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The Electronic Fund Transfer Act: A Primer

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I. INTRODUCTION

In a marathon session during the early-morning hours of its final day, the 95th Congress passed the Electronic Fund Transfer Act,[1] establishing a comprehensive federal legal framework to govern the rights, liabilities, and responsibilities of both consumers and providers of electronic fund transfer [EFT] services.[2] While EFT was already subject to a number of legal forces,[3] passage of this legislation marked the end of a long academic and political debate over the need for federal legislation to regulate the burgeoning EFT field,[4] at least with regard to the important aspect of

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1. Title XX of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, 3728 (1978) (codified at 15 U.S.C. §§ 1693-93r (Supp. 1978) as an amendment adding Title IX to the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-92 (Supp. 1978)) [hereinafter cited as the EFT Act].

2. Although § 902(b) of the EFT Act, 15 U.S.C. § 1693(b) (Supp. 1978), broadly states that the Act's purpose is to provide a framework for *participants* in EFT systems, the Act does not to any significant extent define the legal relationships among the various institutions participating in an EFT service or system. While the Federal agency charged with regulatory implementation, the Federal Reserve Board, has attempted to allocate EFT Act responsibilities between or among financial institutions in some instances, *see* 44 Fed. Reg. 59,464, 59,470 (1979) (to be codified at 12 C.F.R. § 205.4), these matters remain largely a matter of private contract.

3. A great number of states had already enacted legislation dealing with one or more aspects of EFT. *See generally* Prives, *Electronic Fund Transfer Systems and State Laws*, 93 BANKING L.J. 527 (1976) (indicating that 22 states had enacted some sort of EFT statute as of 1975); Zimmer, *State and Federal EFT Legislation: History, Trends and Role of Empirical Evidence*, in ELECTRONIC FUNDS TRANSFER 95 (PLI Course Handbook No. 199, 1978) (indicating that 33 states had EFT laws or regulations by 1978, 16 having consumer protection provisions). In addition, the Federal Reserve Board promulgated regulations governing wire transfer operations on June 16, 1977, as Subpart B to Regulation J. *See* 42 Fed. Reg. 31,764 (1977) (codified at 12 C.F.R. §§ 210.50-.65 (1978)). The Federal Reserve Board has also proposed a Subpart C to Regulation J, dealing with automated clearinghouse [ACH] operations. *See* 41 Fed. Reg. 3097 (1976). A revised proposal is expected before any final action regarding Subpart C is taken. 44 Fed. Reg. 6771, 6772 (1979).

4. *See, e.g.*, White, *EFT Can Function Without a New Payments Code*, Payment Systems Newsletter (PSI Aug. 1978); Brandel & Gresham, *Electronic Funds Transfer: The Role of the Federal Government*, 25 CATH. U.L. REV. 705 (1976); Ege, *A Note on Certainty and Policy in Electronic Funds Transfers: May We Have a Code for the New Money Services?* 25 CATH. U.L. REV. 812 (1976). *See also Electronic Fund Transfer Consumer Protection Act: Hearings on S. 2065 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 45-47, 60, 220, 243-45, 305-06, 338 (1977) [hereinafter cited as *EFT Consumer Protection Act Hearings*]; *Consumer Protection Aspects of EFT Systems: Hearings on S. 2546 and S. 2470 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 2d Sess. 3, 4, 12 (1978) [hereinafter cited as *EFT Systems Hearings*].

For an excellent contemporary account of the political machinations that accompanied the EFT legislation along the tortuous path towards its enactment, see Taffer, *The Making of the Electronic Fund Transfer Act: A Look at Consumer Liability and Error Resolution*, 13 U.S.F. L. REV. 231 (1979). *See also* Naar & Stein, *EFTS: The Computer Revolution in Electronic Banking*, 5 RUTGERS J. COMPUTERS & L. 429 (1976).

consumer protection.[5] It also represented the culmination of several years of study by the National Commission on Electronic Fund Transfer, a national commission established by Congress in 1974 to study the EFT phenomenon.[6]

This article is designed as an introduction to the EFT Act. It will first provide a brief description of the wide variety of services referred to as electronic fund transfers. An overview of the contextual setting of the EFT Act and its history will follow. The article will then examine the major features of the Act, including the Federal Reserve Board's current efforts to develop, promulgate, and interpret the implementing regulation, Regulation E.[7]

II. WHAT IS ELECTRONIC FUND TRANSFER?

At its most basic level, an electronic fund transfer is simply the replacement of a paper order or promise of payment or credit with an electronically-generated message. Although this concept may seem elementary, the capacity for instantaneous transmission of orders in new payment systems represents a major step forward in the evolution of consumer financial services.

Any attempt to define the elements of an electronic fund transfer quickly leads one to the realization that the phrase encompasses an almost

5. The EFT Act is concerned primarily with the relationship between the institutional service provider and the individual consumer. Although it will undoubtedly (and perhaps very significantly) affect competition among financial institutions and numerous other regulatory issues, the Act does not purport to address those concerns specifically. Consequently, this Article will not discuss these aspects of EFT development.

Numerous articles discussing various EFT topics not expressly within the ambit of the Act's coverage may be found in the recent literature. Antitrust Concerns: Ubell, *Electronic Funds Transfer and Antitrust Laws*, 93 BANKING L.J. 43 (1976); Murray, *EFTS and Antitrust: Some Reflections on the Possibilities*, 37 U. PITT. L. REV. 673 (1976); Bernard, *Some Antitrust Issues Raised by Large Electronic Funds Transfer Systems*, 25 CATH. U.L. REV. 749 (1976). Impact on the McFadden Act (Branch Banking): Comment, *Electronic Funds Transfer and "Competitive Equality": A Doctrine That Does Not Compute*, 32 ARK. L. REV. 347 (1978); Note, *Customer Bank Communication Terminals Under the McFadden Act*, 47 U. COLO. L. REV. 765 (1976); Comment, *Electronic Funds Transfer and Branch Banking—The Application of Old Law to New Technology*, 35 MD. L. REV. 88 (1975). Privacy Concerns: Comment, *Financial Privacy in an Electronic Fund Transfer Environment: An Analysis of the Right to Financial Privacy Act of 1978 and California Financial Privacy Law*, 13 U.S.F. L. REV. 485 (1979); Comment, *Electronic Fund Transfers, Branch Banks, and Potential Abuse of Privacy*, 6 FORDHAM URBAN L. J. 571 (1978); Scaletta, *Privacy Rights and Electronic Funds Transfer Systems—An Overview*, 25 CATH. U.L. REV. 801 (1976); Note, *Electronic Funds Transfer Systems: A Need for New Law?*, 12 N. ENG. L. REV. 111 (1976) (urging adoption of federal privacy-protection legislation).

An extensive recent bibliography of EFT articles and other materials may be found in Chin, *Electronic Fund Transfer: A Selected Bibliography*, 13 U.S.F. L. REV. 555 (1979).

6. Congress established the National Commission on Electronic Fund Transfer to look into various issues related to EFT systems. Pub. L. No. 93-495 (1974) (codified at 12 U.S.C. § 2403 (1976)). The Commission issued an interim report, *EFT and the Public Interest*, in February 1977, and a final report, *EFT in the United States*, in October 1977. The Commission concluded that a "consumer bill of rights" was necessary for the growing EFT environment. NATIONAL COMM'N ON ELECTRONIC FUND TRANSFER, EFT IN THE UNITED STATES 6 (Oct. 1977) [hereinafter cited as NCEFT REPORT]. Many of its general findings and recommendations are reflected in various provisions of the EFT Act.

7. 44 Fed. Reg. 18,468, 18,480 (1979) (adding 12 C.F.R. Part 205).

infinite variety of modern payment services. At the present time, it is difficult to do anything more than generalize about the most common EFT services being developed and used in the United States. Furthermore, with computer technology evolving at an ever-increasing pace, the characteristics of current EFT systems will undoubtedly be significantly altered within the next decade. While the "checkless society" may not be just around the corner, as was over-zealously predicted in the 1960's and the early 1970's,[8] a "less-check" payment system unquestionably is.[9]

The current state of the art in electronic banking services has produced roughly six different types of electronic fund transfer services.[10] Perhaps the most well-known EFT facility is the automated teller machine [ATM], which has proliferated in the past few years and has become a familiar convenience for many Americans today. ATMs are electronic terminals through which consumers may withdraw cash from, make deposits to, transfer funds between, and often make payments from, their various accounts at a bank or other financial institution. Customer access at an ATM is achieved by inserting a special EFT card and pushing buttons to enter a secret personal identification number [PIN]. ATMs frequently operate around-the-clock and are most often found at an office of the institution or in a shopping center or similar convenient location, since the economic viability of electronic terminal banking depends upon high volume usage.

A related but somewhat more advanced form of electronic fund transfer is the point-of-sale [POS] system. Through the use of an electronic terminal installed at a merchant location, a customer may pay for

8. *See, e.g.*, Reistad, *The Coming Cashless Society*, 1967 BUS. HORIZONS 23.

9. While the early stages of EFT development and its introduction to the public were plagued by a number of problems and controversies, more recent experience indicates that electronic banking services are incontrovertibly on an upward swing. *See* Moore, *Another Year of Impressive Growth for Payment Systems and Services Predicted*, Am. Banker, January 10, 1979, at 4, col. 3. By the beginning of 1978, over 8,000 automated teller machines were in operation nationwide, each averaging 2,000 transactions per month. *ATM, Cash Dispenser Installations Soared in '77, Double Past Annual Growth Rate*, Am. Banker, March 6, 1978, at 2, col. 4. A year later, the number of ATMs in the United States had risen to over 10,000. *World ATMs Seen Reaching 246,819 by '85, 10 Times '78 Total*, Am. Banker, August 29, 1979, at 2, col. 1. In California, a highly competitive banking market, ATM installation has become a heated race, with practically every major bank announcing plans to double or triple the number of ATMs in use within the next few years. *B of A Ordering 400 ATMs*, Am. Banker, Aug. 29, 1979, at 3, col. 1; *Sec. Pac. Puts Big ATM Order With IBM*, Am. Banker, June 5, 1979, at 3, col. 3; *Sec. Pac. Weighs Big ATM Network; Calif. First Will Enter the Race*, Am. Banker, May 9, 1979, at 2, col. 1. A group of smaller California institutions are also rapidly expanding their shared ATM network and expect to have 100 ATMs installed by 1981. *Small Bank ATM Net Offers Stiff Competition in California*, Am. Banker, May 29, 1979, at 2, col. 2. Moreover, given the inexorably rising costs of handling paper, electronic transfers are becoming an increasingly attractive alternative. A total national potential of nine billion electronic transactions by the late 1980s has recently been projected. Abouchar, *Given Transaction Growth and Costs, EFT Is Inexorable*, Am. Banker, May 22, 1979, at 7, col. 1.

10. While other commentators have sometimes grouped or categorized the species of EFT services differently, most seem to agree upon the basic characteristics of the more common services. *See, e.g.*, H. SCOTT, NEW PAYMENT SYSTEMS: A REPORT TO THE 3-4-8 COMMITTEE OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 5-30 (1978); Feldman, *Overview of EFTS and Whether a New Regulatory System is Necessary to Accomodate EFTS Transactions*, in ELECTRONIC FUNDS TRANSFER 10-32 (PLI Course Handbook No. 199, 1978).

purchases by immediately debiting a deposit account. As with ATM transactions, an EFT card and PIN are generally used to operate a POS terminal. Unlike ATMs, however, electronic POS systems, particularly multi-institutional systems,[11] are still relatively rare.

A third type of electronic fund transfer system is the electronic "check guarantee" system, which is actually a hybrid that combines features of a purely electronic transaction with normal check payment. Like ATMs, check guarantee systems are in very widespread use today. In a typical check guarantee system, the financial institution issues a card, often with a PIN, to a consumer who presents it at a terminal installed at a merchant location. Based on identification and transaction data read by the terminal, the consumer's paper check may be "guaranteed"—that is, if the check is dishonored for almost any reason, the card-issuing bank will nonetheless stand behind it.

Another type of EFT service is the processing of preauthorized payments and credits, which is generally accomplished through Automated Clearinghouses [ACHs]. Through the use of preauthorized debits from an account, a consumer may make payments for regularly recurring obligations like mortgages, insurance premiums, or utility bills. A consumer may also, through the use of preauthorized credits, receive regularly recurring payments from others for such items as wages, dividends, Social Security benefits, or annuities. Each of the thirty-two ACHs around the country has established standard operating procedures for clearinghouse participants.[12]

In the fifth type of electronic fund transfer, a consumer, by prearranged plan with a financial institution, uses the telephone to instruct the financial institution to transfer funds from his account to pay various bills or engage in other banking transactions. In most cases, the consumer communicates directly with the institution's computer, utilizing the various frequencies produced by a push-button telephone to transmit the appropriate information. Such operations are commonly known as "pay-by-phone" or "telephone bill-payer" services.

The final type of EFT, and probably the oldest, is wire transfer. There are two major wire systems: the Bankwire and the Fedwire. The former is a private communication network serving commercial banks with administrative messages and electronic fund transfers between correspondent bank accounts. The latter system, Fedwire, is run by the Federal Reserve System and allows electronic settlement between banks. Wire

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11. Multi-institutional systems are those that connect a retail merchant with more than one financial institution. Although few of these systems are operating at present, the more progressive and aggressive networks have proven that such systems can be successful. *See* Kutler, *Wis. TYME Network Achieves Rare Success Among Shared Systems*, Am. Banker, July 11, 1978, at 1, col. 1.

12. For a more complete explanation of the operation of an ACH network, see Traeger, *Preauthorized Payments and Bill Payments*, in ELECTRONIC FUNDS TRANSFER 219-345 (PLI Course Handbook No. 199, 1978), *and* Homrighausen, *One Large Step Toward Less-Check: The California Automated Clearing House System*, 28 BUS. LAW. 1143 (1973).

transfers in these systems occur almost exclusively at a level far removed from the ordinary consumer; transfers of funds are generally between banks, other financial institutions, and large corporate customers.[13]

The wide variety and diversity of EFT services and systems[14] raised formidable problems in the development of a comprehensive statute governing all consumer aspects of electronic fund transfer.[15] The inability to forecast future technological and banking developments, of course, heightened the impracticability of drafting comprehensive legislation of

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13. For a more extensive discussion of the wire transfer services, see Patrikis, *Wire Fund Transactions Including SWIFT, Fed Wire, and Bankwire*, in ELECTRONIC FUNDS TRANSFER 403-52 (PLI Course Handbook No. 199, 1978).

14. Still another use of electronic technology—one that may soon blossom into wider usage—is the concept of check truncation. Under planned check truncation systems, the first bank in the payment mechanism would retain the check and forward an electronic order regarding the check to the payor bank. The payor bank would, in turn, provide the information to the customer in the form of a computerized summary analogous to that used in credit card billing. Because of various technical problems and the massive implementation effort that would be required to truncate checks on a large scale, the idea has not yet been put into widespread use. Both the Federal Reserve Board and the American Bankers Association, however, have recently announced plans for pilot programs for truncating the processing of certain corporate checks.

The Federal Reserve Board program, scheduled to begin in December 1979, would call for electronic settlement of items of more than $10,000 and would initially cover a handful of banks in a few Federal Reserve districts. If the pilot program is successful, the Board has indicated it may consider gradually lowering the amount covered so that the truncation system will ultimately encompass all corporate checks of more than $1,000 drawn on any large commercial bank. *Fed Sets December Date, Reduces Minimum Check Size*, 4 Payment Systems Action Rep. 2 (PSI Sept. 3, 1979); *Fed Acts to Hasten the Flow of Money in Banking System*, Wall St. J., May 15, 1979, at 40, col. 4; *Fed Moves to Speed Clearing, Start Big Check Pilot Plan*, Am. Banker, May 10, 1979, at 1, col. 3.

The ABA-sponsored pilot program is tentatively scheduled to begin operation in March 1980, and is expected to start off with truncation of corporate dividend checks up to $2,500. Four of the largest commercial banks in the country have already agreed to participate in the ABA's pilot test, and approximately 30 participants are anticipated. *ABA's Check Truncation Program Gets Off the Ground*, 4 Payment Systems Action Rep. 1 (PSI Sept. 3, 1979); *Nationwide Test of Check Truncation Planned by ABA*, Am. Banker, May 22, 1979, at 1, col. 1. Truncation of most consumer checks will undoubtedly be considered more carefully if the pilot programs prove successful.

While the technological, legal, and practical problems of large-scale check truncation should not be underestimated, new developments emerge almost daily. Recognition Equipment, Inc., recently announced the introduction of a statement-issuing system for demand deposit accounts that will return miniature images of cancelled checks. The new system (which will be called TRIM) uses advanced image processing technology and a sophisticated laser printer, so that all vital information—including payee line and signature—may be easily read by the customer. *Images Shown as Checks Record*, Am. Banker, May 22, 1979, at 6, col. 3. Use of this technology, originally developed for NASA, may permit check truncation without sacrificing the consumer's ability to "retain" cancelled checks and use them as proof of payment. An analogous image processing system is already being installed by a major oil company to provide its credit card customers with exact reproductions of the signature and other handwritten notations (such as odometer readings or license plate numbers) on credit card slips. *Amoco Oil Streamlines Credit Card Billings with Image Processing*, 11 Payment Systems Newsletter 6 (PSI June 1979).

15. *See EFT Consumer Protection Act Hearings, supra* note 4, at 202. In addition to the EFT services described in the text, the modern computer technology utilized in credit card transactions might justify a discussion of those transactions as a form of electronic fund transfer. However, since the credit card environment is relatively well-advanced, and since credit cards are governed by a separate set of federal acts (the Truth in Lending Act, 15 U.S.C. §§ 1601-65a (1976 & Supp. 1978), the Fair Credit Billing Act, 15 U.S.C. §§ 1666-66; (1976 & Supp. 1978), and the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81t (1976 & Supp. 1978)), credit card operations were exempted from the EFT Act. *See* EFT Act, § 903 (2), 15 U.S.C. § 1693a(2) (Supp. 1978). Consequently, this Article will not discuss the electronic character of or laws governing credit card transactions, except insofar as they provide a useful analogy for comparison with EFT services governed by the EFT Act.

this type.[16] In spite of this difficulty, Congress felt that the potential consumer hazards in the developing EFT environment warranted immediate legislative action. By focusing the scope of the EFT Act, and by making appropriate distinctions among various services, Congress managed to avoid some of the pitfalls that would otherwise have been encountered.

III. An Overview and a Look at The Context of EFT Legislation

On November 10, 1978, President Carter signed into law H.R. 14279, a comprehensive financial regulatory reform package entitled the Financial Institutions Regulatory and Interest Rate Control Act of 1978.[17] Title XX of H.R. 14279 is the Electronic Fund Transfer Act.

The stated congressional purpose of the EFT Act was "to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems."[18] The goal of the legislation, however, was not merely to bring certainty into the nebulous legal territory surrounding the use of EFT. The Act itself states that its primary objective is to provide individual consumers with protections and rights comparable to those available in other circumstances under existing consumer protection legislation.[19] As a result, the EFT Act relies heavily upon the principle that comprehensive disclosure—of the essential terms and conditions of the relationship with the service provider, of basic information concerning each individual transaction, of account activity and status, and of consumer rights mandated by law—is critical to consumer protection and the proper functioning of a competitive marketplace.[20]

The Act also allocates risks and liabilities between the customer and

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16. Governor Stephen S. Gardner of the Federal Reserve Board testified with regard to the bill that eventually emerged from Congress as the EFT Act:

> *In Section 804 of S. 2065 the Federal Reserve Board is directed to "allow for the continuing evolution of technology" when issuing regulations. Do all the specific requirements of this bill leave enough flexibility so you can issue regulations that adapt to technology? Where is more flexibility needed?*
>
> The Board does not assert clairvoyance as to future EFT technological developments. In my testimony, I identified those provisions which did not allow enough flexibility for the continuing evolution of EFT technology. If the changes I recommended are made, the bill should be flexible enough to accommodate current technology. Nevertheless, the EFT is in a rudimentary state of development and technological innovations are probable. The less rigid the legislation the more likely it can accommodate evolving technology.

EFT Consumer Protection Act Hearings, *supra* note 4, at 171 (emphasis in original).

17. The Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, 3728 (1978), more commonly known as FIRA (use of the acronym survived the last-minute addition of a title extending interest rate controls), had twenty separate titles and dealt with such disparate topics as interlocking bank directorates, foreign banking, federal savings & loan investment authority, financial privacy, and federal chartering of mutual savings banks, as well as electronic fund transfer regulation.

18. EFT Act, § 902, 15 U.S.C. § 1963 (Supp. 1978).

19. *Id.*

20. *See* Part vii *infra*.

the institutional provider of services for such matters as the institution's failure to respond correctly to a consumer's instructions, losses caused by unauthorized access to a consumer's account, and disputes concerning alleged errors.[21] In addition, the Act constructs a detailed set of procedures for resolving allegations of error.[22] It also curtails the previously unrestrained mailing of unsolicited EFT cards, and provides protection against coercion of consumers to use EFT services.[23]

Although the Act is new, it contains little that is conceptually original. Instead, the EFT Act borrows concepts and techniques for legal control from legislation governing transactions and relationships that were thought to be analogous—for example, the Truth in Lending Act,[24] the Fair Credit Billing Act,[25] the Fair Credit Reporting Act,[26] and Articles 3 and 4 of the Uniform Commercial Code.[27] Many changes, however, both substantive and procedural, were adopted in the process of translating these regulatory concepts from their legislative sources into the EFT environment.[28]

At the same time, Congress did not take the opportunity afforded by intensive consideration of new EFT systems to take a fresh look at the disparate rules governing the complete spectrum of existing payment and credit systems. Because no attempt was made to harmonize the existing laws, consumers today may use a wide variety of payment methods, each with its own peculiar set of legal rights and obligations. This multiplicity of legal rules, however, does not necessarily reflect genuine differences in the roles played and the needs fulfilled by the various payment mechanisms. The legal variations may well be greater than the practical variations actually perceived by the average consumer. A consumer carrying two plastic cards—one a credit card, the other a debit (EFT) card—would probably be quite surprised to find that use of the cards will be governed by different legal formulas. Despite the myriad of technical legal distinctions between the rules governing each type of card, however, in both cases federal law and regulation has effectively shifted many of the risks of card use from the cardholder to the service provider. By contrast, the consumer may use a personal check and find that he is provided with little disclosure, that he must bear the loss if his negligence substantially contributes to a theft of funds from his account by means of forgery, and that error

21. *See* PARTS IX, X, XIII *infra*.
22. *See* PART IX *infra*.
23. *See* PARTS XI, XII *infra*.
24. 15 U.S.C. §§ 1601-65a (1976 & Supp. 1978).
25. 15 U.S.C. §§ 1666-66j (1976 & Supp. 1978).
26. 15 U.S.C. §§ 1681-81t (1976 & Supp. 1978).
27. *See EFT Systems Hearings*, *supra* note 4, at 3-4, 80.
28. For instance, § 133(a) of the Truth in Lending Act, 15 U.S.C. § 1643(a) (1976), specifies a uniform $50 ceiling on consumer liability for a lost or stolen credit card, while § 909 of the EFT Act, 15 U.S.C. § 1693g (Supp. 1978), establishes a three-tiered consumer liability limitation dependent upon the consumer's promptness in reporting a lost or stolen EFT card and any unauthorized transactions appearing on the periodic statement. *See* PART IX *infra*.

resolution procedures are a function of the individual policy of the bank with which he does business. Or the consumer may use cash—a payment instrument issued by the federal government—and find that, despite the absence of any consumer disclosures, he, and not the service provider, bears all risks of use and loss.

In the final analysis, therefore, the individual consumer's choice of payment method and the resulting competitive success of each payment system may be based not upon its convenience, low cost, security, certainty, or other merits relative to other systems, but upon factors imposed by historical accident or the vicissitudes of the political climate at the time each payment system was developed. Nonetheless, it is significant that preliminary efforts have been made toward the ultimate goal of coordinating the laws relating to various payment systems. In his report to the 3-4-8 Committee of the Permanent Editorial Board for the Uniform Commercial Code, Professor Hal Scott of Harvard Law School suggested the need for a comprehensive payment code that would attempt to harmonize and consolidate the law in this field.[29] The Federal Reserve Board has also proposed additional legislative action on a limited scale, designed to reconcile the federal laws covering credit cards and debit (EFT) cards.[30] This general movement appears to be gaining momentum and is likely to be a major theme in the evolution of consumer financial services regulation. Therefore, while a review of the legal rules and responsibilities made applicable to electronic fund transfers by the EFT Act is significant for its own worth, one should not lose sight of the fact that EFT is but one competitive segment of the entire payment spectrum, and that its legal framework is but one thread in a larger legal fabric.

IV. THE LEGISLATIVE HISTORY OF THE ACT

Except for its establishment of the National Commission on Electronic Fund Transfer in 1974,[31] Congress showed little interest in EFT regulation until the beginning of 1977. In February of that year, the NCEFT issued an interim report and the Senate promptly convened hearings.[32] Then, in the late summer and early fall of 1977, EFT legislation was introduced in both the House of Representatives and the Senate. Congressman Frank Annunzio, Chairman of the Subcommittee on

29. *See* H. SCOTT, NEW PAYMENT SYSTEMS: A REPORT TO THE 3-4-8 COMMITTEE OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 252-54 (1978). *See also* Scott, *The Risk Fixers*, 91 HARV. L. REV. 737, 792 (1978).

30. *See* 65 Fed. Res. Bull. 399-403 (1979) (statement of Nancy Teeters, a member of the Federal Reserve Board, before the Subcommittee on Consumer Affairs of the House Committee on Banking, Finance, and Urban Affairs, May 1, 1979).

31. *See* note 6 *supra*.

32. *Id. See also Electronic Funds Transfer Systems: Hearings on Oversight on the Report of the NCEFT Entitled "EFT and the Public Interest" Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Oversight Hearings*].

Consumer Affairs of the House Committee on Banking, Finance, and Urban Affairs, introduced H.R. 8753.[33] At approximately the same time, Senator Donald Riegle, Congressman Annunzio's counterpart as Chairman of the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing, and Urban Affairs, introduced S.2065,[34] later reintroduced in a modified form as S. 2546.[35] The NCEFT presented its final report in October, 1977, and hearings on the House and Senate bills continued for the next few months.[36] Meanwhile, the minority members of the Subcommittee on Consumer Affairs of the Senate banking committee introduced an alternative bill, S. 2470.[37]

After extensive "mark-ups," Congressman Annunzio's bill was approved by the House banking committee on June 15, 1978, as H.R. 13007.[38] Two months later, after significant further revision, the bill passed the House of Representatives.[39] The House bill, however, was never formally considered by the Senate.

On the Senate side, S. 2065 was first approved by the Subcommittee on Consumer Affairs, with the clean bill renumbered as S. 3156.[40] Then in September of 1978, the full Committee on Banking, Housing, and Urban Affairs of the Senate attached S. 3156 as a new title VI to S. 3499, which had originally started as a simple extension of interest rate controls.[41] In turn, S. 3499 was appended by the full Senate to H.R. 14279, which had originally contained only one title changing the maximum savings account interest rate. By October 12, with adjournment scheduled just two days later, the Senate had turned H.R. 14279 into a "Christmas tree" containing sixteen separate titles, including those of S. 3499.[42]

While the rest of Washington slept in the early morning hours of October 15, the House passed H.R. Res. 1439, placing its imprimatur on H.R. 14279 as amended by the Senate.[43] The final step for congressional passage was taken when the Senate reapproved H.R. 14279, which had grown to twenty substantive titles, a few hours later.[44] The President signed H.R. 14279, the Financial Institutions Regulatory and Interest Rate Control Act of 1978, into law less than a month later.[45]

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33. 123 CONG. REC. H8708 (daily ed. Aug. 4, 1977).
34. 123 CONG. REC. S14,243 (daily ed. Sept. 7, 1977).
35. 124 CONG. REC. S1943-48 (daily ed. Feb. 21, 1978).
36. *See EFT Consumer Protection Act Hearings, supra* note 4; *EFT Systems Hearings, supra* note 4.
37. 124 CONG. REC. S1015-20 (daily ed. Feb. 1, 1978).
38. 124 CONG. REC. D879 (daily ed. June 15, 1978).
39. 124 CONG. REC. H8489-90 (daily ed. Aug. 11, 1978).
40. 124 CONG. REC. S8449 (daily ed. May 26, 1978).
41. 124 CONG. REC. D1447 (daily ed. Sept. 28, 1978).
42. 124 CONG. REC. S 18,444-502 (daily ed. Oct. 12, 1978).
43. 124 CONG. REC. H13,040-71 (daily ed. Oct. 14, 1978).
44. 124 CONG. REC. S19,144-46 (daily ed. Oct. 14, 1978).
45. 14 WEEKLY COMP. OF PRES. DOC. 2006 (Nov. 13, 1978).

The EFT Act was given a bifurcated effective date.[46] Two provisions, governing consumer liability for unauthorized electronic fund transfers and EFT card issuance,[47] became effective February 10, 1979, a mere ninety days after passage of the Act. The remainder of the legislation is scheduled to take effect on May 10, 1980, eighteen months after passage.[48]

While this action marked the end of the EFT Act's legislative journey, it is more properly viewed as signaling the point of departure for federal EFT regulation. Undoubtedly due to the extreme time pressures under which the Act was finally passed by Congress, the legislators left many issues unresolved. Moreover, the various provisions of the Act itself are teeming with ambiguities and inconsistencies, many of which became apparent only in the course of detailed review and rulemaking.[49] Thus, while Congress has set the stage in the EFT Act, the action in the EFT field has merely shifted to the regulatory forum of the Federal Reserve Board where the lengthy process of promulgating and interpreting Regulation E has begun.[50]

V. Regulatory and Enforcement Authority

Section 904 of the EFT Act[51] grants the Federal Reserve Board authority to promulgate regulations implementing the Act. In contrast to the general regulatory authority extended to the Board by comparable

46. EFT Act, § 921, 15 U.S.C.A. § 1693 *note* (Supp. 1979).

47. EFT Act, §§ 909 & 911, 15 U.S.C. §§ 1693g, 1693i (Supp. 1978).

48. The 18-month delay was considered essential for thoughtful and well-drafted regulatory implementation by the Federal Reserve Board. Given the technologically sophisticated nature of the subject matter, it was also recognized that a substantial period of time should be allotted for compliance efforts. Congress considered §§ 909 and 911 to be of fundamental importance, however, and accordingly enacted an accelerated effective date for those sections. *See* S. Rep. No. 915, 95th Cong., 2d Sess. 18, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9403, 9420 [hereinafter cited as Senate Report]. It should be noted, however, that the Federal Reserve Board was unable, even with diligent effort, to issue implementing regulations for the accelerated sections until March 21, 1979, well over a month after the two accelerated sections became effective. *See* 44 Fed. Reg. 18,468 (1979).

49. *See, e.g.*, note 51 *infra*.

50. In an effort to maximize the opportunity for public comment, the Federal Reserve Board has adopted a multi-phased approach in issuing its initial regulatory implementation of the EFT Act. The first proposals for Regulation E, intended to implement the accelerated sections of the Act, were issued in late 1978. *See* 43 Fed. Reg. 60,933 (1978). Following a public comment period, the proposals were revised and published in final form on March 28, 1979. *See* 44 Fed. Reg. 18,468 (1979). In May, proposals for the remainder of Regulation E were published for comment, and hearings on the regulation were scheduled for June 18 and 19, 1979. *See* 44 Fed. Reg. 25,840 (1979). In the next few months, the Board also adopted technical amendments to the section of Regulation E that deals with consumer liability for unauthorized transfers. *See* 44 Fed. Reg. 33,837, 46,432 (1979). Then, in October 1979, the sections originally proposed in May were republished. At this time, most of the provisions were revised and adopted in final form. *See* 44 Fed. Reg. 59,464, 59,469 (1979). The remainder were again submitted as proposals because the Board felt that the revisions were so substantial that another opportunity for public comment was warranted. *See* 44 Fed. Reg. 59,474, 59,485 (1979). Final adoption of these sections is expected by early 1980.

51. 15 U.S.C. § 1693b (Supp. 1978). Congress did not enact a bifurcated effective date for § 904. Consequently, although §§ 909 and 911 of the Act became effective February 10, 1979, there appeared to be no regulatory authority under those sections until May 10, 1980. Despite this oversight, the Federal Reserve Board quickly asserted authority to promulgate interim regulations implementing the two accelerated provisions of the Act. *See* 44 Fed. Reg. 18,468 (1979).

statutes, for example the Truth in Lending Act,[52] the EFT Act sets forth detailed and explicit guidelines for regulatory rulemaking. The Board is directed to consult with the other federal agencies to whom administrative enforcement responsibility has been alloted under the Act.[53] It is also instructed to consider and make an effort to promote the continuing evolution of electronic banking services and the accompanying technology.[54] Most importantly, and especially significant as a barometer of changing congressional attitudes toward consumer protection legislation, the Board is instructed to prepare an "economic impact" analysis before formulating its regulations—something never before required in this type of law.[55]

To the extent practicable, the Board is directed to demonstrate that the consumer protections of the proposed regulations outweigh the compliance costs imposed upon consumers and financial institutions.[56] Specifically, this cost/benefit analysis must take into consideration the burden imposed by additional documentation, reports, records, and other paperwork on financial institutions, consumers, and other EFT users.[57] Moreover, the analysis must assess the effect of EFT regulation upon competition between large and small institutions in offering electronic

52. The Truth in Lending Act, § 105, 15 U.S.C. § 1604 (1976), reads as follows:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

This language is repeated almost verbatim in § 904(c) of the EFT Act, 15 U.S.C. § 1693b(c) (Supp. 1978).

53. While the Federal Reserve Board is given exclusive authority to promulgate regulations implementing the EFT Act, 15 U.S.C. § 1693b (Supp. 1978), § 917 of the Act, 15 U.S.C. § 1693o (Supp. 1978), provides that administrative enforcement will be divided among the federal regulatory agencies that normally oversee the operations of the various regulated parties. Thus, with respect to the Act, national banks, member banks of the Federal Reserve System, and FDIC-insured banks will be subject to the enforcement authority of the Federal Reserve Board. Federal savings and loan associations and FSLIC-insured state-chartered savings & loan associations will be subject to the enforcement authority of the Federal Home Loan Bank Board. Federal credit unions will be subject to the enforcement authority of the Administrator of the National Credit Union Administration, while air carriers will be subject to the authority of the Civil Aeronautics Board, and brokers and dealers registered under the Securities Exchange Act of 1934 are to be regulated by the Securities and Exchange Commission.

Each of these agencies is empowered to enforce the EFT Act by any authority extended within the Act itself or otherwise conferred upon it by law. In addition, the residual enforcement authority under the Act is assigned to the Federal Trade Commission, which is empowered to exercise any of its functions or powers under the Federal Trade Commission Act to enforce compliance by any person subject to the jurisdiction of the Commission irrespective of whether that person meets the ordinary requirements necessary for the exercise of jurisdiction under the FTC Act. This scheme for allocating enforcement authority is substantially identical to the allocation of enforcement responsibility under the Truth in Lending Act. § 108, 15 U.S.C. § 1607 (1976).

54. The solicitude for the unhampered evolution of electronic banking services and technology was undoubtedly prompted by criticism from opponents of the EFT Act that the legislation was premature and overly restrictive. *See, e.g.*, SENATE REPORT, *supra* note 48, at 21-23; Letter of April 21, 1978, from the American Bankers Association to Congressman Reuss, Chairman of the House Committee on Banking, Finance, and Urban Affairs (on file with the authors).

55. EFT Act, § 904(a), 15 U.S.C. § 1693b (a) (Supp. 1978).

56. *Id.*

57. *Id.*

banking services, as well as the availability of EFT services to different classes of consumers, particularly low income consumers.[58]

The congressionally-mandated cost/benefit analysis is intended to promote sensitivity to the trade-offs and consequences of regulatory decision-making. While the variables of this analysis may be somewhat difficult to reduce to quantitative terms, the requirement should serve to focus regulatory attention upon the ever-present danger of imposing unnecessary or unduly burdensome regulatory requirements. Moreover, to the extent that the full range of modern EFT services has heretofore been relatively unstudied (and therefore largely an unknown quantity), the cost/benefit analysis should have the practical effect of enhancing the Board's awareness of and familiarity with the various features of the wide range of EFT operations and services currently offered by financial institutions and other parties.[59]

Section 904 of the Act also requires the Board to issue model clauses for optional use by financial institutions.[60] The model clauses are designed to facilitate compliance with the disclosure requirements of the Act, and have the salutary effect of protecting those who utilize them from civil liability for failure to make disclosures in a proper manner.[61] A decade of litigation over the disclosure requirements of the Truth in Lending Act has demonstrated that model clauses are necessary to ease the compliance burden, especially for smaller institutions, and to stem the tide of lawsuits alleging hyper-technical disclosure violations. Moreover, in order to aid consumers in understanding their rights and responsibilities, these model clauses are to be written in readily understandable language.[62]

The Federal Reserve Board is also empowered to modify the requirements of the EFT Act for the benefit of small financial institutions if the Board determines that appropriate modifications are necessary to alleviate an undue compliance burden and are not inconsistent with the purposes and objectives of the Act.[63] Finally, the Board is instructed to extend the regulation of electronic fund transfers under the EFT Act to persons other than financial institutions holding consumer accounts if those third parties offer EFT services.[64]

58. *Id.*

59. *See* PART II *supra*.

60. EFT Act, § 904, 15 U.S.C. § 1693b (Supp. 1978).

61. EFT Act, § 915(d) (2), 15 U.S.C. § 1693m(d) (2) (Supp. 1978).

62. EFT Act, § 904, 15 U.S.C. § 1693b (Supp. 1978).

63. In its initial implementation of the EFT Act, the Board has not proposed any modification to alleviate compliance burdens for small financial institutions. The Board has, however, solicited comment on the extent to which compliance with the regulation would impose undue costs and administrative or other burdens upon these institutions, as well as suggestions for the criteria that should be used in determining what constitutes a "small financial institution" for purposes of § 904. *See, e.g.*, 44 Fed. Reg. 25,850, 25,851-52 (1979).

64. EFT Act, § 904(d), 15 U.S.C. § 1693b(d) (Supp. 1978). The Federal Reserve Board accomplished this by defining the term "financial institution" to include not only persons holding an account belonging to a consumer, but also any person "who issues an access device and agrees with a consumer to provide electronic fund transfer services." *See* 44 Fed. Reg. 18,468, 18,480 (1979) (to be codified at 12 C.F.R. § 205.2 (i)).

VI. Coverage of the Act

Faced with the difficult task of formulating comprehensive legislation to regulate the relationship between financial institutions and EFT consumers, Congress wisely sought to focus attention upon that segment of the EFT phenomenon which appeared to provoke genuine concern for consumer protecton. In section 903(6) of the Act,[65] the key term "electronic fund transfer" is broadly defined as any transfer of funds, other than one originated by check, draft, or similar paper instrument, which is initiated electronically and authorizes a financial institution to debit or credit a consumer's asset account. To prevent confusion, Congress specifically enumerated several well-known forms of electronic fund transfer that it intended to include within the definition: electronic point-of-sale transfers, automated teller machine transactions, deposits or withdrawals of funds through the ACH mechanism, and transfers initiated by telephone.[66] At the same time, it clearly emphasized that the general definition was not necessarily limited to those particular types of EFT services.[67] The expansive legal definition stated above is designed to encompass future EFT innovations that will undoubtedly evolve from the present-day arrangement.

By the same token, Congress was also careful to restrict the applicability of the Act where it felt the legislation's provisions were not necessary or appropriate. It enumerated five types of services that are expressly excluded from the Act's coverage, even though they might otherwise be considered electronic fund transfers. These exclusions are significant, since they may be said to delineate the scope of congressional interest and the underlying concerns that originally motivated passage of the EFT legislation.

The first exclusion from the definition of an "electronic fund transfer" is check guarantee or authorization plans that do not directly result in a debit or credit to the consumer's account.[68] Coverage of these systems by the EFT Act was not considered necessary because the electronic function merely facilitates use of the consumer's check and assures it wider acceptance. The medium of payment is still the paper instrument.[69]

The second exclusion is for Fedwire, Bankwire, and similar wire transfer transactions, which service primarily financial institutions and large corporate customers. Wire transfers are already governed by rules

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65. 15 U.S.C. § 1693a(6) (Supp. 1978).

66. *Id.*

67. *See id.*

68. *Id.* The Federal Reserve Board has indicated that it will interpret this exclusion to apply to check guarantee services that merely place a "hold" on the consumer's account at the time of purchase. *See* 44 Fed. Reg. 18,468, 18,481 (1979) (to be codified at 12 C.F.R. § 205.3(a)). In this type of system, the consumer immediately loses the ability to use funds equal to the amount of the check, but the funds are not actually withdrawn until the check clears through normal banking channels. Placing such a "hold" on the consumer's account is commonly known in the industry as "memo posting."

69. *See, e.g.*, Brandel, *Electronic Funds Transfer: Commercial and Consumer Law Aspects*, 82 Comm. L.J. 78, 79 (1977).

established by the Federal Reserve Board in Subpart B of Regulation J.[70]

The third exclusion is for transfers made for the primary purpose of purchasing or selling securities or commodities through a broker-dealer registered with or regulated by the Securities and Exchange Commission.[71]

The fourth exclusion from the definition of an electronic fund transfer is extremely important. This provision exempts from the Act any automatic transfer from a savings account to a demand deposit account pursuant to an agreement to cover an overdraft or maintain a minimum balance in the consumer's demand deposit account. The exemption was intended to maintain the viability of automatic transfer services [ATS] that had been recently authorized by the federal financial regulatory agencies.[72] It is important to observe that in implementing this exemption, the Federal Reserve Board has substantially broadened it to include practically every automatic transfer between a consumer's accounts, to an account maintained by the institution, or from an account to the institution.[73] As explained by the Board, Regulation E will exempt all automatic transfers between savings and checking or NOW accounts from the Act's coverage.[74] Furthermore, such routine items as debiting of service charges and crediting of interest to interest-bearing accounts are exempted from the EFT Act, primarily on the basis of the exorbitant cost that would otherwise be incurred. Items such as automatic loan payments to the institutional creditor or payroll deductions for employees of the financial institution are also generally exempted. While a few of these automatic, intra-institutional transfers, for example, pre-authorized loan payments, are a relatively new occurrence, many of them, such as automatic debiting of service charges and automatic crediting of interest, are by now considered routine and traditional banking practices. Consumer familiari-

70. *See* note 3 *supra*.

71. As implemented by the Federal Reserve Board in Regulation E, the requirement of purchase or sale through a broker-dealer has been eliminated. *See* 44 Fed. Reg. 59,464, 59,470 (1979) (to be codified at 12 C.F.R. § 205.3(c)).

72. *See, e.g.*, 43 Fed. Reg. 20,001 (1978) (amending 12 C.F.R. § 217.5 (1978)).

In an unexpected turn of events, the U.S. Court of Appeals for the District of Columbia handed down a tersely-worded opinion on April 20, 1979, declaring several financial services, including ATS services, illegal under existing statutory law. American Bankers Ass'n v. Connell, [Current] FED. BANKING L. REP. (CCH) ¶ 97,785 (D.C. Cir. 1979). The court overturned regulations of the Federal Reserve Board, the Federal Home Loan Bank Board, and the National Credit Union Administration authorizing these types of services. The court, however, cognizant of the adverse impact that a sudden disruption of these services would have on consumer expectations and the financial community, stayed the effectiveness of its decision until January 1, 1980, to provide Congress with an opportunity to review, and perhaps legitimize with new legislation, the innovative services currently being offered.

73. 44 Fed. Reg. 59,464, 59,470 (1979) (to be codified at 12 C.F.R. § 205.3(d)). Automatic transfers to or from the financial institution, however, will remain subject to the prohibitions on coerced use of EFT. *Id. See also* PART XII *infra*.

74. Negotiable order of withdrawal [NOW] accounts are a relatively new device through which customers can receive interest on what are essentially demand deposit (checking account) funds. To date, NOW accounts are authorized only in a handful of states in the Northeast. New York was recently added to the list by Title XIII of FIRA. 12 U.S.C. § 1832(a) (Supp. 1978). Due to the court of appeals decision striking down ATS services, *see* note 72 *supra*, Copngress is currently considering a bill, H.R. 4986, to extend authority for interest-bearing transaction accounts nation-wide.

ty with these procedures frees them from the vague, uncertain apprehension that motivated much of the clamor for EFT regulation.[75]

The final exemption from the purview of the EFT Act is an exclusion for nonrecurring transfers of funds that are initiated by an ordinary telephone conversation between a consumer and an officer or employee of the financial institution. In order to extend coverage over computerized "pay-by-phone" systems, the general definition of the term "electronic fund transfer" had to be broad enough to encompass transactions initiated through a telephone. Like automatic debiting of service charges and automatic crediting of interest, however, ordinary nonrecurring transfers informally initiated by a consumer's call to an officer or employee of his neighborhood bank or savings and loan association was not considered to pose a serious threat warranting the coverage and additional costs of the EFT Act. Such requests are handled on a personal basis, so the possibility of computer error or institutional abuse, believed to exist with respect to some other EFT systems, was deemed to be absent.

As we have seen, both Congress, in the EFT Act, and the Federal Reserve Board, in Regulation E, have attempted to focus their primary regulatory efforts upon the relatively narrow range of EFT services that have emerged in the 1970's. The view that these efforts, which narrow the scope of federal concern, represent the proper direction for regulatory action is not universally accepted, however. The staff of the Federal Reserve Board in April 1979 requested Board approval to support legislative modification of the EFT Act that would correct what are believed to be troublesome problems created by the carefully limited definition of an electronic fund transfer contained in the Act.[76] The Board's staff observed that an electronic fund transfer is defined to include only transfers that are *initiated* electronically; transfers initiated by check, draft, or similar paper instrument are specifically excluded.[77] As a result, paper-initiated transactions that are subsequently converted into electronic form are not covered by the Act or Regulation E. However, the paper-based and electronic technology cannot always be isolated as separate services. Payment by check remains primarily governed by the state-enacted Uniform Commercial Code Articles 3 and 4, and commingling of paper and electronic transfers exacerbates the effort to regulate electronic fund transfers at the federal level. The Board's staff, therefore, took the position that such a forced separation between the two modes of payment cannot be maintained.

The most obvious cross-over between paper and electronic

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75. *See, e.g., EFT Consumer Protection Act Hearings, supra* note 4, at 57.

76. Staff Memorandum on Regulation E—Unsolved Issues, from the Division of Federal Reserve Bank Operations and the Committee on Consumer Affairs to the Board of Governors of the Federal Reserve System (April 20, 1979) (on file with the authors). *See also* Washington EFT Newsletter, June 18, 1979 at 4 (summarizing the staff's position).

77. *See* EFT Act, § 903(6), 15 U.S.C. § 1693(a) (6) (Supp. 1978).

technology is emerging in the area of check truncation. In a check truncation system, a transfer is initiated by check or draft, but when it reaches a bank of deposit, the essential information is taken from the check and relayed to the payor's bank electronically. The check is ordinarily stored temporarily for reference in case of error, but is not returned to the payor or to his bank.

Check truncation represents a natural transitional stage from an exclusively paper to a predominantly electronic payment system. Since the transfer of funds is not initiated electronically, however, the EFT Act does not apply.[78] The Board's staff believes, however, that the consumer is not adequately protected by other legislation. For instance, it is argued that since the check or a photocopy of it will be retained only temporarily, the consumer would thereafter be left to rely upon the periodic statement for proof of payment.[79] Lacking the protection of the EFT Act,[80] it is not certain that the periodic statement would necessarily be treated as prima facie evidence of payment. Nor is it certain that the summary information provided on the periodic statement would include all the basic elements required by the EFT Act for electronic transfers of funds. Finally, the staff is concerned that, given present disclosure requirements, accounts that are accessible by both paper instrument and electronic means are only provided with partial disclosures. It recommends, therefore, that consumers be given account disclosures covering all types of transactions, whether paper, electronic, or commingled.

The practical effect of this proposal, of course, would be to replace the traditional reliance upon state laws that govern the consumer/financial institution relationship (*i.e.*, the UCC) with a new body of federal law. This federalization of the consumer banking field would undoubtedly shift the law's nature from the "law merchant" orientation of the UCC and ordinary contract principles toward a consumer protection orientation modelled on the Truth in Lending Act and other related federal statutes. This is perhaps an inevitable development, particularly as the electronic and commingled paper-and-electronic segments of the banking relationship come to surpass more traditional payment mechanisms in the not-too-distant future. At the same time, there is little evidence of the inadequacy of current state laws to deal with today's paper-based payment system. Therefore, any immediate attempt to federalize the whole consumer banking environment would appear to be premature, and has

78. *See* SENATE REPORT, *supra* note 48, at 4. Nor is the EFT Act applicable to any EFT payment system that operates in a manner similar to the present-day credit card system. If an EFT card is used merely to imprint a sales slip or similar paper instrument which is then truncated and processed downstream in electronic form, it would not appear to fall within the definition of electronic fund transfer in § 903 (6) of the Act. The key distinction is that the debit would be initiated by the paper sales draft, rather than by electronic means.

79. Technological developments in image processing may blunt this objection. *See* note 14 *supra*.

80. *See* text accompanying note 105 *infra*.

not yet generated substantial support in other quarters.[81] Indeed, proponents of the EFT Act urged its adoption precisely because they were concerned that electronic transfers would not receive the presumably adequate protection provided for paper-based transfers under Articles 3 and 4 of the UCC. The conceptual desirability of a comprehensive payment systems law enacted at the federal level does not seem sufficiently urgent to eclipse the prudence of awaiting a more complete picture of the direction that development of hybrid paper-and-electronic systems will take and the difficulties that are likely to be encountered.

A few weeks after the staff report urged Board support for congressional action to extend the coverage of federal law to include check truncation systems, Governor Nancy Teeters of the Federal Reserve Board testified before the Subcommittee on Consumer Affairs of the House banking committee. On May 1, 1979, she stated that the Board was reluctant to recommend any legislative action until the use of check truncation had become more widespread and the need for consumer protections became more distinct.[82] Thus, for the moment at least, congressional action to expand the EFT Act's scope in any significant way seems unlikely.

VII. Disclosure and Documentation

A. *Disclosure*

One of the primary objectives of the federal legislation is to provide consumers with comprehensive disclosure of their rights and responsibilities with respect to electronic fund transfer services. Following the general pattern of the Truth in Lending Act's requirements for credit card disclosures,[83] section 905 of the EFT Act mandates an initial disclosure at the time the consumer contracts for an electronic fund transfer service.[84] In

81. Many commentators continue to view the UCC as a viable vehicle for the legal structure in hybrid payment systems. *See, e.g.*, Vergari, *UCC Articles 3 and 4 in an EFT Environment—Appendix 2*, in The New Way to Pay—Electronic Fund Transfer (EFT) (May 1979) (seminar materials on file at the University of San Francisco Law Review office); *EFT Consumer Protection Act Hearings, supra* note 4, at 139.

82. 65 Fed. Res. Bull. 399, 403 (1979) (reprint of Governor Teeter's statement).

83. *See* Truth in Lending Act, § 127, 15 U.S.C. § 1637 (1976).

84. EFT Act, § 905(a), 15 U.S.C. § 1693c(a) (Supp 1978). For accounts that are already accessible by electronic fund transfers prior to the effective date of the Act on May 10, 1980, the initial disclosures must be made with the first periodic statement after the effective date, but in any event no later than 30 days after the Act takes effect. EFT Act, § 905(c), 15 U.S.C. § 1693c(c) (Supp. 1978). In the meantime, however, the EFT statute does not require any disclosures relating to consumer liability under § 909, 15 U.S.C. § 1693g (Supp. 1976), which took effect on February 8, 1979, except transitional disclosures when EFT cards were issued on an unsolicited basis.

The Federal Reserve Board, however, believed that this constituted a "disclosure gap" and that all EFT consumers should be informed of their potential liability and of the need for prompt reporting. Consequently, on June 7, 1979, it adopted amendments to Regulation E that had the effect of requiring interim disclosures to consumers unless the institution chooses to impose no liability upon consumers for unauthorized transfers. *See* 44 Fed. Reg. 33,837 (1979). As a result, no institution may impose any liability upon a consumer for unauthorized electronic fund transfers between August 1, 1979, and May 10, 1980, unless it has previously provided the consumer with the interim Regulation E disclosures of addition, section 905 requires an annual summary disclosure of the consumer's rights regarding error resolution.[85]

While the Truth in Lending Act mandates a discrete set of terms and conditions relating to credit accounts, the EFT statute initially appeared to require an all-inclusive disclosure of terms and conditions relating to electronic fund transfers involving a consumer's account. The potential burden of this open-ended disclosure requirement is, however, alleviated by several factors. First, as was mentioned earlier, the Board is required to issue model disclosure clauses for general use, and a financial institution is relieved of any liability for a failure to make proper disclosure if it has utilized the appropriate model clause issued by the Board.[86] Moreover, an institution will not incur liability if it acts or fails to act in good-faith reliance upon any rule, regulation, or interpretation issued by the Board or by an appropriate official.[87] Since section 905 also states that the terms and conditions of electronic fund transfers are to be disclosed in accordance with regulations of the Board, this provision insulates a financial institution from after-the-fact judicial disapproval, as long as the institution has fully complied with the Board's implementing regulations. The Board's regulation regarding initial disclosures seems to have returned to the Truth in Lending Act pattern, and limits the required disclosure to a discrete set of terms and conditions relating to the EFT service offered.[88]

In addition to the initial disclosures and the annual summary of error resolution procedures, section 905 of the Act requires financial institutions to provide written notification to consumers at least twenty-one days prior to any unfavorable change in any term or condition of an EFT account that was disclosed as part of an initial disclosure.[89] Thus, any change which would result in greater cost or increased liability for the consumer, or would decrease access to the consumer's account, must be preceded by

§ 205.5(a) (3) regarding (1) potential consumer liability under the EFT Act or other applicable law or agreement, (2) the telephone number and address to be used for reports of loss, theft, or unauthorized use of a card, and (3) the financial institution's business days as determined under § 205.2(d) of Regulation E. *Id.* at 33,839.

85. EFT Act, § 905(a) (7), 15 U.S.C § 1693 c(a) (7) (Supp. 1978). As implemented in Regulation E, a shorter monthly disclosure included with or printed on the reverse side of the periodic statement may be used as an alternative to the longer annual disclosure form, as long as the consumer received the annual form at the outset of his use of the EFT service. *See* 44 Fed. Reg. 59,464, 59,471 (1979) (to be codified at § 205.8(b)).

86. EFT Act, § 915(d), 15 U.S.C. § 1693m(d) (Supp. 1978).

87. The Truth in Lending Act had no such provision when it was originally enacted. As a result, there was a danger that courts would impose stiff penalties upon institutions that had diligently attempted to comply with the Act, as interpreted by the Board. *See Inaccurate and Unfair Billing Practices: Hearings on S. 1630 and S. 914 Before the Subcomm. on Consumer Credit of the Senate Comm. On Banking, Housing, and Urban Affairs*, 93d Cong., 1st Sess. 198-99, 253 (1973). Faced with this inequitable situation, Congress amended the Truth in Lending Act in 1974 to preclude liability for actions taken in reliance upon a Board regulation, rule, or interpretation. Pub. L. No. 93-495, § 130(f), 88 Stat. 1500, 1518 (1974) (codified at 15 U.S.C. § 1640 (f) (1976)). This provision was expanded in 1976 to include actions taken in reliance upon official interpretations of the Board staff. Pub. L. No. 94-222, § 3(b), 94th Cong., 2d Sess. (1976) (codified at 15 U.S.C. § 1640 (f) (1976)).

88. *See* 44 Fed. Reg. 59,464, 59,470 (1979) (to be codified at 12 C.F.R. § 205.7(a)).

89. EFT Act, § 905(b), 15 U.S.C. § 1693c(b) (Supp. 1978).

written notification of the change. An exception is provided for changes that are immediately necessary to maintain or restore the security of the EFT system or a particular consumer's account.[90] A financial institution may implement a change of this type without prior notice, although if the change is to be made permanent, the financial institution must provide subsequent notification.[91]

B. *Documentation*

The documentation requirements of the Act are comprehensive. Except where technological limitations preclude concurrent documentation—such as in "pay-by-phone" bill-paying systems—the Act requires that relatively complete paper documentation of every electronic transaction be made available to the consumer at the time of the transaction.[92] A receipt is required for each electronic fund transfer initiated by a consumer at an electronic terminal, including POS terminals, ATMs, and cash dispensing machines, but not ordinary telephones.[93] The Act states that, at a minimum, the terminal receipt must set forth the type of transfer, the amount involved, the date initiated, the account involved, the identity of any third party involved, and the location or identification of the terminal.[94] In an effort to ensure that existing ATM and POS terminals are not unnecessarily rendered obsolete by a technical requirement for receipt information, the Federal Reserve Board has proposed slight modifications to the list of required information.[95]

Since recurring preauthorized electronic fund transfers are not initiated at an electronic terminal, they are subject to somewhat different documentation requirements. If an account is scheduled to be credited by

90. *Id.*

91. Under Regulation E, the subsequent notice must be provided with the next periodic statement or within 30 days, but need not be provided if doing so would jeopardize security. *See* 44 Fed. Reg. 59,464, 59,471 (1979) (to be codified at 12 C.F.R. § 205.8(a)).

92. *See, e.g.*, EFT Act, § 906, 15 U.S.C. § 1693d (Supp. 1978).

93. EFT Act, § 903 (7), 15 U.S.C. § 1693a(7) (Supp. 1978).

94. EFT Act, § 906(a), 15 U.S.C. § 1693d(a) (Supp. 1978).

95. Rather than requiring that the receipt information include the customer's account number, which may have created operational, security, and privacy problems, the most recent proposals for Regulation E would instead require that the receipt set forth the type of transfer and the type of the consumer's account(s) from or to which funds are transferred (such as "withdrawal from checking" or "transfer from savings to checking"), as well as the number or other identification of the *access device* used to initiate the transfer. In this way, the customer will still be assured that the transfer was properly completed, since in almost all cases only one of each generic type of account may be accessed by a particular access device. The regulation also provides that a code may be used to provide the type of transfer and type of account(s) involved, if it is explained elsewhere on the receipt. *See* 44 Fed. Reg 59,474, 59,485 (1979) (proposed addition of 12 C.F.R. § 205.9(a)(3), (4)).

The Regulation E proposals also provide that the terminal location information may be given on the receipt by either a location description (street address, place of business, etc.) or a terminal identification number. If the latter method is chosen, both the terminal identification number and a descriptive location must appear on the periodic statement. Also, the Regulation E proposals specify that the name of any third party to or from whom funds are transferred need not be included on the receipt if the name is given by the customer in a form that the terminal cannot duplicate on the receipt. If a code is used to identify a third party, it must be explained elsewhere on the receipt. *See* 44 Fed. Reg. 59,474, 59,485 (1979) (proposed addition of 12 C.F.R. § 205.9(a) (5), (6)).

preauthorized transfers from the same payor at least once every 60 days, the institution must provide some method for determining whether the transfer has occurred as scheduled.[96] Several options are made available by the statute. The payor may provide "positive notice" of the transfer to the consumer.[97] Alternatively, the institution may elect to provide either "positive notice" to the consumer when the credit is made as scheduled, or "negative notice" when the credit is not made as scheduled. This scheme for "documenting" preauthorized transactions represents one of Congress' major failures in properly weighing the economies and technological practicalities of attempting to duplicate a feature associated with most check transactions—payment verification—in the EFT environment. Flexible implementation by the Federal Reserve Board, however, may ameliorate the severity of the problem created by Congress.[98]

The final documentation requirement is set forth in section 906(c).[99] This section mandates a periodic statement for each account of a consumer that may be accessed by means of an electronic fund transfer.[100] The periodic statement must be provided for each month in which an electronic fund transfer affecting the account has occurred, and, in any event, at least every three months. The periodic statement must contain four basic elements. First, it must set forth the same information required for electronic terminal receipts.[101] Second, the periodic statement must show the total amount of any fees or charges for electronic fund transfers or account maintenance during the relevant cycle.[102] Third, the statement must contain the beginning and closing balances in the consumer's

96. EFT Act, § 906(b), 15 U.S.C. § 1693d(b) (1978).

97. The Federal Reserve Board has indicated that a paystub verifying that the transfer was initiated by an employer would satisfy this requirement. *See* 44 Fed. Reg. 59,474, 59,479 (1979). While a paystub does not, of course, guarantee that the transfer was received and executed by the financial institution, it does provide reasonable assurance to the employee that he will be paid as expected.

98. The most recent Federal Reserve Board regulation proposals have made another option available to the financial institution. If the consumer has first been informed of the right to receive positive or negative notice and elects not to receive such notice, the financial institution may furnish a telephone number that the consumer can call to ascertain whether a transfer has occurred, so long as it has disclosed this procedure and the telephone number to be used for this purpose at the outset and with each periodic statement. *See* 44 Fed. Reg. 59,474, 59,486 (1979) (proposed addition of 12 C.F.R. § 205.10(a)(1) (iii)). Given the operational difficulties, potential for error, and expense of providing either positive or negative notice of preauthorized transfers, the option that permits the establishment of a telephone number for transfer inquiries appears to be most advantageous to financial institutions under normal circumstances. This general idea was first suggested by Herb Wegner, Vice Chairman of the NCEFT, during the congressional hearings. *See EFT Systems Hearings, supra* note 4, at 6.

99. 15 U.S.C. § 1693d(c) (Supp. 1978).

100. Although the drafters of the EFT Act may not have been aware of the fact, almost all (if not all) open accounts held by an institution that participates in an ACH are at least potentially accessible by electronic transfers. *See* Christiani, *The Electronic Fund Transfer Act: Some Compliance Problems for Banks*, 13 U.S.F. L. REV. 273, 281-82 (1979).

101. Under the Board's proposals for Regulation E, the information to be provided on the periodic statement will be somewhat more extensive than the minimum data that must appear on the terminal receipt. For instance, the posting data for all EFT transactions must also be provided. *See* 44 Fed. Reg. 59,474, 59,485 (1979) (proposed addition of 12 C.F.R. § 205.9 (b) (1)).

102. The Regulation E proposals would require disclosure only of the fees and charges attributable to the right to make electronic fund transfers rather than general account maintenance charges. *See* 44 Fed. Reg. 59,474, 59,486 (1979) (proposed addition of 12 C.F.R. § 205.9(b) (3)).

account. Finally, it must provide the consumer with the address and telephone number to be used for making inquiries or providing notice of errors contained in the periodic statement.

There are two specific exceptions to the monthly periodic statement requirement. First, if the account is a passbook account that may not be accessed by EFT other than preauthorized credits to the account, financial institutions may, in lieu of a periodic statement, update the passbook to reflect intervening electronic transactions each time it is presented by the consumer.[103] Second, if the account is a non-passbook account that may not be accessed by EFT other than preauthorized credits to the account, the financial institution may provide a periodic statement on a quarterly basis, rather than each month in which a transfer occurs.[104]

Any documentation required by the EFT Act is deemed to be prima facie evidence that the electronic fund transfer was made.[105] This proof-of-payment provision was considered essential if consumers were to be adequately protected in an EFT environment. In fact, there is some evidence that consumer acceptance of new EFT systems may be dependent upon the ability to use the records and documentation generated in these systems as proof for tax-related matters, in court, and for other purposes.[106] Few objections were raised to this provision during consideration of the EFT Act, with one notable exception regarding receipts for automated teller machine deposits.

Typically, deposits made through ATMs are checks or cash placed in an envelope and inserted into the ATM by the consumer, who then receives a receipt showing the amount of deposit, based upon the figure he had keyed into the terminal keyboard. Since the financial institution has no means of verifying the amount of cash or the worthiness of checks placed in the ATM until later, however, the electronic terminal serves only as a pseudo-sophisticated night depository. If terminal receipt information regarding the existence or amount of a deposit were given undue consideration by courts and juries, the potential for fraudulent abuse would be significant. For this reason, many observers feel that deposit receipts should not be accorded any special evidentiary significance.[107] The EFT Act, on the other hand, may establish such receipts as prima facie evidence of the deposit, though not necessarily of the amount.[108] Prima

103. EFT Act, § 906(d), 15 U.S.C. § 1693d (d) (Supp. 1978). The institution need only provide the date and amount of each electronic transfer. This information may be provided on a separate document if the institution wishes. 44 Fed. Reg. 59,474, 59,486 (1979) (proposed addition of 12 C.F.R. § 205.9(c)).

104. EFT Act, § 906(e), 15 U.S.C. § 1693d(e) (Supp. 1978). This feature was designed to simplify compliance for institutions whose only contact with EFT was as a passive recipient of credit entries, such as Social Security or military payroll payments.

105. EFT Act, § 906(f), 15 U.S.C. § 1693d(f) (Supp. 1978).

106. *EFT Consumer Protection Act Hearings*, *supra* note 4, at 8, 11, 86-87.

107. *See, e.g.*, NCEFT REPORT, *supra* note 6, at 48-49.

108. Section 906(f) of the Act, 15 U.S.C. § 1693d(f) (Supp. 1978), is not entirely clear on this point. Deposits of this type might conceivably be completely outside the scope of the definition of

facie evidence, of course, is not conclusive and may be contradicted by other competent evidence. Therefore, the bank may counter an alleged error by showing that it maintained impeccable procedures for safeguarding and opening ATM deposits.[109] However, given the fact that a court or jury is likely to sympathize with a consumer who claims to have been wronged, this problem may prove to be one of the most difficult for financial institutions in the new EFT milieu.[110]

VIII. PREAUTHORIZED TRANSFERS

Because of their special nature, preauthorized regularly-recurring transfers are given independent treatment in section 907 of the EFT Act.[111] Preauthorized transfers must be requested by the consumer in writing and a copy of the authorization must be provided to the consumer at the time it is obtained from him.[112] Although POS and ATM transactions need not be reversible or provide for any stop-payment privilege,[113] preauthorized

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"electronic fund transfer" in § 903(6), 15 U.S.C. § 1693a(6) (Supp. 1978), since they might be deemed "originated by . . . paper instrument," namely, the checks, deposit slip, or other paper items in the envelope. Even more likely is the possibility that an ATM deposit by the consumer to his *own* account would not be considered a transfer "made to another person" within the meaning of § 906(f), 15 U.S.C. § 1693d(f) (Supp. 1978). The proper interpretation of this language, however, remains an open question.

109. Among other things, a bank might show that the deposits are kept in a double-lock box, requiring two employees to open it, and remove and verify its contents, each employee observing the other at all times. Also, if the cost is not prohibitive, closed-circuit television cameras with videotape recording might be deployed at each ATM or in the location where deposit envelopes are opened.

110. The maintenance of strictly controlled procedures for accepting and opening deposits may not exonerate the institution if it cannot adequately explain a deposit's "mysterious disappearance." *Cf.* Vilner v. Crocker Nat. Bank, 89 Cal. App. 3d 732, 152 Cal. Rptr. 850 (1st Dist. 1979); Gramore Stores, Inc. v. Bankers Trust Co., 93 Misc. 2d 112, 402 N.Y.S. 2d 326 (N.Y. Sup. Ct. 1978) (both cases holding bank accountable as bailee for contents of deposit bag inexplicably missing from night depository, despite exculpatory clause in deposit contract).

111. 15 U.S.C. § 1693e (Supp. 1978).

112. EFT Act, § 907(a), 15 U.S.C. § 1693e(a) (Supp. 1978).

113. This has been a major point of contention regarding the legal framework for electronic transfers in POS systems. Some parties (primarily consumer advocates) argued that electronic transfers are principally a vehicle designed to replace ordinary checks, and that consumers should, therefore, be entitled to "float" and stop-payment privileges (*i.e.*, reversibility). *See EFT Consumer Protection Act Hearings, supra* note 4, at 46, 88. Others (primarily those in the industry) contended that electronic transfers would often replace cash transactions, and that the transaction should be final once the consumer has completed it. Indeed, they argued that a legally mandated period of reversibility would destroy one of the primary advantages of EFT to retailers and other merchants—namely, certainty of payment. *See, e.g., EFT Systems Hearings, supra* note 4, at 7-9; *EFT Consumer Protection Act Hearings, supra* note 4, at 221, 284-86; Kutler, *EFT Bill of Rights for Consumers Is Offered*, Am. Banker, April 27, 1978, at 2, col. 1. (following the analogy to a cash transaction and therefore omitting any reversibility privilege).

Faced with a lack of sufficient congressional support, proponents of Senator Riegle's original EFT bill struck a provision that would have required reversibility of electronic transfers of $50 or more during the bill's consideration by the Senate banking committee. *See* 73 Daily Rep. for Executives (BNA) A-5 (April 14, 1978). A reversibility requirement contained in the original House bill, introduced by Congressman Annunzio, was also dropped in committee after attempts to make it more acceptable were unsuccessful. *See Reversibility Clause Deleted From EFT Bill By House Unit*, Am. Banker, June 2, 1978, at 1, col. 3.

For an explanation of reversibility that compares it to consumer rights in other forms of payment, *see* Brandel *supra* note 69, at 82-84. For a discussion of the theory behind what is, in effect, a partial reversibility provision for credit cards in § 170 of the Truth in Lending Act, 15 U.S.C. § 1666i (1976), transfers may be stopped by notifying the financial institution orally or in writing at any time up to three business days preceding the scheduled date of transfer.[114]

Preauthorized transfers also require special notification to the consumer. If preauthorized transfers to the financial institution or a third party payee may vary in amount, the financial institution or designated payee may be required to provide advance notice of the amount to be transferred and the scheduled date of the transfer prior to each transfer.[115] The purpose of the advance notice requirement is to ensure that the consumer is aware of the amount of the impending debit to his account, and that he has an opportunity to make sure that the account has sufficient funds to cover the payment, or perhaps to exercise the stop-payment privilege if the amount of the proposed debit appears to be erroneous.

Because the cost of generating and sending individual notice prior to each transfer might be so great that preauthorized transfer services would no longer be economically feasible, the Federal Reserve Board's implementation in Regulation E would permit a financial institution to use an alternative that will alleviate this burden.[116]

IX. ERROR RESOLUTION PROCEDURES

As with any human undertaking, electronic fund transfer services cannot be completely free of the possibility of error. Various mistakes—the gathering of incorrect information, improper computer programming, or even possibly machine malfunction—may cause transactions to go awry. Therefore, the EFT Act provides procedures for dealing with the resolution of complaints and inquiries regarding possible errors.[117]

The concept of error is broadly defined by the Act. It includes practically any incorrect, mistaken, or unauthorized transfer, any documentation failure or omission, and any consumer request for additional information, clarification, or documentation. Furthermore, should it appear necessary, the Board is given broad authority to designate

and § 226.13(i) of Regulation Z, 12 C.F.R. § 226.13(i) (1978), *see* Brandel & Leonard, *Bank Charge Cards: New Cash or New Credit*, 69 MICH. L. REV. 1033 (1971).

114. EFT Act, § 907(a), 15 U.S.C. § 1693e(a) (Supp. 1978).

115. EFT Act, § 907(b), 15 U.S.C. § 1693e(b) (Supp. 1978). Payments of this type are generally for items such as utility bills, insurance payments, or mortgage payments.

116. If a consumer is informed of the right to receive notice of all varying transfers and agrees to forego such notice, a financial institution may limit its notification duty to those instances in which a variable electronic fund transfer falls outside an agreed range of amounts or differs by more than a prearranged amount from the previous preauthorized transfer under the same authorization. *See* 44 Fed. Reg. 59,464, 59,471 (1979) (to be codified at 12 C.F.R. § 205.10(d)). For matters such as monthly mortgage payments, which may be subject to one annual charge to reflect alterations in insurance or property taxes, and utility bills, which usually remain relatively constant from one month to the next, this relaxation of the pre-notification requirement will retain the cost effectiveness of preauthorized transfers and still prevent consumers from being unfairly surprised by transfers which differ greatly in amount from the expected payment.

117. The need for special error resolution procedures was not extensively challenged during congressional consideration. Rather, debate focused upon the particular time periods and investigation responsibilities to be imposed. *See EFT Systems Hearings*, *supra* note 4, at 28-30.

any other act or failure to act as an error for purposes of the error resolution procedures.[118]

If a financial institution receives a report of an error within 60 days of having transmitted to a consumer documentation first showing the alleged error, it must investigate the alleged error, determine whether an error has in fact occurred, and report or mail the results of its investigation and determination to the consumer within ten business days.[119] The consumer may report an alleged error orally or in writing. However, in order to trigger the error resolution duties of the institution, the consumer must provide enough information to enable the institution to undertake its investigation. Generally, the error report must contain information sufficient to enable the institution to identify the consumer's name and account number, the consumer's belief that the documentation or account is in error and, if possible, the amount of such error and the reasons for the consumer's belief that an error has occurred.[120] Also, the financial institution may require the consumer to provide written confirmation within ten business days of an oral error report, if the consumer is properly advised of this requirement and the address to which such a confirmation should be sent.

The financial institution may extend the period allowed for its investigation from ten business days to forty-five calendar days by provisionally recrediting the consumer's account for the amount alleged to

118. EFT Act, § 908(f), 15 U.S.C. § 1693f (f) (Supp. 1978), reads in full:

(f) For the purpose of this section, an error consists of—

(1) an unauthorized electronic fund transfer;

(2) an incorrect electronic fund transfer from or to the consumer's account;

(3) the omission from a periodic statement of an electronic fund transfer affecting the consumer's account which should have been included;

(4) a computational error by the financial institution;

(5) the consumer's receipt of an incorrect amount of money from an electronic terminal;

(6) a consumer's request for additional information or clarification concerning an electronic fund transfer or any documentation required by this title; or

(7) any other error described in regulations of the Board.

The Federal Reserve Board's most recent Regulation E proposals include a very similar definition of "error," but would specifically exclude routine account balance inquiries and requests for documentation for tax or business reasons. *See* 44 Fed. Reg. 59,474, 59,486 (1979) (proposed addition of 12 C.F.R. § 205.11 (a)).

119. EFT Act, § 908(a), 15 U.S.C. § 1693f(a) (Supp. 1978). The Federal Reserve Board's proposal provides that the 60-day period begins to run only after the financial institution has furnished the first *periodic statement* (or requested supplemental documentation) on which the error appears. 44 Fed. Reg. 59,474, 59,486 (1979) (proposed addition of 12 C.F.R. § 205.11(b)).

120. Although the statutory language contains no such qualification, the Federal Reserve Board's proposals for Regulation E would only require consumers to provide such information "to the extent possible." *See* 44 Fed. Reg. 59,474, 59,486 (1979) (proposed addition of 12 C.F.R. § 205.11(b)). The Board was concerned lest institutions deny their error resolution responsibilities when faced with an inarticulate or incomplete error report. *See* 44 Fed. Reg. 25,850, 25,856 (1979). On the other hand, there is a legitimate argument that institutions should not be put to the expensive and time-consuming task of investigating error reports so broad or unintelligible as to make any serious investigation a "wild-goose chase." While the Board has stated that the regulation "contemplates that the consumer articulate at least a general assertion or description of the suspected error," 44 Fed. Reg. 25,850, 25,856 (1979), the proposed regulatory language would appear to require no more of the consumer than a token attempt at furnishing useful information in the report of alleged error.

be in error, pending the conclusion of its investigation and its determination of whether an error has occurred.[121] During this period, the consumer will have full use of the funds provisionally recredited. However, if the institution has requested a written confirmation of an oral error report and such a confirmation is not received, it may continue its investigation for forty-five days without provisionally recrediting the account.[122]

If the institution determines that an error did occur, it must correct the error within one business day. If it determines that an error did not occur, it must deliver an explanation of its findings to the consumer within three business days after the conclusion of its investigation. Furthermore, upon the consumer's request, the institution must promptly deliver copies of all documents upon which it relied in making its finding that an error did not occur. A notice of the consumer's right to request copies of these documents must be included with the original explanation of its findings.

The financial institution's error resolution obligations under the EFT Act are more stringent than those applicable to open-end credit accounts under the Fair Credit Billing Act.[123] The EFT Act imposes much shorter time periods for investigations and responses, does not require that reports of error be in writing, and imposes potentially more severe sanctions for noncompliance.[124]

The financial institution is subject to liability for treble damages if it knowingly and willfully concludes that the account is not in error when such a conclusion could not reasonably have been drawn from the evidence available.[125] Moreover, unless a requested written confirmation of an error report is not received, the financial institution will be trebly liable if it fails to provisionally recredit a consumer's account within the initial ten business-day period and either (1) does not make a good faith investigation of the alleged error, or (2) does not have a reasonable basis for believing that the consumer's account is correct.[126]

X. Liability for Unauthorized Transfers

One of the most hotly debated topics during consideration of federal EFT legislation was the allocation of liability for unauthorized fraudulent transfers.[127] Industry groups, believing that much of the fraudulent activity

121. Under appropriate circumstances the Board has proposed that the institution need not recredit an amount equal to the consumer's potential liability ($50) arising out of unauthorized card use. 44 Fed. Reg. 59,474, 59,486 (1979) (proposed addition of 12 C.F.R. § 205.11(c) (1) (ii) (A)).

122. If a written confirmation is requested and not received, the financial institution must still investigate the alleged error, but need not provisionally recredit a consumer's account if its determination takes longer than 10 business days. 44 Fed. Reg. 59,474, 59,487 (1979) (proposed addition of 12 C.F.R. § 205.11(c) (2)).

123. 15 U.S.C. §§ 1666-66j (1976).

124. *See id.*

125. EFT Act § 908(e) (2), 15 U.S.C. § 1693f (e) (2) (Supp. 1978).

126. *Id.*

127. *See* Taffer, *supra* note 4, at 235-41; *EFT Consumer Protection Act Hearings, supra* note 4, at 92-93, 129, 248-57, 281.

arose as a result of consumers writing their PIN numbers on or near their EFT cards, argued that a negligence standard should be adopted. Under such a standard, the consumer would bear none of the loss unless his negligence substantially contributed to the unauthorized use; if it did, he would bear the entire loss.[128] While this arrangement would encourage care in the handling and storing of EFT cards and PINs, consumer groups argued that it was unduly harsh on consumers and would enable financial institutions possessing greater legal resources to shift more than a fair share of the liability burden to consumers. They advocated a flat $50 limitation on liability like that applicable to credit cards under the Truth in Lending Act.[129] These concerns ultimately carried the day, and although a pure $50 limit was rejected in favor of a compromise rule, the liability-allocation rule that was finally adopted will place strict limits upon consumer liability regardless of the consumer's negligence in safeguarding the account access devices.

Under the EFT Act, an unauthorized transfer is defined as a transfer initiated by someone other than the consumer or a person to whom the consumer has given actual authority to initiate the transfer, and from which the consumer receives no benefit. Any transfer initiated by someone to whom the consumer furnishes his EFT card and PIN, however, is not to be considered unauthorized unless the consumer has notified the institution that transfers by that person are no longer permitted.[130]

As an initial matter, the amount of a consumer's liability for an unauthorized electronic transfer or related series of transfers will not exceed $50 or the amount of unauthorized transfers that occur before notice is given to the financial institution, whichever is less.[131] Thus, the basic limitation on consumer liability is similar to the flat dollar-amount limitation of the Truth in Lending Act.[132] There are two significant exceptions, however, that may escalate the initial $50 limitation on consumer liability.

First, if the consumer fails to notify the financial institution within two business days after he discovers the loss or theft of an EFT card or PIN, the consumer may be liable for up to $500 of unauthorized use.[133] This second tier of liability is intended to encourage prompt reporting of lost and stolen cards once the consumer becomes aware of the loss or theft. This scheme is designed to hold total system losses to a reasonable minimum, while protecting consumers from unlimited liability for

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128. Under this approach, the general standards of liability used for forged or altered checks would be applied to EFT. *See* U.C.C. § 3-406; *EFT Systems Hearings*, *supra* note 4, at 9-11; *EFT Consumer Protection Act Hearings*, *supra* note 4, at 248-57.

129. *See, e.g.*, *EFT Consumer Protection Act Hearings*, *supra* note 4, at 74, 178; *Oversight Hearings*, *supra* note 32, at 190, 217, 316-18.

130. EFT Act, § 903(11) (A), 15 U.S.C. § 1693a(11) (A) (Supp. 1978).

131. EFT Act, § 909(a), 15 U.S.C. § 1693g(a) (Supp. 1978).

132. Truth in Lending Act, § 133(a), 15 U.S.C. § 1643(a) (1976).

133. EFT Act, § 909 (a), 15 U.S.C. § 1693g(a) (Supp. 1978).

indiscretions in safegarding their EFT cards and PINs, or for slight delays in reporting a loss or theft.

Second, there is no ceiling on consumer liability for subsequent unauthorized transfers that occur because the consumer has failed to report within 60 days of the transmittal of a periodic statement any unauthorized transfer that appears on the statement.[134] This is intended to provide an incentive for consumers to read and verify their periodic statements, and thus thwart fraudulent users who might otherwise drain the account over a lengthy period of time. It also provides necessary encouragement for consumers to report in a reasonably prompt fashion suspected unauthorized transfers which do not arise out of any loss or theft of the access devices.[135]

There are a number of important qualifications upon the tiered $50/$500/unlimited liability structure of the EFT Act. First, the time periods for notifying the financial institution of card loss or theft, or unauthorized transactions appearing on the periodic statement, may be relaxed in extenuating circumstances, such as extended travel or hospitalization. Moreover, either state law or contractual agreement between the consumer and the financial institution may reduce (but not increase) the consumer's liability for unauthorized transfers.[136] Most importantly, however, the burden of proof is placed upon the financial institution to show that the electronic transfer was either authorized, or if unauthorized, that the conditions of consumer liability have been met.[137] Given the extreme difficulty of proving facts solely within the consumer's knowledge (such as when he became aware of the fact that his card had been lost or stolen), many financial institutions may choose not to impose any liability on consumers for unauthorized transactions, unless they believe that consumers are taking undue advantage of the situation.[138]

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134. *Id. Compare* U.C.C. § 4-406(1).

135. One might also observe that the various tiers of liability may operate in conjunction, given the correct circumstances. For instance, a consumer who fails to report a stolen EFT card after discovery of the theft will be liable for up to $500 worth of unauthorized transfers. If he also fails to report unauthorized transfers that appear on his periodic statement within the appropriate 60-day period, he will be faced with the possibility of unlimited liability for future unauthorized transfers. *See* 44 Fed. Reg. 18,468, 18,482 (1979) (later renumbered for codification at 12 C.F.R. § 205.6(b) (2)).

136. EFT Act, § 909(d), 15 U.S.C. § 1693g(d) (Supp. 1978).

137. In addition to the conditions on liability set forth in the text, the consumer cannot be held liable unless (i) the institution has provided a means, such as signature, photograph, or secret PIN, through which the user can be identified as the person authorized to use the card or other access device, and (ii) the card or other access device has been "accepted." EFT Act, § 909(a), 15 U.S.C. § 1693g(a) (1978). A consumer "accepts" an access device by requesting and receiving it, signing it, using it, or authorizing another to use it in an electronic fund transfer. EFT Act, § 903(1), 15 U.S.C. § 1693a(1) (Supp. 1978). The "acceptance" concept is designed to preclude consumer liability for use of a card that is intercepted or lost in the mails, placing that risk instead on the financial institution. *See EFT Consumer Protection Act Hearings, supra* note 4, at 261; *Unsolicited Credit Cards: Hearings on S. 721 Before the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 18 (1969) [hereinafter cited as *Unsolicited Credit Card Hearings*].

138. Today many institutions voluntarily forego the $50 liability for consumers arising from unauthorized use of lost or stolen credit cards. *See EFT Consumer Protection Act Hearings, supra* note 4, at 178; *Unsolicited Credit Card Hearings, supra* note 137, at 19; *Bank Credit-Card and Check-*

For purposes of the consumer liability provisions, notice is considered given to a financial institution when the consumer takes such steps as are reasonably required to provide the financial institution with the pertinent information, whether or not any particular officer or employee of the institution receives the information.[139] At the consumer's option, notice may be given to the institution in person, by telephone, or in writing. Whatever method is chosen, notice will be effective at the time it is properly dispatched by the consumer, whether it is actually received at that time, or, in fact, ever received by the institution.[140]

The final significant issue regarding consumer liability is the relationship between the EFT Act and the Truth in Lending Act. This problem was ultimately resolved by the Federal Reserve Board: A consumer's liability for an unauthorized electronic fund transfer is determined solely in accordance with the EFT Act provisions even if the transfer (1) was initiated by use of an access device that is coincidentally a credit card under Regulation Z, or (2) involved an extension of credit under an agreement between a consumer and a financial institution to extend credit when the account is overdrawn or to maintain a specified minimum balance.[141] On the other hand, a consumer's liability for

Credit Plans: Hearings on Credit Cards Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 2nd Sess. 4-5 (1968) [hereinafter cited as *Credit Card Hearings*]. In addition, a survey conducted prior to passage of the Act found that over one-fourth of all banks were absorbing *all* EFT losses. *EFT Consumer Protection Act Hearings*, *supra* note 4, at 169.

139. EFT Act, § 909(a), 15 U.S.C. § 1693g(a) (Supp. 1978).

140. The proper timing of mailed card loss and theft notifications was a hotly contested issue in the formulation of Regulation E. At first, the Federal Reserve Board adapted a sentence from Regulation Z, 12 C.F.R. § 226.13(e) (1978), which stated that notice in writing is considered given at the time of receipt, or, whether or not actually received, at the expiration of the time ordinarily required for transmission, whichever is earlier. *See* 44 Fed. Reg. 18,468, 18,482 (1979) (superseded). Thus, the consumer would have borne the risk of liability (subject to the applicable ceiling) arising from unauthorized use during the normal period of transmission. The financial institution would have borne the risk of unauthorized use after the normal period for delivery if the written notification was lost or unusually delayed in the mails.

Rapid notification is essential for the reduction of losses from fraud—losses that will increase the cost of EFT services to consumers. Most consumers do, in fact, make such reports by telephone, and since other consumers could do the same (and indeed would be encouraged to do so), it does not seem onerous to place part of the burden of losses resulting from a consumer's choice to notify the institution through the mails on the consumer.

Despite this reasoning, the Federal Reserve Board adopted, effective September 10, 1979, a "mailbox rule" that deems notification given when properly dispatched. *See* 44 Fed. Reg. 46,432 (1979) (later renumbered for codification at 12 C.F.R. § 205.6(c)). This change of heart was undoubtedly prompted by political pressure emanating from Congressman Frank Annunzio, who had conducted a well-publicized oratorical campaign attacking the previous notice-timing provision as inimical to the interests of consumers and contrary to congressional intent. *See* 758 FED. BANKING L. REP. (CCH) 3 (April 12, 1979); 125 CONG. REC. H2206 (daily ed. April 10, 1979); Battey, *Annunzio Hits Fed Card Loss Rules*, Am. Banker, April 10, 1979, at 2, col. 1.

Of course, the amended rule, if adopted, would not be in harmony with the notice-timing provision of the Truth in Lending Act, since it holds an institution totally responsible for unauthorized transfers occurring before the institution has been notified and given an opportunity to prevent them. A better solution to the notice-timing dilemma (and one suggested by Governor Nancy Teeters of the Federal Reserve Board before the Board reversed its previous position) would have been to permit an institution to require that consumers make the initial loss or theft report orally if the institution has established a 24-hour telephone number for that purpose. *See* 85 Daily Rep. for Executives (BNA) A-14, A-15 (May 1, 1979); 44 Fed. Reg. 46,432, 46,433 (1979).

141. *See* 44 Fed. Reg. 18,468, 18,482 (1979) (renumbered and codified at 12 C.F.R. § 205.6(d)).

unauthorized use of a credit card that is also an EFT access device, but that does not involve an electronic fund transfer under the EFT Act, will be determined solely in accordance with the Truth in Lending Act and Regulation Z. Thus, the nature of the particular transaction involved, rather than the characteristics of the card itself, determines which of the liability provisions apply.[142]

XI. EFT Card Issuance

When the Truth in Lending Act was originally enacted in 1968, it contained no restriction upon the issuance of credit cards. Some observers, however, soon felt that the evils which full cost-of-credit disclosure was intended to eradicate were being promoted by the unsolicited issuance of credit cards. Indeed, a veritable flood of plastic was supposedly sweeping consumers along the way to foolish and potentially ruinous overextensions of credit.[143] In addition, the mass mailing of unsolicited cards aggravated the problem of fraudulent use by increasing the risk that large numbers of cards would be intercepted in the mails.[144] This left the intended recipient in the unenviable and often frustrating position of convincing the institutional sender that the credit card had never been received and used as intended, even if the consumer had not wanted the card in the first place.[145] Therefore, in 1970, Congress added a provision to the Truth in Lending Act which forbade the initial issuance of credit cards other than in response to a request or application.[146] While this action may have curbed the perceived abuses of mass credit card mailings, it also had the undesirable effect of freezing the competitive position of institutions in the credit card marketplace.[147] This collateral effect was viewed with special concern by institutions that were relieved of legal restrictions upon offering credit card services, but faced a significant marketing handicap.

Faced with the possibility of massive EFT card distribution and

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142. In testimony before the Subcommittee on Consumer Affairs of the House banking committee on May 1, 1979, Governor Nancy Teeters of the Federal Reserve Board suggested that congressional action be taken to harmonize the liability limitations of the EFT Act and the Truth in Lending Act. *See* 65 Fed. Res. Bull. 399-403 (May 1979); 85 Daily Rep. for Executives (BNA) A-14, A-15 (May 1, 1979). Whether or not the three-tiered structure of the EFT legislation or the flat $50 limitation of the credit card enactment (or some intermediate arrangement) emerges from such a unification, Governor Teeters' proposal would reduce confusion and complication for all parties concerned.

143. *See Unsolicited Bank Credit Cards: Hearings on H.R. 12646 Before the House Comm. on Banking and Currency*, 91st Cong., 1st Sess. 12-13 (1969) [hereinafter cited as *Unsolicited Bank Credit Card Hearings*]; *Unsolicited Credit Card Hearings, supra* note 137, at 39, 45-46.

144. *Unsolicited Bank Credit Card Hearings, supra* note 143, at 122-23, 132-34; *Unsolicited Credit Card Hearings, supra* note 137, at 12, 64.

145. *Unsolicited Bank Credit Card Hearings, supra* note 143, at 65-67, 95-107; *Unsolicited Credit Card Hearings, supra* note 137, at 11, 34-37.

146. Truth in Lending Act, § 132, 15 U.S.C. § 1642 (1976). Since it was directed at new card issuance, the prohibition did not apply to the issuance of credit cards in renewal of, or in substitution for, credit cards that had already been accepted by consumers. *Id.*

147. *EFT Consumer Protection Act Hearings, supra* note 4, at 155-56, 182-83, 219, 243; *Unsolicited Credit Card Hearings, supra* note 137, at 42, 67; *Credit Card Hearings, supra* note 138, at 23-24, 91.

cognizant of the problems encountered under a flat prohibition against unsolicited credit card issuance, Congress took a middle course in the EFT Act. First, it mandated that EFT access devices[148] may generally be issued only in response to a request or application,[149] or as a renewal of, or in substitution for, an accepted access device.[150] Notwithstanding this general prohibition, however, a financial institution or other person may distribute EFT cards or other means of electronic access on an unsolicited basis, if four specified conditions are met. First, the card must not be "validated," that is, it must be incapable of initiating electronic fund transfers in the condition in which it is issued.[151] Second, any unsolicited card must be accompanied by a complete disclosure of the consumer's rights and liabilities that will apply if the card is validated.[152] Third, the card must be accompanied by a clear explanation that it is not validated and instructions for disposing of the card if validation is not desired.[153] Fourth, the card may only be validated in response to a request or application from the consumer, after the consumer's identity has been verified.[154]

This congressional scheme attempts to strike a balance between the twin goals of adequate consumer protection and continued vigorous competition between financial institutions in the EFT environment. It will permit financial institutions to distribute cards,[155] yet still provide almost complete protection for consumers against liability arising from unauthorized use of cards which have been intercepted in the mails. It also soothes the concerns of some consumer advocates that EFT services might otherwise be thrust upon consumers who have no real desire to participate. While an unsolicited, yet validated, card arriving in the mail might be too tempting to be discarded unused, an unvalidated card requires a positive

148. The Act refers to the issuance of "any card, code, or other means of access . . . for the purpose of initiating an electronic fund transfer. . . ." EFT Act, § 911 (a), 15 U.S.C. § 1693i(a) (Supp. 1978). At the present time, practically all EFT systems utilize a plasitic card embossed with a magnetic strip, together with a secret PIN, as the primary electronic means of consumer access to an account. In an apparent attempt to avoid forcing future technological changes into existing patterns, however, the Federal Reserve Board has used the phrase "access device" throughout Regulation E to refer to EFT cards and PINs. *See* 44 Fed. Reg. 18,468, 18,480 (1979) (to be codified at 12 C.F.R. § 205.2(a) (1)).

149. While the Act itself is silent on this point, there is no evidence that Congress intended to limit issuance to written requests. Furthermore, oral requests have been permitted for credit card issuance under the Truth in Lending Act. *See* § 132, 15 U.S.C. § 1642 (1976), and Regulation Z, 12 C.F.R. § 226.13(a) (1978), without significant problem. *See* 44 Fed. Reg. 18,468, 18,471 (1979). Consequently the Federal Reserve Board's regulations specifically authorize acceptance of oral requests. 44 Fed. Reg. 18,468, 18,481 (1979) (later renumbered for codification at 12 C.F.R. § 205.5(a) (1)).

150. EFT Act, § 911(a), 15 U.S.C. § 1693i(a) (Supp. 1978).

151. EFT Act, § 911(b), 15 U.S.C. § 1693i(b) (Supp. 1978).

152. *Id.*

153. *Id.*

154. *Id.*

155. The rate of acceptance of credit cards and EFT cards is considerably higher when the plastic card, rather than a mere request or application for the card, is placed in the hands of the consumer. *See Unsolicited Bank Credit Card Hearings, supra* note 143, at 12-13; *Unsolicited Credit Card Hearings, supra* note 137, at 24-25; *Credit Card Hearings, supra* note 138, at 23-27.

consumer choice—a request or application for validation—before it may be used. Whether the balance struck will have the desired consequences in terms of both consumer protection and workable market competition remains to be seen.

XII. Compulsory EFT Use and Waiver of Rights

Since it was concerned that consumers be able to choose among a multiplicity of payment systems, Congress enacted several restrictions upon the ability of financial institutions to require or compel the use of EFT services. Thus, it is forbidden to condition any extension of credit to a consumer upon repayment by means of preauthorized electronic fund transfers.[156] Moreover, one may not require a consumer to establish an account for the receipt of electronic fund transfers with any particular financial institution as a condition of employment or receipt of a government benefit, such as welfare or Social Security payments.[157]

At the same time, Congress wished to ensure that consumers who elect to participate in EFT systems are not deprived of the basic protections afforded by the EFT Act. Therefore, no waiver of a consumer right conferred by the Act or a cause of action created by the Act will be given effect.[158] This prohibition does not, however, extend to a waiver given in settlement of a dispute or legal action.[159]

XIII. Civil and Criminal Liability

A. *Civil Liability*

There are two basic provisions regarding civil liability under the EFT Act. One governs the liability of a financial institution for failing to

156. EFT Act, § 913(1), 15 U.S.C. § 1693k(1) (Supp. 1978). Although financial institutions may not require repayment by preauthorized electronic fund transfers, this provision does not appear to prohibit a financial incentive (such as a lower interest rate) designed to encourage use of an EFT service. Presumably, financial institutions would offer such an incentive only if use of the service would produce cost savings comparable to the amount of the incentive offered. The Senate Report on the EFT Act expressly contemplates differential pricing based upon cost considerations. SENATE REPORT, *supra* note 43, at 16. *See also EFT Consumer Protection Act Hearings*, *supra* note 4, at 91. The House EFT bill introduced by Congressman Annunzio, on the other hand, would have expressly prohibited discriminatory pricing of EFT services. *See* H.R. 13007, § 916, in H.R. REP. NO. 1315, 95th Cong., 2d Sess. 43 (1978) [hereinafter cited as HOUSE REPORT].

157. EFT Act, § 913(2), 15 U.S.C. § 1693k(2) (Supp. 1978). The Act only prohibits requiring a consumer to establish an account with a *particular* financial institution as a condition of employment or receipt of a government benefit. It does not appear to preclude requiring a consumer to establish an account for receipt of electronic fund transfers with a financial institution that belongs to the ACH network, as long as the consumer is given a choice regarding the financial institution with which he will establish the account. *See EFT Consumer Protection Act Hearings*, *supra* note 4, at 184. Thus, employers or government officials might still be able eventually to convert their entire payrolls or benefit rolls to electronic transfers of funds. By way of contrast, if the House bill introduced by Congressman Annunzio had been enacted, it would have prohibited anyone from requiring an individual to establish any account for receipt of electronic transfers. HOUSE REPORT, *supra* note 156, at 41 (H.R. 13007, § 912(2)).

158. EFT Act. § 914, 15 U.S.C. § 1693*l* (Supp. 1978).

159. *Id.*

make or stop an electronic fund transfer in accordance with appropriate instructions.[160] The other provision sets forth the general civil liability of institutions which otherwise fail to comply with the provisions of the EFT Act.[161]

1. *Liability For Failure to Make or Stop an Electronic Transfer*

A financial institution will be liable to a consumer for all damages proximately caused by its failure to make an electronic fund transfer, in accordance with the terms and conditions of the account, in the proper amount, or in a timely manner when properly instructed to do so by the consumer. There are, however, significant qualifications upon this potential liability.[162] First, a financial institution is excused from failing to make an electronic fund transfer when the consumer's account has insufficient funds, unless the financial institution has also failed to credit a deposit of funds to the consumer's account which would have provided sufficient funds to make the transfer. Failure to make a transfer is also excused if the funds are subject to legal process or other encumbrance restricting transfer.[163] Moreover, a transfer need not be completed if it would exceed an established credit limit for overdrafts on the consumer's account, or if the consumer is attempting to use an electronic terminal which has insufficient cash to complete the transaction. Finally, other exculpatory circumstances may be specified by regulation.[164]

A financial institution will also be liable for all damages proximately caused by its failure to stop payment of a preauthorized transfer from a

160. EFT Act, § 910, 15 U.S.C. § 1693h (Supp. 1978).

161. EFT Act, § 915, 15 U.S.C. § 1693m (Supp. 1978). In addition, § 908(e), 15 U.S.C. § 1693f(e) (Supp. 1978), provides for trebling the liability under § 915(a) (1), 15 U.S.C. § 1693m (a) (1) (Supp. 1978), if the institution fails to fulfill its error resolution duties. *See* text accompanying note 104 *supra*.

162. Some consumer advocates unsuccessfully argued that all exculpatory factors should be eliminated, thereby imposing strict liability. *See, e.g., EFT Consumer Protection Act Hearings, supra* note 4, at 41, 55, 135.

163. Since an EFT withdrawal or transfer is often the functional equivalent of a check, financial institutions should be (and need to be) provided with the same justifications for failing to make or stop an electronic transaction as they would possess under state law (*i.e.*, the U.C.C.) for dishonoring checks or stop-payment orders. For this reason, it is hoped that the phrase "other encumbrance" in the Act will be interpreted to include "adverse claims" by third parties to funds in the account, if the institution believes that it would potentially expose itself to liability by allowing anyone access to the funds until the true right of ownership is established. *See, e.g.*, H. BAILEY, BRADY ON BANK CHECKS §§ 15.3, 18.6 (5th ed. 1979).

164. The Federal Reserve Board has declined to take advantage of this opportunity for regulatory action. Instead, it has suggested that financial institutions may further qualify their liability by including additional exculpatory circumstances in the terms and conditions of the account agreement. *See* 44 Fed. Reg. 59,464, 59,464 (1979). The Board reached this result by construing the language of § 910 of the Act, which imposes liability for failure "to make an electronic fund transfer, *in accordance with the terms and conditions of an account*, in the correct amount or in a timely manner," as authorizing the institution to further qualify the circumstances that will give rise to liability under § 910 15 U.S.C. § 1693e (Supp. 1978) (emphasis added). If this interpretation of the statute is correct, an institution could theoretically nullify the applicability of § 910 altogether by including a provision in the account agreement that would relieve it of liability for failure to properly make a transfer under most circumstances. It would not be different to argue, however, that unreasonable further limitations upon liability in the account agreement could conceivably constitute an attempted waiver of the protections of the Act, which is prohibited under § 914, 15 U.S.C. § 1693i (Supp. 1978).

consumer's account when it has been properly instructed to do so by the consumer.[165] An institution will not, however, be liable for a failure to make or stop an electronic fund transfer if it can show by a preponderance of the evidence that its failure to act resulted from an act of God or other circumstance beyond its control despite its exercise of care to prevent the occurrence, and that it exercised such diligence as was required in the circumstances.[166] Moreover, a financial institution will be relieved of liability for failure to make an electronic transfer if its omission resulted from a technical malfunction known to the consumer at the time he attempted to initiate the transfer, or, if the transfer was preauthorized, at the time the transfer should have occurred.[167] Finally, if the failure to make a transfer is not intentional and results from a bona fide error notwithstanding procedures reasonably designed to avoid such an error, the financial institution will be liable only for the actual damages proved.[168]

2. *General Civil Liability for Other Violations*

The general civil liability section of the Act provides that any person who otherwise fails to comply with any provision of the Act, except for an error resolved in accordance with the error resolution procedures,[169] is liable to the injured consumer for any actual damage sustained as a result of the violation.[170] In addition, if the consumer brings an individual action, he is entitled to recover a minimum penalty of not less than $100, but not more than $1,000.[171] If a class action is instituted, however, there is no individual minimum penalty recoverable by each member of the class, and the total penalty recoverable in any class action or series of class actions arising out of the same violation may not exceed the lesser of $500,000 or 1% of the net worth of the defendant, plus the actual losses of the class members.[172] Finally, in any successful action to enforce liability for an EFT Act violation, the plaintiff will be awarded costs and reasonable attorney's fees, as determined by the court.[173] These provisions parallel those of the Truth in Lending Act in most respects.[174] In setting the penalty

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165. EFT Act, § 910(a) (3), 15 U.S.C. § 1693h(a) (3) (Supp. 1978).

166. EFT Act, § 910(b), 15 U.S.C. § 1693h(b) (Supp. 1978).

167. *Id.*

168. *Id.* "All proximate damages" could presumably encompass such nebulous damage as alleged injury to the consumer's reputation, while "actual damages proved" would not provide relief unless some definite monetary loss could be demonstrated. *See EFT Consumer Protection Act Hearings, supra* note 4, at 39.

169. *See* EFT Act, § 908, 15 U.S.C. § 1693f (Supp. 1978).

170. EFT Act, § 915(a) (1), 15 U.S.C. § 1693m(a) (1) (Supp. 1978).

171. EFT Act, § 915(a) (2), 15 U.S.C. § 1693m(a) (2) (Supp. 1978).

172. *Id.*

173. EFT Act, § 915(a) (3), 15 U.S.C. § 1693m(a) (3) (Supp. 1978). If the court finds that an unsuccessful action was brought in bad faith or for purposes of harassment, it may award the defendant costs and attorneys' fees. EFT Act, § 915(f), 15 U.S.C. § 1693m(f) (Supp. 1978).

174. Truth in Lending Act, § 130, 15 U.S.C. § 1640 (1976).

that may be recovered in any action under the general civil liability provision, the court is instructed to consider, among other relevant factors, the frequency and persistence of the violation, the nature of the violation, and whether the violation was intentional. Furthermore, in a class action, the court is to consider the resources of the defendant and the number of persons adversely affected as well.

Like the section imposing liability for failures to make or stop transfers when instructed to do so, the general civil liability provision specifies certain exculpatory circumstances. Under section 915(c)[175], if the defendant can demonstrate by a preponderance of the evidence that its violation was not intentional and resulted from a bona fide error notwithstanding use of procedures reasonably designed to avoid the error, it may not be held liable for a violation. At the same time, if section 915(c) is interpreted by the courts in the same way that its counterpart in the Truth in Lending Act has been, the validity of the bona fide error excuse will not extend to erroneous interpretations of the Act's technical legal requirements.[176] Thus, it is important that the Act further provides that an institution will not be liable for any act or failure to act in good faith in conformity with a rule, regulation, interpretation, or model clause issued by the Federal Reserve Board or a duly authorized official, even if the rule, regulation, interpretation, or model clause is subsequently amended, rescinded, or held invalid for any reason. Also, a financial institution that discovers that it has inadvertently violated the Act may preempt any lawsuit by notifying the consumer concerned of the failure, complying with the requirements of the Act, making an appropriate adjustment to the consumer's account, and paying actual damages, if any.[177]

A suit under the EFT Act may be brought, regardless of the amount in controversy, in a federal district court or in any state court of competent jurisdiction. The action must be brought within one year of the alleged violation.[178]

B. *Criminal Liability*

Any person who knowingly and willfully violates a provision of the Act may be fined up to $5,000 and imprisoned for up to one year, or both. In addition, anyone who knowingly and fraudulently sells, transports, or uses a counterfeit, forged, lost, stolen, or fraudulently

175. 15 U.S.C. § 1693m(c) (Supp. 1978).

176 *See, e.g.*, Palmer v. Wilson, 502 F.2d 860, 861 (9th Cir. 1974.) (interpreting 15 U.S.C. § 1640 (c)).

177. EFT Act, § 915(e), 15 U.S.C. § 1693m(e) (Supp. 1978). If the violation was an improper failure to make or stop an electronic transfer, the institution must pay damages in accordance with § 910 of the Act, 15 U.S.C. § 1693h (Supp. 1978).

178. The Board in Regulation E has added a provision that requires a financial institution to retain records for two years in normal circumstances and even longer if the institution holding the records has actual notice that it is under investigation or subject to an enforcement proceeding or an action for an alleged violation of the Act or Regulation E. 44 Fed. Reg. 59,464, 59,472 (1979) (to be codified at 12 C.F.R. § 205.13(c)).

obtained EFT card or other access device to obtain more than $1,000 worth of money, goods, or services may be fined up to $10,000 and imprisoned for up to ten years, or both.[179]

XIV. Relation to State Electronic Fund Transfer Laws

In keeping with its traditional reluctance to preempt existing state laws in the consumer protection area, Congress in the EFT Act adopted a "relation to state laws" provision which preempts only state law which is "inconsistent" with the federal legislation. However, state law is to be deemed not inconsistent to the extent that it affords any consumer greater protection than that afforded by the EFT Act.[180] This "inconsistency/greater protection" position evolved from a forerunner in the Truth in Lending Act,[181] and emerged in its present form only as recently as the 1974 enactment of the Fair Credit Billing Act[182] and the Equal Credit Opportunity Act.[183]

While it did not eradicate the difficulties caused by dual regulation at separate governmental levels by mandating complete federal preemption of state law,[184] or at least some form of "presumptive preemption,"[185] Congress has recognized the shortcomings of its general preemption guidelines. Therefore, it has empowered the Federal Reserve Board to

179. EFT Act, § 916(b), 15 U.S.C. § 1693 n (a), (b) (Supp. 1978).

180. EFT Act, § 919, 15 U.S.C. § 1693q (Supp. 1978). For a more thorough discussion of the multifarious problems caused by the current congressional timidity in dealing with the preemption issue in the consumer credit area, and in the EFT Act in particular, see Brandel & Danchuk-McKeithen, *The Relationship of Federal to State Law in Electronic Fund Transfer and Consumer Credit Regulation*, 13 U.S.F. L. Rev. 331 (1979).

181. *See* Truth in Lending Act, § 123, 15 U.S.C. § 1633 (1976).

182. *See* Fair Credit Billing Act, § 306, 15 U.S.C. § 1666j (1976).

183. *See* Equal Credit Opportunity Act, § 503, 15 U.S.C. § 1691d(f) (1976).

184. An American Bar Association discussion paper on the EFT Act concludes that its failure to preempt state legislation is one of the Act's most serious drawbacks. Kutler, *Bar Analysis Says EFT Act Should Pre-empt State Laws*, Am. Banker, April 30, 1979, at 1, col. 1. Moreover, Professor Hal Scott has testified in favor of complete federal preemption in the EFT area. *EFT Systems Hearings*, *supra* note 4, at 214-15, 217.

185. Congress has established such an approach to the preemption question in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1976). Section 111(c) of that Act, 15 U.S.C. § 2311(c) (1976), preempts all state labelling or disclosure provisions for written consumer product warranties unless the Federal Trade Commission determines that the state provision affords greater protection and does not unduly burden interstate commerce. If such a determination is made by the FTC, the state law is "validated" and given effect. *Id.*

Congress adopted a similar scheme for addressing the preemption issue in four related consumer protection statutes—the Consumer Product Safety Act, 15 U.S.C. §§ 2051-82 (1976); the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-74 (1976); the Poison Prevention Packaging Act of 1970, 15 U.S.C. §§ 1471-76 (1976); and the Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1976)—when it passed the Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, 90 Stat. 503 (1976). Under almost identical provisions in each of these Acts, the Consumer Product Safety Commission is empowered to validate an otherwise-preempted state law if the state makes a showing that (i) compliance with the state law would not violate the federal law, (ii) the state law affords a significantly higher degree of consumer protection, and (iii) the state law would not unduly burden interstate commerce. 15 U.S.C. § 2075(c) (1976). For a more complete discussion of this alternative to the present preemption quagmire in the consumer credit and EFT field, see Brandel & Danchuk-McKeithen, *supra* note 180, at 356-60.

make determinations regarding the preemption of particular state laws.[186] This preemption review process may be invoked by the Board on its own motion or upon the request of any financial institution, state official, or other interested party. Moreover, a financial institution relying upon a Board determination that a state law has been preempted is explicitly given immunity from any liability if that determination is subsequently overruled or rescinded. Thus, the provision for Board review should partially relieve financial institutions and others of the difficult burden of predicting whether a state law will ultimately be held to have been preempted by the EFT Act.[187]

XV. CONCLUSION

The EFT Act represents a significant development in the evolution of consumer financial services. For the first time, comprehensive federal regulation will govern the rights, responsibilities, and liabilities of consumers and service providers in EFT systems. It will be interesting (and one hopes instructive for future legislators) to observe the impact that the EFT Act has upon the growth and development of electronic banking services. To be sure, consumers have been guaranteed a number of basic and important rights in the EFT world—limited liability, documentation rights, partial stop-payment privileges, and special error resolution procedures. But formulating, implementing, and extending these rights and privileges has not been and will not be inexpensive, and consumers will ultimately bear the burden in the form of higher service fees and other charges. Market forces, responsive to perceived consumer desires, may or may not have reached the same result regarding the cost/benefit equation for each of the practices mandated. However, the true cost of EFT regulation at the present time will probably never be known, for it cannot be measured in terms of dollars and cents—the cost of having possibly diverted the growth and development of EFT into less productive avenues of endeavor before it had blossomed into a mature payment system. Particularly troublesome is the possibility that future EFT development will be marked by a lack of fresh, uninhibited experimentation and will instead have its innovative advances channeled into technical refinements and elaborations upon existing EFT services. While Congress was, and the Board is, sensitive to these concerns, and the EFT Act appears to

186. EFT Act, § 919, 15 U.S.C. § 1693q (Supp. 1978). An almost identical review authorization will be added to the Truth in Lending Act if a pending bill, S. 108, the Truth in Lending Simplification and Reform Act, is enacted. *See* S. 108, § 9, 96th Cong., 1st Sess., 125 CONG. REC. S4984, S4985 (daily ed. May 1, 1979). At the time this Article was written, the bill had already passed the Senate and was awaiting consideration by the House.

187. This assumes, of course, that the expensive and time-consuming process for obtaining Board resolution can realistically be used. If the concerned party does not have extensive legal and financial resources, or if the preemption issue is not inherently obvious, Board review would probably not be a practical alternative. Meanwhile, the concerned party is in jeopardy because there is no provision for suspending the applicability of the state law until "validated" by the Federal Reserve Board. *See* note 185 *supra*.

accommodate much innovation regarding current and foreseeable future EFT payment mechanisms, the legal and psychological barriers that it raises to truly creative departures from current thinking may hamper that unrestrained potential a silent casualty.[188] Moreover, the technical minutiae of the Act and, even more importantly, the overlay of variant state laws will undoubtably act as a series of hurdles that will slow the development of a nation-wide EFT payment system.

Even if Congress has failed to achieve optimal results in the EFT Act, it is unlikely that it will reconsider its handiwork in the near future. If one can rely upon past experience with other titles of the Consumer Credit Protection Act, there will simply be too little political motivation to undertake any corrective action. Many proposed changes would be likely come under attack from consumer advocates because they would be viewed as weakening consumer protections. Industry, which serves as an intermediary for the costs of regulation borne by consumers, will have accommodated competitively to the new legal structure. Even socially desirable changes that would impose no additional operating costs may require transitional costs that might produce industry opposition. In fact, many rules opposed by industry when first enacted may, once compliance has been undertaken, actually provide a competitive advantage vis-a-vis new entrants or smaller competitors.

As on many other occasions, the spotlight now turns to the Federal Reserve Board for enlightened regulatory implementation of the Congressional directives, a process which may mitigate the most onerous and potentially adverse effects of the Act and further enhance consumer protection objectives. This is not to slight the importance of obtaining legislative relief from unexpected hardships and legislative correction of the most significant failings of the Act—such as its failure to deal realistically with state laws that unnecessarily upset the delicate balance of interests achieved by Congress[189]—but merely recognizes the fact that immediate activity is occurring, and will occur, on the regulatory level.

Given the paucity of expertise and detailed information available to Congress regarding EFT and the relatively short period of time during which Congress actively considered EFT legislation, the EFT Act is a creditable effort to balance the multiple interests and legislative goals involved. If the Federal Reserve Board holds steady on its present course by interpreting and implementing the Act in a fair and sensible manner, and with an eye towards the limitations upon the sophisticated technology involved, the EFT Act will provide a suitable legal foundation for the continued development of consumer EFT services in the years ahead.

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188. Governor Gardner admitted this likelihood in testifying on behalf of the Federal Reserve Board on the Senate EFT bill that was a forerunner of the bill ultimately enacted into law as the EFT Act. *See* note 16 *supra*.

189. *See* PART XIV *supra*. *See also EFT Consumer Protection Act Hearings*, *supra* note 4, at 159 (remarks of Senator Reigle).