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## BOOK REVIEW

# THE LAW OF ELECTRONIC FUNDS TRANSFER

*By Robert C. Zimmer  
and Theresa A. Einhorn*

(Sponsored by Electronic Money Council,  
Chicago, Illinois, 1978, published by Card Services, Inc.,  
1775 K Street, N.W., Suite 215, Washington, D.C. 20006)

This loose-leaf volume is intended to provide a "base case" hornbook of the current legal environment for electronic funds transfer ("EFT"). The authors have accumulated the current statutes and regulations, both state and federal, applicable to the new electronic technology used in the delivery of financial services.

The volume is organized into seven chapters and seven appendices. The first six chapters discuss the primary legal issues associated with EFT. The statutes and regulations of each state, which are specifically applicable to the electronic delivery of financial services, are compiled in the seventh chapter. The appendices draw together the federal statutes, proposed legislation, federal regulations, and court decisions in the EFT area. The final appendix includes the rules of the National Clearinghouse Association.

The first six chapters address, respectively, these basic issues: (1) the authority of providers of EFT; (2) the treatment of EFT facilities as branch banks; (3) the relationship between antitrust laws and state mandatory sharing statutes; (4) commercial rights and liabilities; (5) consumer rights and liabilities; and (6) communication laws and regulations. These chapters summarize the pertinent statutes, court decisions, and regulations falling into the respective subject areas. The authors are content to discuss the primary sources briefly without much commentary or analysis. The reader is provided a brief survey rather than a detailed critique of the applicable law.

In the first chapter, the authors describe the authority of feder-

ally chartered depository institutions, federal reserve member banks and federally insured financial institutions to provide financial and data processing services by electronic means. (Those institutions governed solely by state law are treated in chapter seven, which sets forth the statutes and regulations on a state-by-state basis).

The first chapter also discusses the status of electronic funds transfer services offered by non-depository institutions. These institutions include retailers and other commercial operators who offer access at their premises to credit or debit accounts maintained with authorized financial institutions. It is the authors' opinion that non-depository institutions run little risk of a suit for unauthorized practices if the services are offered in connection with a chartered financial institution. The risk increases as the link between the non-depository institution and the chartered financial institution becomes more remote. Though there is little legal precedent governing these new developments, the authors suggest that the pivotal factual issues are whether deposits are taken, and secondly, whether any such deposits are available solely to pay for merchandise or can be withdrawn in cash. If deposits can be withdrawn in cash, the non-depository institution may be conducting unauthorized banking.

The second chapter treats the issue of bank branching. The authors briefly review the history of branching and the decisions establishing that federally chartered banks are subject, under the McFadden Act, to the restrictions of state law governing bank branching. Based on the decision of the United States Supreme Court in *First National Bank in Plant City v. Dickinson*,<sup>1</sup> the federal courts, with one exception,<sup>2</sup> have held that remote electronic terminals are branches within the meaning of the McFadden Act. Consequently, the establishment of such remote terminals by federally chartered banks is subject to state restrictions on branching.

This situation presents some problems. In some states, the state chartered banks are allowed to establish remote terminals without qualifying them as branch banks. In such states, it is unclear whether national institutions nevertheless must meet branching requirements for their remote electronic facilities. The authors discuss the opposing views of two federal district courts<sup>3</sup> on this is-

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1. 396 U.S. 122 (1969).

2. Oklahoma *ex rel.* State Banking Bd. v. Bank of Okla., 409 F. Supp. 71 (N.D. Okla. 1975).

3. *Id.*; State Bank of Fargo v. Merchants Nat'l Bank & Trust Co., 451 F. Supp. 775 (D.N.D. 1978), *aff'd*, 593 F.2d 341 (8th Cir. 1979).

sue.

The authors also briefly review the views on branching of the National Commission on EFT. The Commission recommended that off-premise deployment of electronic terminals should be subject to separate and less restrictive rules than those governing traditional "brick and mortar" branches.

In the third chapter, the authors review mandatory sharing statutes, which have been adopted in several states, and the validity of such statutes under federal antitrust law. Two questions are raised in this area: (1) whether sharing violates federal antitrust laws, and (2) whether state laws mandating shared facilities conflict with federal antitrust laws. Sharing of facilities is generally tested under the rule of reason. Where meaningful competition is not reasonably possible, the Department of Justice takes a position that sharing is permissible under federal law. However, any such facilities which are not "naturally monopolistic" generally cannot be shared.

As examples of these policies, the authors review the decision of the Department of Justice which refused to give a favorable business review clearance to the Nebraska Electronic Transfer System. The Justice Department's position relative to the BankAmericard program is also discussed.

More than twenty states have addressed the issue of the sharing of EFT services in legislation or by regulation. The National Commission on EFT recommended that sharing of facilities be governed by competitive considerations. Such sharing should not be allowed if it inhibits competition among the banking institutions involved. The Justice Department essentially agrees with that position, and opposes mandatory sharing on the rationale that it inhibits competition and free choice by both consumers and providers of EFT services.

The rights and liabilities of commercial and consumer users of EFT, respectively, are reviewed in the fourth and fifth chapters. The authors point out the limitations of the current Uniform Commercial Code in handling problems unique to electronic systems, such as the creation of duplicate, and possibly inconsistent, electronic records. The work of the Permanent Editorial Board for the U.C.C. in preparing recommended changes to the Code is reviewed, and the Board's May 1978 recommendations are listed. The authors indicate that an outline of the proposed "Comprehensive Payments Code" is being prepared for circulation and comment.

The authors begin the chapter on consumer rights and liabilities with a list of the relevant provisions of the 1978 Federal EFT Act. They note that most state laws provide less comprehensive coverage

of consumer rights and liabilities than the federal Act, and are preempted wherever inconsistent with federal law. State law is not considered inconsistent if the state provision affords greater protection than under federal law. Chapter five concludes with a brief survey of the protection of privacy and other consumer interests under federal statutes, the regulations of the Federal Home Loan Bank Board and the EFT consumer guidelines promulgated by the Comptroller of the Currency.

In Chapter VI, the authors describe communications as presently being the most unsettled area of law associated with EFT development. Technological progress makes it increasingly difficult to distinguish between data processing and telecommunications. The FCC has proposed redefining "data processing" to allow common carriers to conduct "network control and routing" and "input/output processing."<sup>4</sup> Otherwise, under the FCC's "maximum separation" requirement, common carriers must maintain "arms-length" separation between data processing services and communication activities. Chapter VI also provides a list of the major legal and regulatory factors identified by the National Commission on EFT as affecting EFT systems and telecommunications.<sup>5</sup>

Chapter VII provides source materials on the regulation of EFT by each of the separate states. The authors have not compiled all state laws affecting EFT. If state law treats electronic facilities as bank branches, the authors have merely cited the statute governing branching without providing the actual text. If the state regulates EFT facilities separately from traditional brick-and-mortar branches, the authors briefly describe the statute, and any existing regulations, and reproduce the text of the statute.

This volume is recommended as a convenient source of primary statutory and regulatory materials on EFT. It is of great assistance to the practitioner who needs a single volume for the source of the law in this field. However, since very little analysis is included, the *LAW OF ELECTRONIC FUNDS TRANSFER* should not be relied upon for the critique usually expected in a "hornbook" treatise.

*Howard D. Neal\**

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4. 42 Fed. Reg. 13,029 (1977).

5. R. ZIMMER & T. EINHORN, *THE LAW OF ELECTRONIC FUNDS TRANSFER* 71-78 (1977).

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