are competing with non-banking entities such as the general merchandise retailer. This would include requiring payment by the banks for use of EFTS-Federal Reserve System funded or aided facilities (including a changed Regulation J) for non-banking purposes such as bank credit cards; and the structuring of the proposed EFTS changes so that competing non-bank electronic data processing programs, for example, could be integrated with the resultant system.8

8. NRMA Position Paper, Mar. 8, 1974, at 7-8, submitted to the Secretary, Board of Governors, Federal Reserve System. The Federal Reserve System asked for views on proposed changes in Regulation J (Regulation J governs the use of Federal Reserve facilities to collect checks, 12 C.F.R. § 210 (1976)), concerning the framework for use of the Federal Reserve Bank's interregional electronic funds transfer network. More specifically, it requested comments addressed not only to the technical details of the proposal but also to issues arising from electronic funds transfer, such as ownership and operation, conditions of access and payment of the costs of such a system. Federal Reserve System News Release, Nov. 19, 1973.

On January 15, 1976, the Federal Reserve Board issued revised proposed amendments to Regulation J and invited comments within a 60-day period extending through March 19. 41 Fed. Reg. 3097 (1976). Commercial banks, thrift industry banks and credit unions, among the many entities which commented, are divided in their views on the merits of the new proposal. See American Banker, Mar. 29, 1976, at 1; id., Apr. 21, 1976, at 1; 8 Payment Systems Newsletter, Feb. 1976, at 2-4. The Office of Telecommunications Policy, Executive Office of the President, was particularly critical of this proposal. See American Banker, Apr. 7, 1976, at 1; the Department of Justice was also critical, id., May 28, 1976, at 1. However, the National Commission on Electronic Fund
I believe both EFTS and the retailer have come a long way since that position paper was filed two years ago. To cite just one instance, the retailer's grave concern has found support in the Department of Justice's effective admonitions about various potential EFTS antitrust problems.  

Transfers (see note 47 infra), although specifically invited by the Commission to comment, elected not to do so at its March 12, 1976 meeting. See 8 Payment Systems Newsletter, Mar. 1976, at 1.  

9. For example, Donald I. Baker, then Assistant Attorney General and Director of Policy Planning, Antitrust Division, Department of Justice, in a speech before the California Bankers Association, cautioned about the monopoly implications of automated clearing houses and joint use of POS terminal equipment or money machines providing instant banking and credit services. He said that while technological advances must not be inhibited, competitive avenues must be kept open. By way of illustration, he observed that "[T]hrift institutions probably are entitled to access to automated clearing house arrangements, if they can show that they would be significantly injured by exclusion in competing for time and savings deposits." American Banker, May 8, 1973, at 6.  

Mr. Baker has continued to reiterate the need for as many competing systems as possible, commenting that the Justice Department should continue its surveillance in order to ensure that local POS retail banking services are not larger than reasonably necessary. He noted that electronic clearing, for example, need not be confined to banks, but could be done by a private data communications company. Above all, he stressed the need to encourage initiative in the private sector and, toward this end, mentioned that the Department of Justice had urged the Federal Reserve Board to announce a policy of being a "clearer" only in the last resort. The Department also recommended against the Federal Reserve Board funding a local POS "utility" (actually a switching and processing center, see note 3 supra) requested by COPE in Atlanta. See American Banker, Oct. 30, 1974, at 5. This paper was prepared for an EFTS symposium sponsored by the Federal Reserve Bank of Boston. Mr. Baker reaffirmed the Justice Department's view on the need to preserve competition when, on November 26, 1974, as Deputy Assistant Attorney General, Antitrust Division, he testified for the Department before the House Subcommittee on Banking and Currency on H.R. 11221, 93d Cong., 2d Sess. (1974).  

For Mr. Baker's later views to the same effect, see notes 12 and 13 infra and Baker, Antitrust as a Positive Force in Relation to Financial Joint Ventures, 41 U.S. LEAGUE OF SAVINGS ASS'N LEGAL BULL. 68 (1975). For an expanded treatment of antitrust problems of EFTS, see Ubell, Electronic Funds Transfer and Antitrust Laws, 93 BANKING L.J. 43 (1976). See also, Survey—Toward A Less-Check Society, 47 NOTRE DAME LAW. 1163, 1258 (1972), where it was observed:  

Since consumer credit needs should be provided by competitive institutions, the question that must be answered is whether a Less-Check Society would remove credit from the competitive market and give banks or a national multi-bank association monopoly power in the consumer credit market. If so, a charge of monopolization under section 2 (of the Sherman Act) would probably be sustained.  

Id. At this symposium, Jonathan B. Rose, Deputy Assistant Attorney General, Antitrust Division, speaking of shared EFTS facilities, said:  

Some EFTS projects in compulsory-sharing states include all (or nearly all) the available financial institutions. The participants in these projects seem to believe that the state laws shelter them from antitrust attack, at least with regard to questions of access. This belief is not likely to go unchallenged.  

See American Banker, Mar. 16, 1976, at 19 for the full text of this speech. See id. at 4 for editorial comment.
Without gilding the lily, the retailer has since achieved a certain recognition as an entity to be considered when discussing many phases of EFTS.\textsuperscript{10} \textit{Yet the general merchandise retailer realizes that it cannot afford to be asleep at the EFTS switch.} Its need for alertness, both as to legal and economic dangers, is well-intentioned and doubly motivated. It must fairly protect not only its own interests but those of the consumer it services by offering credit on terms competitive with fellow retailers and other credit grantors such as banks. The gates of credit must be kept wide open for all applicants who meet the retailer’s two credit granting criteria—ability and willingness to pay.

Major retailers in particular have not been EFTS laggards. However, their efforts have not necessarily or even particularly been channeled toward cooperative ventures with banks. Rather, to effect internal operating economies without violating laws, large retailers, aided by the ingenuity and resourcefulness of suppliers, have continued to explore and improve upon already sophisticated point-of-sale (POS) techniques within their own organizations. Like National BankAmericard and Interbank, whose EFTS roots have spread throughout the country, retailers able to do so have concentrated on expanding the capabilities of their POS equipment by placing their local, regional and national outlets or offices electronically on-line with each other.

Retailers regard the POS aspect of EFTS as a modern, innovative tool enabling them to run their retail businesses better. That’s exactly how they are using it today. Retail POS, under their impetus and at their considerable expense, is progressing toward meeting merchandise sales necessities and accounting problems. It is constantly being adapted and improved to meet the merchant’s need for such sophisticated capabilities as descriptive billing, flash totals, perpetual inventory controls, customer identity at point of purchase and otherwise, price and credit terms notation, shipping and processing governance, coordination of payroll and tax information, and tax data. Featured is the Electronic Cash Register (ECR), which performs so many of these useful, novel functions for the merchant.

In so using EFTS, the merchant extending credit must, of course, conform to all pertinent requirements respecting customers and their purchases which federal or state laws now mandate.\textsuperscript{11} More specifically, if a law now requires

\textsuperscript{10} Dr. Allen H. Lipis, then Project Director of COPE, speaking about POS at an American Bankers Association Automation and Operations Conference in 1973, said: “The fact is that the major merchants may be telling us what we need in order to talk to them.” \textit{Bus. Week}, Sep. 15, 1973, at 134. This statement reflected a growing awareness by banks and others not only of the importance of EFTS to general merchandise retailers, but also of the retailers’ concern and activities with respect to the new technology.

\textsuperscript{11} \textit{See, e.g.}, Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146
or were hereafter to require descriptive billing as against "country club" billing, or vice versa, the retailer's electronics POS usage, to the extent it was thus affected, would of course have to be adapted to comply.

Professor Donald I. Baker, formerly with the Department of Justice, and a staunch advocate of free and untrammelled EFTS competition, observed, in testifying before the Comptroller of the Currency, that retailers and others are pioneering in developing important services of POS unrelated to electronic funds transfer. He said: "They are developing computerized systems for accepting, sorting, switching, and processing many kinds of electronic information." Though major retailers are, in fact, installing national on-line EFTS terminal networks for their own business operations (actually, who isn't?), consumer finance companies, credit unions, credit card companies are all doing it too.

Legally and practically, a retailer who harnesses POS capabilities for such internal use enjoys the same advantages and is in the same relative legal position as a bank or any other business entity conceivably would or could be regarding its in-house operations. More specifically, the retailer requires no governmental, bank, or customer consent, and competes with, and harms no one. In a sense, such usage is legally "home free," subject to restrictions imposed by federal or state law disclosure or other requirements that may have impact on some facet of the electronic operation.

The retailer's current utilization of POS for such internal operations far outdistances any three-way experimentation involving the bank, retailer and consumer in concert. Three-way EFTS ventures have grown more common but are hardly overwhelming either in number or in demonstrable value to any participant. The banker has come to realize that, in such undertakings, it needs the retailer's help respecting the consumer (who is hard to please and who finds it difficult to see any real benefits in EFTS), subject always to antitrust restrictions. Toward this end, thrift industry banks in particular


13. Id.
14. See note 11 supra.
are throwing in their lot with supermarkets in many states. POS terminals are placed on selling floors, on-line with the banks, and are not deemed by the governing Federal Home Loan Bank Board to be "branches," enabling shoppers to pay for purchases, transfer funds, and sometimes even to make cash withdrawals. Commercial banks are likewise doing the same where not inhibited by legal barriers to maintenance of off-premises POS facilities in a particular state.

The retailer's interest is also concentrated in another area of electronic functions where the gains can be great and the legal problems so far appear to be minimal once the electronic operation is launched. More particularly, I have always emphasized that the retailer's interest in bank POS services really stresses guarantee of checks rather than mere credit verification. The retailer understandably wants to reduce credit losses through minimizing collection and litigation expenses, and at the same time maintain good will among its customers. The retailer recognizes that in merchandising there's many a slip 'twixt the cup (verification) and the lip (guarantee). Progress is being made in this area with minimal legal problems surfaced so far.

15. In January 1974, First Federal Savings and Loan Association of Lincoln, Nebraska, pioneered the tie-up of a thrift industry bank with a supermarket—in this case, the colorfully named Hinky Dinky Supermarkets. This use of electronic remote customer terminals is designated Transmatic Money Service. The Service is now licensed to thrift institutions and banks in at least 16 states and has been expanded to include retail stores other than supermarkets. A Hinky Dinky type of terminal now costs about $2,000. In June 1975, a commercial bank, the Omaha National Bank, announced that it would share point-of-sale terminals with First Federal. See Crum, Electronic Funds Transference, Tex. Bus. Rev. 129, 130 (Jun. 1976). This trend is reviewed in Revolving Credit & Electronic Systems Letter, Apr. 6, 1976, at 3-4. California savings and loan associations have been particularly active in installing point-of-sale terminals in supermarkets. See American Banker, Feb. 25, 1975, at 1; id., Aug. 5, 1976, at 1. Commercial banks also continue joining the parade to tie in with supermarkets. Typical is Security Pacific National Bank in Los Angeles, which initiated a check authorization program called Security Service for testing in a dozen Alpha Beta supermarkets beginning in July 1976. See 8 Payment Systems Newsletter, Jul. 1976, at 6.

16. For the Federal Home Loan Bank Board regulations authorizing these remote service units (RSU's), see note 28 infra.

17. See, e.g., Schuman, Financial Institutions' Projected Relationship With Retail Credit, 63 Credit World 6, 9 (1975); Schuman, EFTS in Other Industries—Retailers and EFTS Today, 30 Personal Finance L.Q. Rep. 10, 12 (1975).

There are now thousands of check guarantee and credit card authorization terminals placed in retail establishments by commercial banks (all of them potential funds transfer terminals), comprising the bulk of the electronic customer-service terminals which financial institutions have installed both on and off their premises. The pace at which financial institutions, in the aggregate, install terminals will probably increase in the next several years; by one estimate, the number of customer terminals of all types in operation (these include check guarantee and credit card authorization terminals installed and owned by retailers, already numbering in the tens of thousands) may reach 200,000 by 1980. Crum, supra note 15, at 132.
Telecredit, Inc., a West Coast nonbank enterprise, has been successfully guaranteeing checks since 1961. It has extended its check guarantee services to include Ford, Lincoln and Mercury car dealers.

Commercial banks have also recognized this need. One of them is the Continental Illinois National Bank & Trust Company in Chicago which, in addition to offering a check guarantee service for supermarkets, has recently agreed to develop and share an EFTS network. This system will be aimed at supermarket customers and will be shared with the Federal Home Loan Bank of Chicago, which services 158 savings and loan institutions. The Bellevue project in Washington state for thrift institutions is also a sharing plan. In my home city, First National City Bank offers electronic check guarantee services. Wells Fargo Bank in San Francisco, California and Valley National Bank in Phoenix, Arizona are among others which have instituted a check guarantee system.

Actually, Western Europe is far ahead of us on check guarantees. Under their Eurocheque System, the account holder’s bank arms him in advance with guaranteed checks which other merchants will accept after he fills in the amount—usually $100 or less. The European system seems to work both legally and practically. We would do well to consider some form of it here.

Hempstead Bank in Garden City, New York has revived its Instant Transaction (IT) system (formerly Insta-Tran) permitting customers

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18. See 78 NILSON REPORT 1 (1973); Revolving Credit & Electronic Systems Letter, Sep. 30, 1974, at 6-7. James D. Farley, Executive Vice President of Citicorp., New York, in a speech before the Pennsylvania Bankers Association Operations Clinic, has said that bank guarantee of checks could save merchants all or much of the $400 million a year they now lose. American Banker, Mar. 17, 1975, at 1. The opportunity for banks is there. One is tempted to inquire if the risks are deemed too great when weighed against the potential rewards.

19. Begun in June 1974, the Bellevue project is a multi-thrift bank EFTS facility essentially affording 24-hour cash-dispensing facilities, originally through 15 cooperating savings and loan associations and mutual savings banks. It has successfully overcome initial technical difficulties. It was the first instance of the shared use of an electronic facility by a large number of financial institutions with respect to the joint use of an automated teller unit, postal machines, telephones, adding machines, and a coin changer. This venture was encouraged by new state legislation authorizing such ownership and use of unmanned electronic facilities. See Crum, supra note 15, at 132-33 n.25. The Bellevue activity has very promising possibilities in cooperative EFTS ventures. See American Banker, Nov. 20, 1974, at 1.

20. The Eurocheque System is discussed in 7 Payment Systems Newsletter, Nov. 1975, at 6-7.

21. Hempstead Bank’s current project is described in Revolving Credit & Electronic Systems Letter, Jun. 28, 1976, at 4. For details of the original pioneering experiment which became operative in November 1971, see Toward A Less-Check Society, supra note 9, at 1228.
to purchase merchandise and obtain money by direct electronic debiting of the customer's account and crediting of the merchant's account. For the merchant, this is better than check guarantee—it is instant payment. Of course, it deprives the customer of float.

In another important new, yet old, development, Farmers and Mechanics Savings Bank of Minneapolis has revived the ill-fated 1973 Seattle-First National Bank In-Touch experiment by successfully promoting Pay-By-Phone. Since November 1974, it has permitted customers, for a 10-cent transaction fee, to pay their bills from home electronically (using the ordinary, "non-fancy" telephone as a link) through interest-bearing savings accounts. Many other savings banks in the East have followed suit, and the idea appears to be catching on. I have been told by the Minneapolis sponsor that legal problems so far have been minimal.

There is, of course, a functional relationship between such point-of-sale systems, which principally involve immediate or guaranteed electronic debiting, and the direct deposit payroll (DDP) aspect of EFTS, which is electronic crediting. Surprisingly, the direct deposit of payroll feature, electronic crediting, has not appealed to retailers' employees as much as many EFTS planners had anticipated. One research analyst explains this by saying that 60 per cent of these potential subscribers want some or all of their earnings in cash—immediately. They are not interested in an electronic deposit which then still requires a personal visit to the bank to get cash for ordinary household and personal needs.

22. Washington Mutual Savings Bank in Seattle, the State's largest mutual savings bank, has recently taken up where In-Touch left off. This Seattle EFTS renascence is described in N.Y. Times, Jul. 18, 1976, Financial Section, at 1.


24. A Booz, Allen & Hamilton survey early in 1975 found that employees do not like DDP because 60% of all employees get the cash which they use for ordinary household and personal needs at the time they cash or deposit their paychecks. So the direct deposit of the check does not save them a trip to the bank. Those who cash their checks at stores may have to take an extra trip. None of these people find the service more convenient; at best it's equally so.

Id., Apr. 29, 1975, at 4-5.

Further, a study has shown that electronic payment as a substitute for payroll payments by cash or check was not popular with householders in Georgia. See Toward A Less-Check Society, supra note 9, at 1216. The survey quotes from a study conducted by the Georgia Tech Research Institute under the sponsorship of the Federal Reserve Bank of Atlanta.
The introduction of automated tellers permitting immediate cash withdrawals may satisfy this need for immediate cash and lessen some of the objections to DDP's instant crediting of the entire amount of earnings. Yet, how convenient are the automated tellers and what operating limitations are there on the frequency and amount of each individual's or day's withdrawal? A prominent banker informally but rather graphically observed to me that, under many laws, the automated teller often can only be located in the exterior of the bank's own building, its "belly," rather than at railroad stations or busy marketing centers where the facility would better service consumers.

More significantly, DDP's growth may receive needed collateral help from supermarkets installing POS terminals which do allow on-the-spot withdrawals and perhaps even overdrafts; this service could help DDP by giving the customer instant cash without the necessity of cashing a payroll check to get it. Banks know that if a retailer's employees do not accept DDP for any reason whatever, neither can or will the retailer.

One weighty legal problem that electronic DDP may have to face in the various states is the fairly common statutory requirement that wages must be paid in a form which is negotiable and payable in cash, on demand, at an established place of business in the state. Both SCOPE in California and COPE in Georgia encountered this problem early in their activities. It was solved, of course, by passage of legislation enabling payrolls to be paid through electronic crediting. The launching of COPE was actually

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25. The statutory situation faced by SCOPE in California was typical. California Labor Code Section 212 is similar to provisions enacted in a number of other states, and provides that no person "shall issue in payment of wages due . . . [any order, check, draft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the State." While it could be argued that a credit entry representing wages is not "issued in payment of wages," and that the legislature did not intend to prohibit such transfers, the matter was uncertain. Homrighausen, One Large Step Towards Less-Check: The California Automated Clearing House System, 28 Bus. Law. 1143, 1157 (1973). "A similar uncertainty existed for many years with respect to deposits made pursuant to automatic payroll deposit plans." Id. at 1157 n.29.

26. For SCOPE's statutory hurdle in California, see note 25 supra. I was informed by COPE participants in an EFT panel sponsored by Payment Systems, Inc. in April 1973, in New York City, that the existing law prescribing the forms of payment of wages and salaries had been an obstacle. They also confirmed that the absence of enabling legislation had delayed COPE's operational debut until May 15, 1973. For both the SCOPE and COPE solutions by appropriate statutory amendments, see note 27 infra.

27. To resolve any uncertainty, the California Legislature amended Labor Code section 213 to make it clear that section 212 does not prohibit an employer from depositing wages in a bank account of the employee's choice in California, provided the employee has voluntarily authorized such deposit. Section 213 provides in pertinent part:
delayed until Georgia passed such a law.

Now what about "CBCT's" and "RSU's," acronyms which translate, respectively, into "customer bank communication terminals," the term used by the Comptroller of the Currency, and "remote service units," the characterization favored by the Federal Home Loan Bank Board? Succinctly, these are EFT facilities maintained by a financial institution "off-site," that is, away from its principal office or authorized branch. These facilities are of two types: unmanned automated tellers which the customer's inserted card triggers, and point-of-sale terminals manned by nonbank employees, such as those placed on the selling floor of a retail merchant.

The merchant and his customers are obviously affected by such developments in terms of convenience and otherwise. For the merchant, there is a more important legal problem, "sharing" of POS facilities. Violent controversy has raged over the rulings by the Comptroller of the Currency for commercial banks\(^\text{28}\) (paralleled by similar but more sheltered rulings of the Federal Home Loan Bank Board\(^\text{29}\) and the National Credit Union Adminis-
trator\textsuperscript{30} for institutions they govern). These rulings state that maintenance of such electronic devices by federal commercial banks does \textit{not} constitute branch banking so as to be prohibited to them under the McFadden Act\textsuperscript{31} in states which forbid branch banking by their own state banks and classify these off-premises devices as branches.

The Comptroller's ruling has been challenged by a recent court of appeals decision,\textsuperscript{32} and the entire matter is in a state of flux. Several subsequent decisions have also disagreed with the Comptroller's interpretation of the McFadden Act.\textsuperscript{33} Yet, Federal District Court Judge Barrow in Oklahoma held that Comptroller Smith is absolutely right.\textsuperscript{34} In effect, the judge said that

\begin{quote}

The act permitted a national bank, with the approval of the Comptroller, to establish and operate new branches within the limits of the city, town or village in which the bank is situated, if such establishment and operation were permitted by state law to state banks. The act further defined "branch" as follows:

The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any state or territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The McFadden Act also imposed for the first time a limit on the branching ability of some state-chartered banks. State banks which were members of the Federal Reserve System were permitted to retain and operate existing branches, but were forbidden to establish any new branches "beyond the limits of the city, town, or village, in which the parent bank is situated." According to Rep. McFadden this act established competitive equality "among all member banks of the Federal Reserve System."


32. Independent Bankers Ass'n of America v. Smith, 402 F. Supp. 207 (D.D.C. 1975), aff'd, 534 F.2d 921 (D.C. Cir. 1976). The Comptroller appealed, and when the Court of Appeals for the District of Columbia Circuit refused to lift the stay of his ruling pending the appeal, the Comptroller suspended his ruling. 40 Fed. Reg. 49077 (1975). The court of appeals later affirmed the lower court ruling and agreed that these off-premises electronic facilities were "branches" within the meaning of the McFadden Act.


McFadden and Congress had never heard of EFTS in 1927 and, by a branch, they meant a bank place of business bristling with bank employees. The outcome can be significant. One commentator estimates that an EFTS terminal performing many branch bank functions costs about $45,000, contrasted with the $425,000 estimated cost of buying and building a modest downtown branch of a midwestern bank.

These administrative rulings, at a time when they were not yet judicially questioned, precipitated a rash of state legislation designed to stop or meet the prospective EFTS invasion by federal financial institutions using CBCT's or RSU's extending even beyond the home state of the institution into neighboring states. They also precipitated proposed federal legislation designed to call a halt to their use by federal financial institutions, beginning with Senator Proxmire's S. 245 introduced in December 1974 and then

Oklahoma. Judge Barrow said:

The employment of computer science or electronic funds transfer technology to include CBCT's is merely another step in the application of new technology to old systems and methods.

Id. at 85. The case also held the CBCT's were not branches within the Oklahoma anti-branching statutes. Id. at 92. For a discussion of the case, see American Banker, Jan. 14, 1975, at 1; id., Jan. 15, 1975, at 1.

35. 409 F. Supp. at 84. Specifically, he found that in 1927 "the use of electronic devices for the transmission of instructions for the making of electronic debits or credits was as unknown and as unforeseen as was our placing a man on the moon." Id.

36. N.Y. Post, Nov. 17, 1975, at 28, col. 2 [column by Sylvia Porter].

37. Twenty-two states have legislation dealing with electronic funds transfers, 20 of which enacted their legislation in 1975. Eight of these 1975 laws have provisions designated to prohibit establishment and operation of EFTS facilities by out-of-state institutions. See Pfeiffer, Funds Transfer Terminal Systems: A Lawyer's View, 41 U.S. LEAGUE OF SAVINGS ASS'N LEGAL BULL. 105, 122 (1976).

This state legislation has three principal objectives:

(1) Arming their own state commercial banks, thrift industry banks and credit unions with the same competitive rights as their national counterparts to establish CBCT's, without being thereby deemed to violate state branch prohibitions or restrictions;

(2) Forbidding or attempting to forbid utilization in the legislating state of this new EFTS terminal liberality unless the institution—obviously aimed at federal institutions—has its principal office or place of business in that state; and

(3) Mandating a sharing of CBCT facilities on a competitive, cost-allocated basis by all such institutions, whether federal or state.

Actually, the bills were poured into the legislative hopper in all sizes, colors and shapes, with varying permutations and combinations. For a more detailed analysis of legislative, judicial and administrative developments, see 8 Payment Systems Newsletter, Jan. 1976, at 4-6; Modern Data 27 (Jan. 1976) (24 states have EFTS statutes, 21 of them enacted in 1975); and Jolley, Banking, May 1976, at 33.

38. S. 245, 93d Cong., 2d Sess. (1974), is captioned Electronic Funds Transfer Moratorium Act of 1974. The bill's immediate objective was to arrest bank EFTS activities pending the report of the National Commission on Electronic Fund Transfers so that such activities would not develop beyond recall, regardless of their merit and impact on
again on January 17, 1975. That bill sought a moratorium on the establishment of electronic transfer facilities by financial institutions until December 1, 1976, by which date the National Commission on Electronic Fund Transfers was scheduled to make its final report.

Significantly, last September, Senator Thomas J. McIntyre announced that his Subcommittee on Financial Institutions would study the whole subject of bank expansion, emphasizing what he described as a "mish-mash" of confusing state branching laws, the effect of which he characterized as "ludicrous." He said it was time to overhaul the McFadden Act which, to maintain competitive equality, has restricted the activities of federal banks within state borders by compelling them to operate within the same geographic limits specified by the states for state banks. He also regretted the attack on the Comptroller's interpretation of the McFadden Act, apparently believing that the expansion of national bank activities within state lines should be liberalized by Congress and that state branching laws should also be overhauled to permit branching generally.

Incidentally, the FDIC and the Federal Reserve Bank seem to agree with the Comptroller, Senator McIntyre and Judge Barrow that CBCT's are not branches. So, of course, does the Federal Home Loan Bank Board which, unencumbered by any McFadden Act restrictions on savings and loan activities, recently empowered federal savings and loan institutions to establish an unlimited number of RSU's. They will be located mostly in retail stores and are restricted to four tellers who can take deposits, pay out funds, and accept mortgage payments. The American Bankers Association, to no
one's surprise, is not very happy about this\textsuperscript{46} for obvious reasons. The undaunted Board has even proposed savings and loan branching in \textit{rural} areas, and the small savings and loan institutions are up in arms about that.

This progressive development of off-premises electronic funds transfer facilities, however labeled, does raise legal questions of interest to the retailer regarding sharing of such facilities. In this respect, the retailer must be protected in what I regard as its obvious right to install or have installed on its own premises POS facilities designed for its own use and for the use of its own customers with respect to its internal operations, whether that usage is for its one outlet or for many or all of its outlets, wherever located. This should include proper availability and utilization, electronically, of credit data within its own organization or in conjunction with such entities as credit reporting agencies, all without any banking department approval or regulation as to the retailer's EFTS facilities and usage. With regard to its POS operations relating to depository institution banking functions, the retailer should retain the right to experiment with any one or more of such institutions in introducing POS facilities on its premises, without compelling the retailer to extend those facilities to any or all of them. Since a merchant's customers normally utilize a variety of depository institutions, sharing of its facilities by that variety of institutions within the limits I have described might ultimately be feasible for the retailer, without compulsion to do so.

Further, the retailer should not be compelled to accept any particular credit device or system offered by one depository institution merely because it has accepted that of another. Frankly, the legal aspects of EFTS sharing of POS facilities are in their comparative infancy, but they are patently important and will become increasingly so to retailers, consumers and depository institutions alike.

More so than ever, the establishment of the National Commission on Electronic Fund Transfers\textsuperscript{47} potentially shapes up as the most significant single governmental legal or prospectively legal development affecting EFTS' rush to maturity. Public Law 94-553, which the President signed on December 31, 1975, extended the time periods for the Commission's one-year and two-year reports so that the initial one will now be due in October 1976, and the final report not until October 29, 1977, with the Commission ceasing to exist 60 days thereafter.

I have been talking about investigation and regulation of EFTS, federal and state legislative and judicial controls, and competitive efforts, develop-

\textsuperscript{46} \textit{Id.} \textit{See also} ABA Bank Card Letter, Dec. 1975, at 6.

\textsuperscript{47} 12 U.S.C. §§ 2401-08 (Supp. V, 1975) established the Commission and provided for its membership, functions, powers, funding and other details.
ments and philosophies of the various business entities involved. Once again, I must emphasize that, setting aside the internal improvements and economies which EFTS may effect for a retailer or other business entity without need for anyone's approval or cooperation, the most important tenet for EFTS' use and direction is its acceptability to the consumer. Without consumer participation there are no real legal problems in a sense because there would be no demand for the product.

Commenting on the American Bankers Association's Symposium at its Centennial Convention last October on "Consumer Conveniences Through Electronics," the post-convention news report aptly began with a Madison Avenue truism: "One of the older marketing gags goes, 'Everybody loved it but the public.'" And not too long ago, a prominent banker warned that EFTS could become "an Edsel," though I do not believe this will be its fate. Neither does the Federal Office of Telecommunications Policy, whose Acting Director, in a press release on a study of EFTS, aptly said: "EFTS has the potential of affecting our lives as powerfully as the adoption of the automobile affected the lives of our grandparents." It should, in time, realize that potential.

Consumer reluctance is concededly a paramount consideration in shaping the future course of EFTS. The merchants who depend on the consumer for economic survival must share some misgivings with them. Consumers are concerned about so many things, legal as well as economic. To me, one of the great EFTS "truths," if you can call it that, is that the legal and economic issues are so often practically inseparable. Look, for example, how they are inextricably intertwined in the consumer's mind. For one thing, the consumer worries about the possible invasion of individual privacy, already generally regarded as a major issue for the Commission to consider. Consumers are also worried about increased costs to them without counterbalancing advantages. They fear loss of control over their own money, difficulties in correcting errors—a distrust born perhaps from a widespread consumer dislike for computers, lack of legally acceptable proof of payment, and the inability to stop payment on checks—all protections currently provided in the Uniform

49. Robert E. Knight, research officer and economist, Federal Reserve Bank of Kansas City, told a bank management conference group in Kansas City: "In the electronic funds area banks could be creating an Edsel—something which looks good on paper but simply will not sell." American Banker, Jun. 4, 1974, at 4. One commentator emphatically agreed with him some months later. See 10 NILSON REPORT 8 (1975).
Catholic University Law Review

Commercial Code for the present payments mechanism. They are also greatly concerned about protection against fraud and, of course, the elimination of "float" for their checks. Any saleable EFTS development involving consumers must solve these weighty problems. Undoubtedly, the National Commission will have more to say on these subjects and perhaps come up with viable solutions.

The problems are many and the solutions require careful, disinterested research and conclusions. For these reasons I would urge the federal and state legislatures to hold their fire except for indisputably liberalizing legislation preserving rather than limiting free enterprise in EFTS, and to wait at least for the Commission to make its tentative findings this October. Any alternative action may well be premature enactment of either federal or state legislation proceeding from an inadequate understanding of the needs, entitlement and rights, among others, of the financial institution, the merchant and the consumer.

What of the potential for cooperation between the banking industry, for example, and the general merchandise retailer? I believe that bankers and retailers alike must continue to be competitive in using EFTS, cooperating, however, within legal limits, where their mutual interests and those of the consumer sensibly so dictate. The general merchandise retailer is not looking for a David and Goliath relationship with the banks, regardless of casting. More to the retailer's liking is Damon and Pythias. Bankers could then assign the roles for the EFTS extravaganza as long as the legitimate interests and concerns of the general merchandise retailer in the uses and progress of EFTS continue to be recognized adequately.

Retailers will necessarily continue to fight for a free and competitively developed EFTS. It is not only their legal right but it is also, in a sense, their economic necessity. They will continue to oppose attempts, if any, by any entity to curtail the competitive development of this twentieth century phenomenon or to restrict its use to financial institutions or any other business entity.

Running throughout the retailer's EFTS position is the continuing concept of free enterprise—actually the legal keystone. In a sense, the retailer is saying, "Don't tread on me. I won't tread on you. If we can get together for

51. For an excellent discussion of problems raised by EFTS which, for the existing traditional payments mechanism, have been solved by provisions in the Uniform Commercial Code, see Toward A Less-Check Society, supra note 9, at 1233-51. Admission of computer printouts as business records is also exhaustively explored. Id. at 1265-83.
'our common good and that of the consumer without violating any laws, so much the better, and we think there are areas in which we can.'

The consumer's position is somewhat the same. In effect, the consumer is saying, "Don't put us into anything. Don't deprive us of credit opportunities through monopolization of electronic fund transfer facilities. Give us freedom of choice. Educate us for us. Show us benefits in any and all aspects of EFTS. Cure disadvantages and we will listen." 52

From the beginning, the general merchandise retailer has arguably been more realistic than the banks, for example, in its approach to EFTS. It now looks to the National Commission on Electronic Fund Transfers for an objective, all-encompassing report, without undue delay. Significantly, among the Commission's specifically designated functions are several important directives: it must investigate the need to promote competition among financial institutions and competition by them with other business entities; 53

52. Such was the unmistakable and emphatic tenor of remarks voiced by consumer advocate representatives at a meeting in Washington, D.C., on June 13-14, 1974, which I attended as a member of the Oversight Committee and leader of the NRMA delegation. The sessions were conducted by Arthur D. Little, Inc., as part of an EFTS survey funded by the National Science Foundation. The survey report was published under the title The Consequences of Electronic Funds Transfer, Jun. 1975 (GPO Doc. No. 038-000-002-49-0).

it must also recommend measures to assure that government regulation and involvement or participation in a system competitive with the private sector are kept to a minimum;\textsuperscript{54} it is further charged with exploring ways of promoting maximum user and consumer convenience and of protecting rights of privacy and confidentiality, as well as determining the impact of EFTS on the availability of credit and on economic and monetary policy.\textsuperscript{55}

The retailer hopes that the Commission's reports will fairly, reasonably and impartially enunciate the viewpoints of bankers, retailers, consumers and others alike, and then reach objectively supportable and practical conclusions about the future of EFTS and the part, if any, the government should play in helping private industry fashion this electronic marvel to improve the national economy. If not, retailers—as would any other group in like circumstances—will undoubtedly be heard from. The general merchandise retailer has too much at stake in preserving fair and competitive extension of consumer credit to sit idly by. It seeks no competitive advantage—only a fair shake. If eternal vigilance is truly the price of liberty, that price the retailer is ready, willing and able to pay.

\textsuperscript{54} Id. \S 2403(a)(2).
\textsuperscript{55} Id. \S\S 2403(a)(4)-(a)(7).