

# THE NATIONAL COMMISSION ON ELECTRONIC FUND TRANSFERS: PROBLEMS AND PROSPECTS

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## I. INTRODUCTION

To most observers, Electronic Funds Transfer (EFT) conjures up all the mysteries of the computer age. Others perceive it as a threat to the revered concept of "float" (funds left unrecorded during the time between the writing of a check and its being charged against that bank account). The fear and mystery surrounding EFT is exacerbated by the absence of a generally accepted definition of it. Because this paper focuses on the National Commission on Electronic Fund Transfers (EFT Commission), its definition of EFT will suffice: "EFT is a payments system in which the processing and communications necessary to effect economic exchange, and the processing and communications necessary for the production and distribution of services incidental or related to economic exchange, are dependent wholly or in large part on the use of electronics."<sup>1</sup>

EFT began in 1915 when the Federal Reserve Board (Fed) used the telegraph systems of Western Union and Postal Telegraph to transmit its financial data. The Fed now uses its own system, the Federal Reserve Wire System, located in Culpeper, Virginia,<sup>2</sup> and has begun other EFT projects such as the Bank Wire System, GIRO Transfer Systems, Direct Deposits of Federal Recurring Payments and Payrolls, and automatic clearing houses (ACHs).<sup>3</sup> The rapid development of new technology and its application to financial affairs via automatic teller machines, universal pricing codes, and computer terminal cash registers, introduced the public to the perplexing, mushrooming computer network and created the recent interest in EFT.

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1. National Commission on Electronic Fund Transfers, Programs, Plans, and Accomplishments of the National Commission on Electronic Fund Transfers: A Progress Report to the President and to the Congress 4 (Oct. 29, 1976) (unpublished internal working document).

2. Federal Reserve Board, *Federal Reserve Operations in Payment Mechanisms: A Summary*, 62 FED. RES. BULL. 481 (1976).

3. M. BENDER, EFTS—ELECTRONIC FUNDS TRANSFER SYSTEMS—ELEMENTS AND IMPACT 12-19, 28-36, 38-41 (1975).

## II. CONGRESSIONAL PARTICIPATION IN EFT USE: THE EFT COMMISSION

On October 28, 1974, Congress established the EFT Commission to enable it to better understand the rapidly expanding EFT industry.<sup>4</sup> It instructed the 26-member commission to study "the possible development of public or private electronic fund transfer systems"<sup>5</sup> and to recommend appropriate Congressional action. Specifically, Congress directed the Commission to consider nine items:

- (1) the need to preserve competition among the financial institutions and other business enterprises using such a system;
- (2) the need to promote competition among financial institutions and to assure Government regulation and involvement or participation in a system competitive with the private sector be kept to a minimum;
- (3) the need to prevent unfair or discriminatory practices by any financial institution or business enterprise using or desiring to use such a system;
- (4) the need to afford maximum user and consumer convenience;
- (5) the need to afford maximum user and consumer rights to privacy and confidentiality;
- (6) the impact of such a system on economic and monetary policy;
- (7) the implications of such a system on the availability of credit;
- (8) the implications of such a system expanding internationally and into other forms of electronic communications; and
- (9) the need to protect the legal rights of users and consumers.<sup>6</sup>

The EFT Commission was required to submit an interim report by October 29, 1976, a final report one year later, and to dissolve within 60 days thereafter.<sup>7</sup> The Commission anticipated that considerable research would be necessary to prepare these reports because both the public and private sectors were experimenting extensively with EFT. Widespread experimentation created significant public policy questions which the EFT Commission was instructed to resolve.<sup>8</sup>

Although Congress established the EFT Commission on October 28, 1974, the Senate did not confirm its Chairman, William B. Widnall, until 1975. In the interim, Senator William Proxmire introduced a bill to impose a moratorium on EFT development until Congress reviewed

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4. 12 U.S.C. §§ 2401-2408 (Supp. IV 1974) (amended 1975).

5. *Id.* § 2403(a).

6. *Id.* § 2403(a)(1)-(9).

7. *Id.* § 2403(b).

8. 120 CONG. REC. 33,998-99 (1974).

the EFT Commission's report.<sup>9</sup> After holding hearings,<sup>10</sup> Congress defeated the bill and endorsed private experimentation with EFT systems. Congress later extended the EFT Commission's life and required submission of a final report by October 29, 1977.<sup>11</sup>

Shortly after the appointment of a Commission Chairman, a new controversy involving the selection of Dr. John Benton as executive director embroiled Congress and the executive branch. The President's nominee met immediate Congressional criticism because he had not been selected by Chairman Widnall and was suspected of planning to return to his former employer, a company extensively involved in EFT development, after serving as director.<sup>12</sup> These differences were ultimately resolved and, during March of 1976, Dr. Benton was sworn in; the staff was finally assembled two months later. Thus, the EFT Commission lost over a year of valuable time while EFT development in the United States and throughout the world continued at an accelerating pace.

### III. THE EFT COMMISSION'S ACTIVITIES DURING THE FIRST YEAR

During its first year of operation, the EFT Commission began a number of hearings which culminated in the interim report.<sup>13</sup> The EFT Commission first divided into four operating committees: Users, Providers, Regulatory Issues, and Suppliers. The staff then set out eight EFT topics which required study:

1. Use, Access, and Control of EFT Systems;
2. National Economic Policy Implications of EFT;
3. Comprehensive Cost-Benefit Analysis of EFT Capabilities;
4. Management of EFT Information (including the question of privacy);
5. Impacts of EFT on Recordkeeping Practices by Organizations and Individuals;
6. Telecommunications Requirements and Related Issues Raised by EFT;

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9. S.245, 92d Cong., 2d Sess. (1975).

10. *Electronic Funds Transfer Moratorium Act of 1975: Hearings on S. 245 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs*, 94th Cong., 1st Sess. (1975).

11. 12 U.S.C. § 2403(b) (Supp. V 1975) (amending 12 U.S.C. § 2403(b) (Supp. IV 1974)).

12. Flato, *The EFT Commission's Sunshine Boy*, 8 *COMPUTER DECISIONS* 36 (April 1976).

13. See note 1 *supra* at app. F (chronology of EFT Commission's activities to that time).

7. Other Technological Factors Pertinent to the Delivery of EFT Services; and
8. International Developments in EFT.<sup>14</sup>

During the summer and fall of 1976, the EFT Commission and its committees met frequently to consider priorities and review ongoing research. In late October of 1976, the Commission began the first of five hearings on EFT. By the end of the year, the Commission had studied consumer interests, the branch/terminal question, the government's role in EFT, sharing of EFT systems, and technological issues related to privacy, security, competition, and standards in EFT systems.

#### IV. THE COMMISSION'S INTERIM REPORT

After concluding its hearings in December of 1976, the Commission prepared and submitted its first substantive report to Congress on February 23, 1977.<sup>15</sup> The EFT Commission discussed six topics in the report: consumer issues,<sup>16</sup> branch/terminal issues,<sup>17</sup> sharing of EFT systems,<sup>18</sup> government operation of EFT,<sup>19</sup> EFT and monetary policy,<sup>20</sup> and EFT and technology.<sup>21</sup> The EFT Commission also identified some issues which required further study: a comprehensive cost-benefit analysis, international EFT systems, credit markets, and disadvantaged groups in EFT.<sup>22</sup>

The Commission noted that the trend towards increased use of EFT was likely to continue: "Depository institutions are likely to continue to implement EFT facilities offering enhanced and broadened services. The role of computers in money and banking will become increasingly apparent to consumers. It is time, therefore, for Government to develop a coherent policy toward EFT services and systems."<sup>23</sup>

The data processing industry, already displeased with the executive branch's failure to appoint a representative from their industry, promptly

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14. National Commission on Electronic Fund Transfers, A Summary of Opinions Expressed at the NCEFT Workshops on March 2 and March 5, 1976 (March 1976).

15. NATIONAL COMMISSION ON ELECTRONIC FUND TRANSFERS, EFT AND THE PUBLIC INTEREST: A REPORT OF THE NATIONAL COMMISSION ON ELECTRONIC FUND TRANSFERS (Feb. 1977).

16. *Id.* at 7-30.

17. *Id.* at 31-48.

18. *Id.* at 49-64.

19. *Id.* at 65-80.

20. *Id.* at 81-92.

21. *Id.* at 93-114.

22. *Id.* at 115-17.

23. *Id.* at 2.

criticized the interim report.<sup>24</sup> They claimed that the report overlooked "recommendations on standards, systems security and competition between common carriers and the [data processing] industry . . ."<sup>25</sup> These omissions, however, can be explained by congressional delay in confirming appointments<sup>26</sup> and by the inability of the Commission to consider *all* issues exhaustively in the interim report.

#### V. PREPARATION OF THE FINAL REPORT

The EFT Commission is currently preparing its final report to be submitted to Congress by October 29, 1977. Information from interested persons will play as important a role in completion of the final report as it did for the interim report. In calling for such information, Director Benton stated:

Now is the time for individuals and vested interest groups to get back to us, to present new facts and arguments to be looked at . . . I rather suspect that in October we will make a restatement of all these issues, but the burden of proof is on those who think our recommendations should be changed.<sup>27</sup>

A Senate subcommittee has already supplied some information on EFT consumer issues. In response to the Supreme Court's decision in *United States v. Miller*,<sup>28</sup> which held that a person does not have a legitimate expectation of privacy with respect to bank records,<sup>29</sup> several Congressmen have submitted bills dealing with the privacy of financial records.<sup>30</sup> Senators at the Hearings Before the Subcommittee

24. Leavitt, *EFTs Unit Chided for DP Lack*, *COMPUTERWORLD* 1, 5 (Nov. 19, 1975).

25. *Damned if You Do*, *COMPUTERWORLD* 14 (March 7, 1977).

26. See text accompanying notes 9-12 *supra*.

27. Wiseman, *EFT Commission Head Pleased by Report*, *COMPUTERWORLD* 10 (March 21, 1977).

28. 425 U.S. 435 (1976).

29. *Id.* at 442-43. The Court, however, distinguished this case in which "the Government has exercised its powers through narrowly directed subpoena *duces tecum* subject to the legal restraints attendant to such process" from the "wide-ranging inquiry" condemned in *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell & Blackmun, J.J., concurring.) 425 U.S. at 443 n.6.

30. See, e.g., H.R. 1985, 95th Cong., 1st Sess., 123 CONG. REC. H1865 (daily ed. March 8, 1977) (Statement by Rep. Koch on H.R. 1985); (H.R. 1985 limits access by *state & local governments and private persons* to bank, telephone, and credit records unless they obtain (i) the subject's consent; (ii) an administrative subpoena subject to challenge; (iii) a judicial subpoena with notice to the subject (unless it would jeopardize a criminal or civil investigation); or (iv) a court-authorized search warrant with notice to the subject). (See 123 CONG. REC. H1019 (daily ed. Feb. 9, 1977) for a section-by-section analysis of H.R. 1985); H.R. 4322, 95th Cong., 1st Sess., 123 CONG. REC.

on Financial Institutions of the Senate Committee on Banking, Housing, and Urban Affairs, held on March 21-22, 1977, expressed concern over the issues of branching, erroneous debiting and crediting, competition, and federal preemption of EFT regulation.<sup>31</sup> Senator McIntyre was particularly concerned with the EFT Commission's failure to give clear policy direction in its interim report.<sup>32</sup> Although the remarks of these Senators might indicate the direction of future congressional action, predictions are difficult and premature.

The one certain prediction is that EFT will continue a fast-paced development throughout the next year. Although Congress originally intended that existing EFT projects would be temporary experiments subject to change, the undertaking of EFT projects by such corporate giants as AT&T and IBM may make any alterations economically impossible. Similarly, the Fed's pilot program linking regional ACHs may be irreversible.<sup>33</sup> Further research of EFT costs and benefits, security and privacy, and government regulation is necessary. The EFT industry should look forward to October 29, 1977, when the EFT Commission submits its final report to Congress<sup>34</sup>; it may then be able to anticipate the form governmental regulation of EFT will take.

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H1660, E1115 (daily ed. March 2, 1977) (introduction by Rep. Stark) (H.R. 4322 applies to records maintained by financial institutions. It allows access to the records of such institutions only when the subject's consent, an administrative subpoena or summons, a search warrant or a judicial subpoena is obtained. Under H.R. 4322, the Treasury may not require the keeping of records or transmittal of reports unless required by the IRS or a Supervisory agency.) (See also the remarks by Rep. Giaimo on H.R. 4322, 123 CONG. REC. E1072 (daily ed. March 1, 1977). S.14, 95th Cong., 1st Sess., 123 CONG. REC. S167 (daily ed. Jan. 10, 1977) (introduction by Sen. Mathias and text of bill) (S.14 may be viewed as a counterpart to H.R. 1985. It restricts access by the *federal government* to bank telephone and credit card records unless the government (i) obtains the written consent of the subject; (ii) serves a subpoena or a summons on the holder of the records to produce information relevant to a legitimate law enforcement purpose and which the subject must receive a copy of and may challenge; and (iii) procures a judicial search warrant. The bill "also establishes procedures for examining the outside envelopes of first class mail, and telephone company monitoring of calls for service quality. It extends the present wiretap law to cover telephone and telex messages, computer data transmissions, and other nonverbal messages." *Id.*)

31. *Electronic Funds Transfer Systems: Hearings Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, & Urban Affairs*, 95th Cong., 1st Sess. (1977).

32. *Id.* at 1, 2.

33. See note 2 *supra*.

34. NATIONAL COMMISSION ON ELECTRONIC FUND TRANSFERS, *EFT IN THE UNITED STATES: POLICY RECOMMENDATIONS AND THE PUBLIC INTEREST* (Oct. 1977) (The Report has been published since the writing of this Article and has already stimulated much discussion.).