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## CUSTOMER-BANK COMMUNICATION TERMINALS AND BRANCH BANKING

MARTHA I. MACARTNEY

Competition among banking institutions is aimed at capturing the banking public by offering customer services and conveniences. While technology has progressed and provided more efficient and flexible methods of banking, the laws which regulate the banking system have not always kept pace. For example, the federal branch banking law is currently being reevaluated in light of certain innovative techniques which the drafters of that statute, almost half a century ago, could not have envisioned.<sup>1</sup> One significant innovation has been the development of customer-bank communication terminals which have created a great deal of controversy due to the lack of regulation by any banking law. A CBCT is an electronic device remote from a main bank or its branches.<sup>2</sup> The machine can be operated only by those bank customers who have cards which have been encoded with certain information on a magnetic strip.<sup>3</sup> The customer inserts his card into a slot on the unit, taps out his personal identification number, and the machine in turn identifies the customer from the previously encoded information.<sup>4</sup> The bank customer is then permitted to select one of several transactions: a cash withdrawal from his account; a crediting of funds to his account; a transfer between his checking and savings accounts; or payment transfers from his account into accounts maintained by other bank customers.<sup>5</sup>

Electronic terminals, similar to CBCTs, have been allowed by the Federal Home Loan Bank Board, which governs federal savings and loan associations,

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1. National Banking Act of 1927, ch. 191, § 7(c), 44 Stat. 1228, *as amended*, 12 U.S.C. § 36 (1970).

2. There are two types of CBCTs—unmanned and manned. The CBCT may be self-contained (off-line), or it may be connected by wire (on-line) to a bank's central computer at a remote location. Information which is not transmitted instantaneously to the central computer is recorded within the CBCT by tape or other means and the tape periodically is removed and taken to the bank for processing. All transactions conducted at a CBCT are subject to verification either by on-line communication with the bank's computer or by later examination by the bank of the tape and funds collected from the CBCT.  
39 Fed. Reg. 44416, 44417 (1974).

3. The cards used may be either a credit card such as "Master Charge," "Bank-america" or a card issued by the bank. Typically, the encoded information consists of a personal identification number, the customer's checking or savings account number, the number of withdrawals permitted to him each day, and the date of expiration. The encoded information might also contain the credit card number, as in *Colorado v. First Nat'l Bank*, 394 F. Supp. 979, 981 (D. Colo. 1975).

4. If the identification is not made, the card is often retained in the machine and no transaction can be accomplished. *Colorado v. First Nat'l Bank*, 394 F. Supp. 979, 982 (D. Colo. 1975).

5. 12 C.F.R. § 7.7491 (1975).

and the National Credit Union, which governs credit unions.<sup>6</sup> These two financial institutions together with national banks comprise the entire federal banking system. In an attempt to maintain a competitive equality among these institutions and to promote new and efficient modes of customer service, the Comptroller of the Currency of the United States has issued an interpretive ruling permitting national banks to establish exclusive CBCTs within a 50 mile radius of their main bank or any of their branches regardless of state boundaries.<sup>7</sup> According to the ruling, a CBCT could be established beyond a 50 mile radius if one or more local financial institutions were able to share the facility at a reasonable cost.<sup>8</sup> Under the federal branch banking statute, a national bank's authority to establish branches within a state is subject to state branch banking laws.<sup>9</sup> To circumvent regulation under these state laws, the Comptroller has determined that a CBCT does not constitute a "branch" within the federal statutory definition and therefore need not comply with the applicable state laws.<sup>10</sup>

Several state banking boards are currently challenging this ruling because of the potential competitive advantage it may give to the national banks which would adversely affect the state chartered banks.<sup>11</sup> If CBCTs are branches the competitive balance between the national and state banks will be unaffected. If, on the other hand, CBCTs are not branches the national banks will be able to establish these customer service devices throughout the state, while state banks will be prevented by their respective branch banking statutes from installing similar facilities. Therefore, the states must either accept the consequences of being outnumbered by national bank facilities or enact legislation permitting their banks to establish electronic terminals.

The Comptroller's interpretive ruling raises four major issues: First, the principal legal issue to be resolved is whether a CBCT is a branch; second, what is the competitive impact of the ruling on interstate banking as between national and state banks; third, whether the establishment of CBCTs should be postponed, which would facilitate the making of a detailed analysis of electronic banking.<sup>12</sup> Finally, whether CBCTs, as forerunners of electronic banking, should be allowed regardless of their legal status.<sup>13</sup>

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6. See 39 Fed. Reg. 23991 (1974). The federal savings and loan associations' terminals are called Reserve Service Units (RSUs) which are comparable to CBCTs. For the National Credit Union's regulation, see 39 Fed. Reg. 30107 (1974).

7. 12 C.F.R. § 7.7491 (1974), *as amended* 12 C.F.R. § 7.7491 (1975).

8. These financial institutions are those authorized to receive deposits, such as a commercial bank, a mutual savings bank, a savings and loan association, or a credit union. 12 C.F.R. § 7.7491 (1975).

9. 12 U.S.C. § 36(c) (1970).

10. *Id.* § 36(f).

11. Those challenging the ruling include the state bank commission of Colorado and the Independent Bankers Association of America.

12. S. 1899, 94th Cong., 1st Sess. (1975). The proposed temporary controls on electronic funds transfer systems have recently been tabled in the Senate.

13. See 39 Fed. Reg. 44416 (1974) for a complete discussion of these issues.

## LEGISLATIVE HISTORY

In 1926, Representative McFadden introduced a bill to authorize national banks to establish branches. Prior to this bill, the national banks created by the National Bank Act of 1864 were at a competitive disadvantage to the state banks because only state banks were permitted to engage in branching.<sup>14</sup> As enacted by Congress, the McFadden Act of 1927 contained three significant provisions: First, it granted national banks the power to establish branches within the municipal limits of the bank's location if state banks were granted the same privilege by statute.<sup>15</sup> Second, the Act defined a branch as: [A]ny branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.<sup>16</sup> Third, the McFadden Act limited the branching ability of state chartered banks which were members of the Federal Reserve System to "inside" branches.<sup>17</sup> The overall effect of the McFadden Act, therefore, was to establish "competitive equality among the members of the Federal Reserve System."<sup>18</sup>

While the definition of the term "branch" as defined in the McFadden Act has remained unchanged, the branching powers of national banks were affected by the Banking Act of 1933.<sup>19</sup> It is clear from the language and legislative history of Section (c)(2) of the McFadden Act that branch banking by national banks was permissible "in only those states the laws of which permit branch banking, and only to the extent that the State laws permit branch banking."<sup>20</sup> As enacted, the Banking Act of 1933 allowed national banks to establish "outside"<sup>21</sup> branches if such branches could be established by state banks under state laws.<sup>22</sup> This amendment to the McFadden Act en-

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14. For a detailed historical analysis of the competitive disadvantage of the national banks see 39 Fed. Reg. 44416 (1974).

15. 12 U.S.C. § 36(c) (1970).

16. *Id.* § 36(f).

17. "Inside" branches are branches within the limits of the city, town, or village in which the parent bank is situated. 12 U.S.C. § 36 (1970). See also 39 Fed. Reg. 44416, 44417 (1974). The Act included a grandfather clause which allowed the state banks to retain and operate the existing branches but were forbidden from establishing any new branches which did not comply with the Act's requirements. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966).

18. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966), citing 68 Cong. Rec. 5815 (1927). For a recent case reaffirming Congress' intent to accomplish "competitive equality" see *Seattle Trust & Sav. Bank v. Bank of Cal.*, 492 F.2d 48, 52 (9th Cir. 1974).

19. Compare National Banking Act of 1933, ch. 89, 44 Stat. 189 (1933) with McFadden Act, ch. 191, 44 Stat. 1228 (1927), as amended 12 U.S.C. § 36 (1970).

20. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 259 (1966), citing 76 Cong. Rec. 2511 (1933). (Remarks of Senator Carter Glass, the sponsor of the amendment.)

21. "Outside" branches are branches beyond the limits of the city, town, or village in which the parent bank is situated.

22. 12 U.S.C. § 36(c) (Supp. I, 1933), as amended, 12 U.S.C. § 36(c) (1970). See 39 Fed. Reg. 44416, 44417 (1974).

abled national and state banking associations to compete more equitably by removing the restriction on statewide branching by national banks. This Act also expanded the National Banking Act to permit statewide as opposed to "limited"<sup>23</sup> branching by national banks to the extent that state banking institutions were expressly permitted to branch in accordance with their particular state law.<sup>24</sup>

#### THE FEDERAL DEFINITION OF "BRANCH"

Although state law determines how, where, and when branch banks may be operated, federal law defines what constitutes a branch.<sup>25</sup> The United States Supreme Court in *First National Bank v. Dickinson*<sup>26</sup> rejected the contention that "state law definitions of what constitute 'branch banking' must control the content of the federal definition."<sup>27</sup> Prior attempts by Congress to inhibit the growth of state banking demonstrate the independence of the National Banking Act from state statutes regulating state chartered banks.<sup>28</sup> Chief Justice Burger, in the *Dickinson* decision, reaffirmed this independence by stating that:

[I]n § 36(c) Congress entrusted to the states the regulation of branching as Congress then conceived it. But to allow the states to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36(c) of a general definition of 'branch.'<sup>29</sup>

Several courts have considered factors other than the statutory definitions in determining whether a new banking institution is a branch bank.<sup>30</sup> For

23. "Limited" is a type of branch banking in which a bank is permitted to establish branches within specifically defined areas such as a city or county.

24. Compare National Banking Act of 1933, ch. 89, 44 Stat. 189 (1933), with McFadden Act, ch. 191, 44 Stat. 1228 (1927), as amended, 12 U.S.C. § 36 (1970). See 39 Fed. Reg. 44416, 44417 (1974).

25. *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820, 822 (10th Cir. 1972); see *National Bank v. Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir. 1958); 39 Fed. Reg. 44416, 44417 (1974).

26. 396 U.S. 122 (1969).

27. *Id.* at 133; 39 Fed. Reg. 44416, 44417 (1974).

28. Congress formerly gave special competitive advantages to national banks over state banks in order to induce the state banks either to convert into national banking associations or to cease operation. 39 Fed. Reg. 44416, 44418 (1974). When the state banking system did not disappear, Congress enacted a 10 percent tax on state bank notes. The 1865 statute achieved the desired result as the number of state chartered banks diminished while the number of national banks increased considerably. *Id.* at 44418.

29. *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 133-34 (1969). The standards prescribed by 12 U.S.C. § 36(f) are applied by courts to determine what constitutes a branch of a national bank. See *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820, 822 (10th Cir. 1972); 39 Fed. Reg. 44416, 44417 (1974).

30. See *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 136-37 (1969); *First Nat'l Bank v. First Bank Stock Corp.*, 306 F.2d 937, 942-43 (9th Cir. 1962); *Nemirov v. Bloom*, 445 P.2d 214, 215 (Colo. 1968); *Goldy v. Crane*, 445 P.2d 212, 214 (Colo. 1968); *Tri-City Bank v. State*, 197 N.W.2d 332, 334 (Ct. App. Mich. 1972).

example, in *First National Bank v. First Bank Stock Corp.*,<sup>31</sup> the United States Court of Appeals explained that if the banking facility in question is conducting business with the parent bank as if both were one institution, this facility is a branch.<sup>32</sup> The court also pointed out that independent capital structures and loan bases are strong evidence that the banking facility is operating independently of the main bank and therefore is not a branch.<sup>33</sup> Moreover, it has been held that common control through stock ownership is not sufficient proof that the facility is a branch.<sup>34</sup>

The Michigan Court of Appeals in *Tri-City Bank v. State*,<sup>35</sup> examined the manner of operation of two facilities in determining whether one was a branch bank. The court pointed out that while in this case the original facility had changed its name, it had not changed the physical features of the office.<sup>36</sup> Additionally, the recently established Warren bank was paying the salaries as well as insurance coverage of the employees of both banks.<sup>37</sup> By using an intermediary, Tri-City Services, the Southgate employees performed banking functions for the Warren bank. Despite the fact these were two different corporations, in reality they were one entity. Thus, the court ruled that the bank was operating in violation of the branch banking laws.

Because the McFadden Act definition has not been updated to encompass the modern facilities employed by banks and not expressly covered by the definition, it is questionable whether a particular banking facility is the type of branch bank contemplated under the 1927 statute.<sup>38</sup> In response to the advancement of computer technology in the commercial world, the means of accomplishing customer services have been modernized. Because of the lack of express statutory regulations prohibiting the operation of certain modern devices, some banks have implemented facilities such as drive-in tellers and pickup and delivery services. Consequently, the question of whether these new innovations are a circumvention of the federal and state branch banking limitations has frequently been litigated in the courts.<sup>39</sup> For example, in *First National Bank v. Walker Bank and Trust Co.*,<sup>40</sup> the Utah Supreme

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31. 306 F.2d 937 (9th Cir. 1962).

32. *Id.* at 942.

33. *Nemirov v. Bloom*, 445 P.2d 214, 215 (Colo. 1968); *Goldy v. Crane*, 445 P.2d 212, 214 (Colo. 1968); *In re Application of Kenilworth*, 230 P.2d 377, 380 (N.J. 1967).

34. *First Nat'l Bank v. First Bank Stock Corp.*, 306 F.2d 937, 942-43 (9th Cir. 1962). A court may also consider other aspects which might grant a bank an advantage in attracting customers. *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 136-37 (1969).

35. 197 N.W.2d 332 (Mich. Ct. App. 1972).

36. *Id.* at 334.

37. *Id.* at 334.

38. *See generally* *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969); *Howard v. Citizens*, 385 F.2d 528 (3d Cir. 1967); *Camden Trust Co. v. Gidney*, 301 F.2d 521, 524 (D.C. Cir.), *cert. denied*, 369 U.S. 886 (1962).

39. *See generally* *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969); *Howard v. Citizens*, 385 F.2d 528 (3d Cir. 1967); *Camden Trust Co. v. Gidney*, 301 F.2d 521 (D.C. Cir.), *cert. denied*, 369 U.S. 886 (1962).

40. 425 P.2d 414 (Utah 1967).

Court held that a drive-in teller, not physically attached to the main banking office but connected by pneumatic tubes, was not a branch bank within the meaning of a Utah statute prohibiting the establishment of branch banks.<sup>41</sup> Although these facilities accommodated both drive-in and walkup customers for the purpose of receiving deposits, withdrawing funds, and cashing checks, thus meeting the Utah statutory definition of branch banks, the court considered other factors in determining whether the drive-in tellers were branch banks.<sup>42</sup>

The physical attachment of a facility to the main bank was also emphasized in *Jackson v. First National Bank*.<sup>43</sup> In *Jackson*, a national bank had established a bank office supplementing the parent bank in accordance with a Georgia statute.<sup>44</sup> However, the bank had subsequently established a non-contiguous drive-in facility approximately 300 feet from the main branch for the purpose of cashing checks and receiving deposits. The Georgia District Court enjoined the establishment of this facility, holding that it constituted branch banking as defined under the McFadden Act<sup>45</sup> and under Georgia's statutory definition of a "branch facility."<sup>46</sup> The physical attachment or detachment of the other facility to the main bank appears to have been the decisive factor in this type of situation.

The legal status of pickup and delivery services as possible branch banks was first settled in 1969 in *First National Bank v. Dickinson*.<sup>47</sup> A national bank in Florida had obtained permission from the Comptroller to operate two off-premises services: a mobile armored car and a stationary deposit receptacle. The bank operated an armored car (a mobile drive-in) staffed with bank employees which delivered cash in exchange for checks and received cash and checks at the depositor's premises. In addition, the bank main-

41. *Id.* at 419; UTAH CODE ANN. tit. 7, ch. 3 § 7-3-6 (1953). Generally, Utah prohibits its banks from establishing branches when there are other operating branches except by taking over an existing bank which has been in operation for not less than five years. UTAH CODE ANN. tit. 7, ch. 3 § 7-3-6 (1953).

42. These other factors were: (1) The new facilities were constructed on property owned by the main bank and were contiguous and immediately adjacent to the main bank; (2) no other building or place of business separated the new facilities and the main bank; (3) deposits and withdrawals were conducted via pneumatic tubes; (4) the new facilities were constructed as close to the main bank building as the established right-of-way would reasonably permit. *First Nat'l Bank v. Walker Bank & Trust Co.*, 425 P.2d 414, 419 (Utah 1967).

43. 246 F. Supp. 134 (M.D. Ga. 1965).

44. Ga. Code Ann. § 13-201.1(a)(b) (Supp. 1965).

45. *Jackson v. First Nat'l Bank*, 246 F. Supp. 134, 138 (M.D. Ga. 1965); 12 U.S.C. § 36(f) (1970).

46. *Jackson v. First Nat'l Bank*, 246 F. Supp. 134, 138 (M.D. Ga. 1965); Ga. Laws 1960, pp. 67, 70; 1963, p. 602. The term "branch facility" was defined as:

[A]ny additional place of business of a parent bank or a branch bank located in the particular city, town, or village in which said parent bank or branch bank is situated and which has obtained a permit to operate a limited banking service . . . . Ga. Laws 1960, pp. 67, 70; 1963, p.602.

47. 396 U.S. 122 (1969).

tained in a shopping center, a secured receptacle, to which the customers had keys; the monies and night bags stored at this facility were picked up daily by the armored car. Relying on the Comptroller's ruling, the bank entered into a "dual control contract" whereby transmittal slips were filled out specifying the bank as the customer's agent during transport of the funds; however, the bank insured the funds during transit. The United States Supreme Court rejected these arrangements, holding that the term branch bank includes "any place" where deposits are received.<sup>48</sup> Consequently, the Court thwarted this systematic attempt by the national banks to secure branching privileges through use of a mobile armored car and stationary deposit receptacle; privileges which Florida denies to competing state banks.<sup>49</sup> This decision reaffirmed the congressional policy of competitive equality and its deference to state standards. Since the Florida statute prohibited these modes of banking services, the Court refused to allow the Comptroller to modify these standards by his discretionary powers.<sup>50</sup>

Although the Comptroller's recent ruling on CBCTs is interpretive of a federal statute,<sup>51</sup> it indirectly modifies state standards by totally disregarding state branch banking prohibitions or limitations. The Comptroller has determined that a CBCT is not a branch; consequently, it is not subject to state branch banking laws.<sup>52</sup> Until revised, this interpretation may be relied upon by national banks.<sup>53</sup> As regulator of national banks, it is within the Comp-

48. *Id.* at 135.

49. *Id.* at 138.

50. *Id.* at 138.

51. The Comptroller's ruling reads in part:

Part 7 of 12 C.F.R. Chapter I is amended by revising § 7.7491 to read as follows:

§ 7.7491 Customer-Bank Communication Terminals.

(a) A national bank may receive and act upon communications from its customers transmitted through electronic devices or machines requesting the withdrawal of funds either from the customer's deposit account or from a previously authorized line of credit, or instructing the bank to receive funds or to transfer funds for the customer's benefit. The device or machine may be established and operated by the bank, by the customer, or by a third party. In accordance with the customer's request or instruction and subject to verification by the bank, cash or checks may be received and cash may be dispensed at the location of the device or machine. The device or machine may not be staffed by a bank employee, except that the bank for a reasonable period of time may provide an employee to instruct and assist customers in the operation of the device or machine. Any transactions initiated by such a device or machine shall be subject to verification by the bank either by direct wire transmission or otherwise. A bank may provide insurance protection under its bonding program for transactions involving such a device or machine.

40 Fed. Reg. 21700, 21703-21704 (1974).

52. 39 Fed. Reg. 44416, 44418 (1974):

53. Analogous situations in which decisions outside of the strict statutory power of federal officials have been upheld. *See American Trucking Ass'n v. United States*, 344 U.S. 298, 308-13 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216, 223 (1943); *Altman v. McClintock*, 20 F.2d 226, 231-32 (D. Wy.), *appeal dismissed*, 28 F.2d 1607 (1927).



troller's authority to interpret the "branch" definition of the McFadden Act.<sup>54</sup> In addition, as supervisor of national banks, the Comptroller has been accorded broad discretion in the field of national banking. This authority is not without limitations,<sup>55</sup> for his findings are subject to judicial review and reversal.<sup>56</sup> His ruling that CBCTs are not branches must be examined by applying the branch definition to the electronic terminal.

#### APPLICATION OF THE "BRANCH" DEFINITION

The McFadden Act contains a two-part definition of what constitutes a branch.<sup>57</sup> The primary statutory question is whether a CBCT satisfies the first part of the definition by being a "branch bank, branch office, branch agency, additional office, or any branch place of business."<sup>58</sup> The Comptroller has argued that a CBCT is not an "office" because not all the transactions associated with a banking office or place of business can be initiated at a CBCT.<sup>59</sup> A CBCT does not, for example, allow a customer to open an account with the bank, apply for a loan, purchase savings bonds, obtain money orders, cashiers checks, or travellers checks, maintain a safe deposit box, cash travellers checks, or exchange currency.<sup>60</sup> Because of the nature of its functions, the CBCT is available only to existing bank customers.<sup>61</sup> The CBCT has been recently analogized to a mail box, telephone, or a telex machine through which a customer communicates with his bank to accomplish certain transactions such as making deposits and transferring funds.<sup>62</sup> These types of facilities have not been challenged as branches, however, because of the vital function they perform and their acceptance by the financial community.

Generally, legislators have regarded both teller windows and branches as having certain physical and personnel characteristics,<sup>63</sup> although some legis-

54. See *Ramapo Bank v. Camp*, 425 F.2d 333, 341, 347 (3d Cir.), cert. denied, 400 U.S. 828 (1970). Cf. *Udall v. Tallman*, 380 U.S. 1, 4 (1965). See also 39 Fed. Reg. 44416, 44418 (1974).

55. See *Seattle Trust & Sav. Bank v. Bank of Cal.*, 492 F.2d 48, 50-51 (9th Cir. 1974); *First Nat'l Bank v. Saxon*, 352 F.2d 267, 272 (4th Cir. 1965); *Community Nat'l Bank v. Saxon*, 310 F.2d 224, 226-27 (6th Cir. 1962).

56. For examples of situations in which the Comptroller's rulings have been revised, see Note, *National Banks—National Banks Need Not Comply With State Banking Laws When Seeking to Relocate Principal Office and Retain the Former as a Branch*, 24 VAND. L. REV. 175, 177 (1970).

57. 12 U.S.C. § 36(f) (1970).

58. *Id.* See also 39 Fed. Reg. 44416, 44418 (1974).

59. 39 Fed. Reg. 44416, 44418 (1974).

60. *Id.* at 44418.

61. For a discussion of this customer limitation see *Independent Bankers of Oregon v. Camp*, 357 F. Supp. 1352, 1355 (D. Ore. 1973). See also 39 Fed. Reg. 44416, 44418 (1974).

62. *Colorado v. First Nat'l Bank*, 394 F. Supp. 979, 982 (D. Colo. 1975). The Comptroller of the Currency was also named as a defendant in this action, thus challenging his authority as well as his interpretive ruling. 39 Fed. Reg. 44416, 44418 (1974).

63. 39 Fed. Reg. 44416, 44418 (1974), citing 67 Cong. Rec. 2860, 3230 (1926).

lators have viewed branches in functional rather than physical terms.<sup>64</sup> Admittedly, CBCTs do not have the traditional physical attributes of a branch facility nor do they strictly comply with the personnel characteristic. Some electronic terminals are manned, but these are operated by a bona fide party under contract to the bank. It is generally required that this third party not be an employee or an agent of the bank, thus avoiding the personnel characteristic. The United States District Court for the District of Columbia recently rejected the Comptroller's contention that physical characteristics determined a branch bank.<sup>65</sup> The court interpreted the definition of the McFadden Act as having a "calculated indefiniteness" which dictates only the minimum requirement of a branch bank.<sup>66</sup>

The Comptroller has also argued that even if a CBCT is a branch bank or branch place of business it does not receive deposits, pay checks, or make loans within the meaning of the federal branch definition.<sup>67</sup> CBCTs, however, allow the customer to conduct the following types of transactions: (1) cash withdrawals from demand accounts, savings accounts, and credit card accounts; (2) deposits to demand accounts or to savings accounts; and (3) transfers from demand to savings accounts, or from savings to demand accounts, or from credit card to demand accounts.<sup>68</sup> Authentication and verification of these transactions are prerequisites to deposits being considered received or checks paid or money lent.<sup>69</sup> At their current stage of development, CBCTs are not sophisticated enough to accomplish these procedures.<sup>70</sup>

A deposit transaction is not consummated until the customer's funds, stored at the CBCT, have been collected and processed by the bank according to the customer's request.<sup>71</sup> A customer may record his instructions upon a tape or other medium if an off-line unmanned terminal is involved; whereas, with an on-line terminal the customer communicates instantaneously with the bank. The United States District Court in *Colorado v. First National Bank*<sup>72</sup> rejected the idea that notification, receipt, and verification of a deposit occurs at the bank. The court held that an off-line customer service machine was

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64. 39 Fed. Reg. 44416, 44418 (1974), citing 68 Cong. Rec. 5816 (1927) (Representative McFadden); 67 Cong. Rec. 2855 (1926) (Representative Kurtz); 67 Cong. Rec. 3248 (1926) (Representative Cannon).

65. *Independent Bankers Ass'n v. Smith*, No. 75-0089 (D.D.C. July 31, 1975).

66. *Id.*

67. 39 Fed. Reg. 44416, 44419 (1974).

68. 12 C.F.R. § 7.7491 (1975).

69. *Id.* Most banks use a deposit slip which contains a provision to the effect that the deposit is accepted subject to verification and the provisions of the Uniform Commercial Code. Therefore, a "deposit" at a bank is equally as tentative as one at a CBCT. In both instances, verification which occurs at the bank is necessary to hold the bank liable.

70. *Id.*

71. 12 C.F.R. § 7.7491 (1975).

72. 394 F. Supp. 979 (D. Colo. 1975).

the location at which deposits are received and not the bank.<sup>73</sup> In rejecting the Comptroller's interpretation of the time at which deposits are made, the court relied upon *First National Bank v. Dickinson*.<sup>74</sup> In *Dickinson*, the United States Supreme Court stated that:

Unquestionably, a competitive advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor and creditor is established at the moment of receipt or somewhat later.<sup>75</sup>

The Colorado District Court saw "no functional difference" between the manner in which a customer makes a deposit at a CBCT and the stationary receptacle for deposits discussed in *Dickinson*.<sup>76</sup> The court concluded that to the extent of this single function of receiving deposits, the machine in question was a branch under 12 U.S.C. § 36(f) and not authorized to operate under Colorado's branch banking laws.<sup>77</sup> The Colorado decision further indicated that on-line terminal service would also be deemed a receipt of deposits.<sup>78</sup> In both on-line and off-line CBCTs there is a delay between the customer's making what he considers a deposit and the bank's receiving the customer's funds to implement his instructions. Since the court determined that the CBCT had received the deposit even without the main bank's knowledge of the transaction, the Comptroller's argument for an on-line CBCT would be even more tenuous because the bank is instantaneously notified of the customer's transaction and thus has more warning of the debtor-creditor relationship the customer seeks to create.

Following the Colorado decision, the United States District Court, in *Independent Bankers Association v. Smith*<sup>79</sup> held that a facility, either off-line or on-line, which transacts the same business as the main bank is a branch. Thus, the court held that receiving deposits through CBCTs was branch banking.<sup>80</sup>

Both the Comptroller and the Colorado District Court relied on the Uniform Commercial Code's definition of a check in concluding that a cash withdrawal from a CBCT is not "paying a check" within the language of 12 U.S.C. § 36(f).<sup>81</sup> The withdrawal is typically activated by a plastic card which is not a check; a check being "a draft drawn on a bank and payable on demand."<sup>82</sup> Although the Colorado court acknowledged that using the

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73. *Id.* at 984.

74. 396 U.S. 122 (1969).

75. *Id.* at 137.

76. *Colorado v. First Nat'l Bank*, 394 F. Supp. 979, 984 (D. Colo. 1975).

77. *Id.* at 984; see COLO. REV. STAT. ANN. § 11-6-101(1) (1973).

78. *Colorado v. First Nat'l Bank*, 394 F. Supp. 979, 984 (D. Colo. 1975).

79. No. 75-0089 (D.D.C. July 31, 1975).

80. *Id.*

81. *Colorado v. First Nat'l Bank*, 394 F. Supp. 979, 984-85 (D. Colo. 1975); 12 C.F.R. § 7.7491 (1975).

82. UNIFORM COMMERCIAL CODE § 3-104(2) (1972).

machine and presenting a check accomplished the same result, it held that this similarity was not controlling.<sup>83</sup> It emphasized that the *means* by which the customer communicates with the bank was the difference between the two transactions.<sup>84</sup> Thus, the district court applied a literal construction of the "branch" definition while admitting that both methods performed the same function.<sup>85</sup>

According to the Comptroller and the Colorado District Court, a cash withdrawal from an open-end credit account, such as a credit card or approved overdraft, does not constitute a loan at the bank.<sup>86</sup> The customer is drawing against a prearranged line of credit which is subject to verification at the bank that the withdrawal was within the approved line of credit.<sup>87</sup> Even though such a transaction is a loan, the cash withdrawal from a credit card does not constitute branch banking. The Colorado District Court omitted the fact that a credit card company is an independent third party corporation, unassociated with the bank.<sup>88</sup> Such a corporation does not, therefore, satisfy the initial requirement of the branch definition as a "branch office, branch agency, . . . office or any branch place of business."<sup>89</sup>

The United States District Court, for the District of Columbia, in *Independent Bankers Association v. Smith*,<sup>90</sup> chose a functional construction of the McFadden Act by declaring the Comptroller's interpretive ruling to be null and void.<sup>91</sup> The court dismissed the Comptroller's arguments by resorting to the legislative history and case law of 12 U.S.C. § 36(f).<sup>92</sup> Both the United States District Court for the District of Columbia,<sup>93</sup> and the Colorado District Court<sup>94</sup> based their decision on *First National Bank v. Dickinson*.<sup>95</sup> In *Dickinson*, the Supreme Court stated:

Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term 'branch'; use of the word 'include' the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term 'branch bank' at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises, it may include more.<sup>96</sup>

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83. Colorado v. First Nat'l Bank, 394 F. Supp. 979, 984-85 (D. Colo. 1975).

84. *Id.* at 984-85.

85. *Id.* at 985.

86. Colorado v. First Nat'l Bank, 394 F. Supp. 979, 985 (D. Colo. 1975); 12 C.F.R. § 7.7491 (1975).

87. Colorado v. First Nat'l Bank, 394 F. Supp. 979, 985 (D. Colo. 1975); 12 C.F.R. § 7.7491 (1975).

88. Colorado v. First Nat'l Bank, 394 F. Supp. 979 (D. Colo. 1975).

89. 12 U.S.C. § 36(f) (1970).

90. No. 75-0089 (D.D.C. July 31, 1975).

91. *Id.*

92. *Id.*

93. *Id.*

94. Colorado v. First Nat'l Bank, 394 F. Supp. 979 (D. Colo. 1975).

95. 396 U.S. 122 (1969).

96. *Id.* at 135.

Thus, the Court indicated that the McFadden Act should be read broadly, that is, from a functional as opposed to narrow or literal viewpoint.<sup>97</sup>

In the *Independent Bankers Association* decision, the court cited Representative McFadden's comment in the definitional section of the Act, that "any place outside of or away from the main bank where the bank . . . transact[s] any business carried on at the main bank, is a branch."<sup>98</sup> Therefore, the court reasoned that since a CBCT conducts business transactions similar to those of the main bank, a CBCT is a branch.<sup>99</sup> Currently, the Comptroller is enjoined from further implementation of his ruling, thus leaving national banks in a quandary.<sup>100</sup> This decision is having a nationwide impact because it attacks all units in operation that conflict with state branch banking restrictions. Although this is the present judicial interpretation, the future of electronic banking will be resolved by the United States Supreme Court.

A strong argument can be advanced for a functional as opposed to a literal construction of the Act especially since Representative McFadden, the sponsor of the "branch" definition, viewed branches in functional terms. A functional approach would determine the nature of the activity from the functions it performs, whereas a literal view would confine the interpretation to the precise language of the statute. The intention to regulate banking institutions which accomplish certain transactions should govern the construction and application of the statute rather than the exact words of the Act. If the literal approach is correct, Congress has allowed the law regulating the banking system to be antiquated by the technological advances in the industry. If, however, a functional approach is adopted, the drafters of the statute incorporated a durational quality in the Act, anticipating its progressive reinterpretation in the future.

There has been no judicial determination of whether a manned on-line CBCT is a branch. An example of a manned CBCT is a point of sale (POS) terminal located at a commercial, non-bank establishment, such as a supermarket, which is financially involved in the transaction. All the customer's transactions occurring as a result of the sale of goods or services are recorded with the bank, however, the bank customer is regarded as dealing not with the bank but directly with the third party.<sup>101</sup> Nevertheless, the bank is essential to the transaction. The bank's computer notifies the customer that the third party has the funds necessary to the transaction and validates the customer's card.<sup>102</sup> All transactions involving the bank, such as deposits, with-

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97. *Id.* at 135.

98. *Independent Bankers Ass'n v. Smith*, No. 75-0089 (D.D.C. July 31, 1975), *citing* 68 Cong. Rec. 5816 (1927).

99. *Id.*

100. *Independent Bankers Ass'n v. Smith*, No. 75-0089 (D.D.C. July 31, 1975).

101. 12 C.F.R. § 7.7491 (1975).

102. *Id.*

drawals, or transfers are consummated at the bank under the Comptroller's analysis.<sup>103</sup> The third party is not considered an agent of the bank because it is acting in furtherance of its own business purposes.<sup>104</sup> If the test announced in *Independent Bankers Association v. Smith*<sup>105</sup> was applied to manned CBCTs, the facilities would be deemed branches because of the similarity of the functions they and the main bank perform.

Wide discretion has been afforded the Comptroller in the field of national banking.<sup>106</sup> Therefore, even if a CBCT is not a branch bank, the Comptroller might control CBCTs to protect the banking system. The Comptroller should not, however, exercise this supervisory power merely to preserve the status quo. Many banks burdened by geographic restrictions will be faced with a competitive adjustment from traditional banking methods to an electronic system in which time and distance are irrelevant.<sup>107</sup> Therefore, the Comptroller has adopted several policies: First, any national bank seeking to establish a CBCT must first give 30 days written notice to the Comptroller containing the information specified in the interpretive ruling; second, the Comptroller has ruled that national banks are permitted, but not required, to share their CBCTs with any other financial institution;<sup>108</sup> third, the Comptroller has urged national banks not to establish CBCTs prior to July 1, 1975, in any state in which state chartered banks are prohibited by state law from establishing a similar facility.<sup>109</sup> This delay is designed to give the state legislatures time to decide whether they wish to place their state chartered banks on an equally competitive footing with national banks.

#### STATUTORY REGULATION IN THE STATES

State reaction to the advent of CBCTs and electronic banking has been varied. Three states, Massachusetts, Oregon, and Washington passed legislation in 1974 which specifically authorizes an electronic funds transfer system (EFTS) but does not treat these facilities as branches.<sup>110</sup> Of these

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103. *Id.* The bank and the third party can also contractually arrange for the bank to assume the risk of dishonor. The assumption of the risk is usually subject to compliance with various bank procedures, including the possibility of charging the face amount of a check so processed back to the customer's account. *Id.*

104. *Id.*

105. No. 75-0089 (D.D.C. July 31, 1975).

106. *Ramapo Bank v. Camp*, 425 F.2d 333, 341 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970).

107. 39 Fed. Reg. 44416, 44420 (1974).

108. 12 C.F.R. § 7.7491 (1975). Sharing is mandatory if the CBCT is being established beyond a 50 mile radius of the national bank or one of its branches.

109. 39 Fed. Reg. 44416, 44420 (1974).

110. Other states which specifically exclude these facilities as branches are: FLA. STAT. ANN. § 659.062 (Supp. 1975); Kan. S.B. 515 § (f), 1975 Legislature; Md. H.B. 630, § (E), 1975 Legislature; NEB. REV. STAT. § 8-157(3) (Supp. 1975); N.D. CENT. CODE § 6-09-34 (Supp. 1975); R.I. GEN. LAWS ANN. § 19-29-1 (Supp. 1975). *See also* 39 Fed. Reg. 44416, 44419 (1974).

states, Massachusetts is the least specific in stating what functions may be performed by a remote unmanned facility.<sup>111</sup> Washington, on the other hand, permits the facility to accept deposits, dispense cash, and make account transfers.<sup>112</sup> The Washington statute is silent, however, on whether or not lines of credit or overdraft privileges are available through unmanned remote tellers. Oregon's statute is the broadest of the three states.<sup>113</sup> It allows the unmanned remote facilities to conduct general banking business.<sup>114</sup> Both Massachusetts and Washington require advance supervisory approval, whereas Oregon requires only notice for the first four units, after which approval is required.<sup>115</sup> The owner or lessee of the facility must notify the Superintendent of Banks within 30 days of the removal or installation of a CBCT.<sup>116</sup>

Several states have enacted EFTS legislation. Kansas and Nebraska, for example, have developed their own enabling and regulatory schemes.<sup>117</sup> Both permit banks to establish unmanned remote facilities which accomplish banking transactions such as deposits, withdrawals, account transfers, and pre-authorized loans.<sup>118</sup> Both states also provide that sharing by like institutions is mandatory, but both are silent on sharing by unlike institutions.<sup>119</sup> Most other states, however, maintain that sharing by like and unlike institutions is permissible and not mandatory.<sup>120</sup> Generally, the states require that sharing be accomplished on a nondiscriminatory basis, conditioned upon pay-

111. MASS. GEN. LAWS ANN. ch. 1147 (1974).

112. WASH. REV. CODE § 62.41.201 (Supp. 1974).

113. Ore. Laws 1974, ch. 797.

114. *Id.*

115. MASS. GEN. LAWS ANN. ch. 1147 (1974); Ore. Laws 1974, ch. 797; WASH. REV. CODE § 62.41.201 (Supp. 1974). Florida also requires only notice. FLA. STAT. ANN. § 659.062 (Supp. 1975).

116. Ore. Laws 1974, ch. 797.

117. Compare Kan. S.B. 515, §§ 1(d)(1), (2), 1975 Legislature with NEB. REV. STAT. § 8-157(3) (Supp. 1975) (effective January 1, 1976).

118. Compare Kan. S.B. 515, § 1(d)(1), 1975 Legislature with NEB. REV. STAT. § 8-157(3) (Supp. 1975). See also CONN. GEN. STAT. REV. § 75-373 (Supp. 1975); ME. REV. STAT. ANN. tit. 9-B, §§ 334(1)-(2), 342(35) (Supp. 1975); N.J. REV. STAT. § 17:9(A)(1) (Supp. 1975); N.D. CENT. CODE § 6-03-02 (Supp. 1975).

119. Compare Kan. S.B. 515, § 1(g), 1975 Legislature with NEB. REV. STAT. § 8-157(3) (Supp. 1975). "Like institutions" determines whether similar institutions are required or permitted to share facilities (banks and banks, savings and loans and savings and loans). "Unlike institutions" refers to sharing between banks and thrifts and thrifts and banks.

120. Sharing is permissible between like and unlike institutions in these states. FLA. STAT. ANN. § 659.062 (Supp. 1975); Ga. S.B. 149, 1975 Legislature; MASS. GEN. LAWS ANN. ch. 167 § 65 (Supp. 1974); Md. H.B. 630, 1975 Legislature; N.J. REV. STAT. 17:9(A)(1) (Supp. 1975); Ore. Laws 1974, ch. 797; R.I. GEN. LAWS ANN. § 19-29-1 (Supp. 1975); WASH. REV. CODE § 62.41.201 (Supp. 1974) (refers to mutual savings banks and savings and loan associations). On the other hand, sharing is mandatory in CONN. GEN. STAT. REV. § 75-373 (Supp. 1975); ME. REV. STAT. ANN. tit. 9-B, § 339 (Supp. 1975); N.H.S.B. 255, 1975 Legislature; N.D. CENT. CODE § 6-03-02 (Supp. 1975); WASH. REV. CODE § 62.41.201 (Supp. 1974).

ment of a reasonable proportion of all costs, including a reasonable return on capital expenditures incurred in connection with the development, installation, and operation of the electronic facility.<sup>121</sup> Entry of automated facilities into a state by out-of-state banking institutions is prohibited in some states while other state statutes are silent on the issue.<sup>122</sup> None of the states, however, expressly authorize out-of-state entry.

“Wild card” legislation which establishes parity with federally regulated financial institutions, including federal savings and loans associations, has been enacted in Maryland, North Dakota, and Virginia.<sup>123</sup> In Virginia, the State Corporation Committee has the authority to define a branch so as to achieve this parity with national banks.<sup>124</sup> In Maryland, New Hampshire, and Rhode Island the banking authority may promulgate rules and regulations for the operation and sharing of facilities to the same extent as those regulations promulgated by the Comptroller of the Currency with respect to national banks.<sup>125</sup> In addition to the Comptroller’s regulations, New Hampshire also considers the Federal Home Loan Bank Board’s regulations regarding federal savings and loan associations.<sup>126</sup> Rhode Island, on the other hand, provides that every financial institution may establish CBCTs to the same extent but only during the time that competing financial institutions, federally regulated and domiciled in the state, are permitted.<sup>127</sup> Utah, in contrast, has declared a moratorium on the EFTS issue until July 1, 1976.<sup>128</sup> It permits the Commissioner of Financial Institutions to authorize experimental EFTS. The Utah statute further provides that if a court or Congress authorizes establishment of electronic funds transfer systems in Utah prior to July 1, 1976, the Commissioner will grant financial institutions the same authority.<sup>129</sup>

Providing adequate security for the electronic devices is of primary concern to the banks. Although several states advocate that sufficient safeguards be

121. See, e.g., FLA. STAT. ANN. § 659.062 (Supp. 1975); WASH. REV. CODE § 62.41-201 (Supp. 1974).

122. Prohibit: CONN. GEN. STAT. REV. § 75-373 (Supp. 1975); FLA. STAT. ANN. § 659.062 (Supp. 1975); Kan. S.B. 515, 1975 Legislature; ME. REV. STAT. ANN. tit. 9-B, § 339 (Supp. 1975); Md. H.B. 630, 1975 Legislature; MASS. GEN. LAWS ANN. ch. 167 § 65 (Supp. 1974); NEB. REV. STAT. § 8-157 (Supp. 1975); N.J. REV. STAT. § 17:9 (A)(1) (Supp. 1975). Silent: Ga. S.B. 149, 1975 Legislature; N.H.S.B. 255, 1975 Legislature; N.D. CENT. CODE § 6-03-02 (Supp. 1975); Ore. Laws 1974, ch. 797; WASH. REV. CODE § 62.41.201 (Supp. 1974); Wis. STAT. § 221.14 (Supp. 1974).

123. Md. H.B. 630, 1975 Legislature; N.D. CENT. CODE § 6-03-02 (Supp. 1975); VA. CODE ANN. § 6.1-39 (Supp. 1975). See also N.H.S.B. 255, 1975 Legislature; R.I. GEN. LAWS ANN. § 19-29-1 (Supp. 1975); Wis. STAT. § 221.14 (Supp. 1974).

124. VA. CODE ANN. § 6.1-39 (Supp. 1975).

125. Md. H.B. 630, § F, 1975 Legislature; N.H.S.B. 255, § 1, 1975 Legislature; R.I. GEN. LAWS ANN. § 19-29-1 (Supp. 1975).

126. N.H.S.B. 255, § I(a), (b), 1975 Legislature.

127. R.I. GEN. LAWS ANN. § 19-29-1 (Supp. 1975).

128. Utah S.B. 100, 41st Legis. Sess. (1975).

129. *Id.* § 6(1).



incorporated into the systems, only Kansas has attempted to delineate such measures.<sup>130</sup> The statute governing the establishment of remote service units by savings and loan associations clearly states that these security devices are the minimum requirements and not an exclusive list.<sup>131</sup>

State legislation has also dealt with manned remote facilities. Some states permit deposits, withdrawals, account transfers, and pre-authorized loans to be performed; the same functions being allowed at unmanned remote facilities.<sup>132</sup> An analysis of the statutes reveals that most of the states require the manned facility to be operated by a third party under contract.<sup>133</sup> Generally, the states maintain the same standards for both unmanned and manned units.<sup>134</sup>

### CONCLUSION

A customer-bank communication terminal is an electronic means by which a bank customer may communicate with the bank concerning the disposition of his account. Whether this business constitutes branch banking depends partly on whether a literal or functional construction of the McFadden Act is to be employed. Because a CBCT does not fit the statutory language, a literal application of the statute would support the Comptroller's position. If a functional approach is applied, some if not all of a CBCT's transactions would constitute branch banking. In *Colorado v. First National Bank*,<sup>135</sup> the Colorado Federal District Court decided the deposit issue against the Comptroller but held in his favor with respect to the withdrawal and loan aspects of the CBCT.<sup>136</sup> By contrast, the Federal District Court for the District of Columbia in *Independent Bankers Association v. Smith*,<sup>137</sup> held against the

130. Kan. S.B. 519, 1975 Legislature; FLA. STAT. ANN. § 659.062 (Supp. 1975); Md. H.B. 630, 1975 Legislature.

131. Kan. S.B. 519, § 5, 1975 Legislature. More protective measures are required for the unmanned than for the manned facility such as: adequate lighting; tamper-resistant locks on the exterior unit; an alarm system; and security provisions that prevent interference with data communication linkage by a foreign source. For the manned facility, only the last device mentioned above is a condition of operation.

132. See, e.g., Kan. S.B. 515, 1975 Legislature; N.J. REV. STAT. § 17:9(A)(1) (Supp. 1975); N.D. CENT. CODE § 6-03-02 (Supp. 1975).

133. CONN. GEN. STAT. REV. § 75-373 (Supp. 1975); FLA. STAT. ANN. § 659.062(1)(c) (Supp. 1975); Md. H.B. 630, § C, 1975 Legislature; ME. REV. STAT. ANN., tit. 9-B, § 339 (Supp. 1975) (employees of business where facility located); NEB. REV. STAT. § 8-157(3) (Supp. 1975) (nonbank employees can assist in transactions originated at the facilities, and such assistance is not deemed to be engaging in the business of banking); N.J. REV. STAT. § 17:9(A)(1) (Supp. 1975); N.D. CENT. CODE § 6-03-02 (Supp. 1975); Ore. Laws 1974, ch. 797, § 4.

134. For example, most states require advanced supervisory approval for the establishment of either type of facility. See Georgia, Maine, Maryland, Nebraska, North Carolina, New Jersey, North Dakota, Rhode Island, and Wisconsin. This approval is usually based on convenience to the public. See, e.g., Florida, Washington, and Utah.

135. 394 F. Supp. 979 (D. Colo. 1975).

136. *Id.*

137. No. 75-0089 (D.D.C. July 31, 1975).

Comptroller on all the CBCTs functions.<sup>138</sup> Thus, while one court has taken a literal approach to the Act another has applied a functional analysis.

Although the specific point of controversy is whether national banks should be able to establish CBCTs regardless of state boundaries, the main issue is whether electronic banking, regardless of its status, should be allowed. The arguments for and against electronic banking deal primarily with economic and policy considerations rather than legal reasoning.

The competitive impact of electronic banking and the Comptroller's ruling in particular on state banks is of major concern in the banking industry. The Independent Bankers Association of America<sup>139</sup> has taken the position that the Comptroller's ruling will lead to a disparity between the limitations on state and national banks.<sup>140</sup> State banks will remain geographically restricted by their state statutes while national banks will be unrestricted.<sup>141</sup> Moreover, because the 31 states which limit or prohibit branch banking are those states in which 90 percent of the national banks are located, the ruling will effectively create statewide branching in these states.<sup>142</sup> The national banks will be able to establish and operate CBCTs throughout the state because they are not branches and therefore not subject to state branching restrictions. If this situation occurs there would be an increase in concentration of national banks which could lead to rigidity of prices and services and possibly foster collusion,<sup>143</sup> instead of offering more efficient services and lower costs to the bank customers. It is possible that the interpretive ruling may result in a competitive imbalance between state and national banks but these differences are those inherent in a dual banking system.<sup>144</sup> Although national banks are regulated uniformly by Congress, state chartered banks are governed by each particular state's laws. Thus, national bank practices do not always produce the same result, as far as business advantages are concerned, when interwoven with the state statutes. In response to this situation, the Comptroller has urged temporary limitations in an attempt to minimize any competitive advantages and disadvantages which might result from his ruling.<sup>145</sup>

The Comptroller's ruling was in large part prompted by recent regulations of the Federal Home Loan Bank Board permitting the establishment of re-

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138. *Id.*

139. The Independent Bankers Association of America is a trade association which represents over 7,300 state and federally chartered commercial banks.

140. *Statement-Consultant—Independent Bankers Association of America Before the Comptroller of the Currency* at 3-4 (April 2, 1975).

141. *Id.* at 2-3.

142. *Id.* at 3.

143. *Id.* at 5.

144. See 39 Fed. Reg. 44416, 44419 (1974).

145. 39 Fed. Reg. 44416, 44420 (1974).

mote service units by federally chartered savings and loan associations.<sup>146</sup> Similar regulations have been issued for credit unions by the National Credit Union Administration.<sup>147</sup> In some states, such as Nebraska, savings and loan associations have already taken advantage of the regulations.<sup>148</sup> First Federal Savings and Loan Association of Lincoln, Nebraska, for example, has installed point-of-sales terminals in certain supermarkets through which cash or cash items are received or disbursed.

By installing such a point-of-sales terminal, a national bank would treat these terminals as CBCTs and appropriate notice to the Comptroller prior to installation would be required. The Comptroller's ruling specifically excludes from all reporting requirements, however, a terminal whose sole function is to accomplish an electronic funds transfer in payment for goods and services received, and through which neither cash is dispensed nor cash or checks left for deposit.<sup>149</sup> Such a limited point-of-sales terminal is not within the intended scope of the Comptroller's regulation. For example, most of the 6,000 point-of-sales terminals contemplated in the EFTS network being planned by Credit Systems, Inc. of St. Louis, Missouri, will not receive or dispense cash and therefore will not require 30 days notice from any bank.<sup>150</sup> Despite the Comptroller's exclusion of this type of system, federal savings and loan associations and federal credit unions have greater latitude than national banks to establish these EFTS.

The Comptroller is attempting to provide a means by which the commercial banking industry can meet this competition. If the McFadden Act is strictly interpreted, the national banking system might be weakened through the loss of customers to the remote CBCTs offered by credit unions and savings and loan associations.<sup>151</sup> Because of the electronic communication technology employed, CBCTs will also practically eliminate insufficient-funds checks and bad-check losses to merchants. The possibility still exists, of course, that a card used for identification and credit rating could be altered, but this is much more remote a possibility than the present actuality of forged and worthless checks.<sup>152</sup> Such electronic banking should also stabilize the cost of processing billions of pieces of paper now relied upon to make the payments system work. National banks should be allowed to establish CBCTs because of the efficiency, convenience, and flexibility they offer to the public.

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146. See 39 Fed. Reg. 23991 (1974).

147. 39 Fed. Reg. 30107 (1974).

148. See 39 Fed. Reg. 44416, 44419 (1974).

149. 12 C.F.R. § 7.7491 (1975).

150. Dep't of Treasury, Press Release (May 9, 1975).

151. See 39 Fed. Reg. 44416, 44420 (1974).

152. Due to the current problem of stolen cards, banks have activated "hot lists" composed of the stolen card numbers which will not initiate a transaction at the terminal. Difficulty in accommodating the increasing number of stolen cards has led some banks to create temporary time periods for which a stolen card remains on the "hot list."

Potential anti-trust violations are perhaps the most serious problem posed by establishing CBCTs. Although the Comptroller did not require national banks within the 50 mile radius to share these devices with other financial institutions, he did not specifically prohibit such sharing.<sup>153</sup> He did, however, require sharing of those CBCTs established beyond the 50 mile radius and that they be "available at a reasonable cost."<sup>154</sup> Sharing of a CBCT system by two or more competitors capable of supporting their own network might raise anti-trust issues if the practice were to discourage competition and innovation. The Independent Bankers Association advocates a coordination and cooperation between financial institutions but seeks safeguards to protect the public against risks inherent in the sharing of a CBCT system by competitors.<sup>155</sup>

In the past the Comptroller has not been required to take potential anti-trust problems into consideration while approving the establishment of a branch bank.<sup>156</sup> If CBCTs are not branches the anti-trust issue of sharing facilities arises. Because the ruling does not attempt to settle the anti-trust problem, it places the burden upon the anti-trust agencies to prevent illegal price fixing or market sharing devices. If, on the other hand, CBCTs are branches, problems of monopoly, anti-trust, and competitive imbalance will be caused by the fact that national banks will be severely restricted, whereas the other federal financial institutions such as the savings and loan associations and credit unions will not be restricted.

Senate Bill 1899, presently tabled in the United States Senate, was introduced to establish certain temporary controls on electronic funds transfer systems.<sup>157</sup> These temporary restraints were to be imposed on electronic branch facilities for one year and would apply to national banks, federal savings and loan associations, and federal credit unions.<sup>158</sup> This bill allowed some experimentation with EFTS while curbing any uncontrolled spread of the systems. The moratorium was designed to provide the National Commission on Electronic Funds Transfer with the time to investigate the impact of

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Unfortunately these cards have been utilized after the expiration of this period to effect unauthorized transactions.

There are two basic systems which the bank may use for customer identification purposes (a negative file and a positive file). The negative file contains a list of the customers that are not entitled to conduct any transactions at the CBCT because of overdraft or some other deficiency in credit rating. The disadvantage with this type of system is that it has to be updated in order to be effective. This updating is particularly more inconvenient to the bank if the CBCT is off-line. A positive file, on the other hand, contains every customer's number and either clears the customer for business or rejects him depending on the information in the file. This kind of file is generally regarded as more efficient and secure.

153. 12 C.F.R. § 7.7491 (1974).

154. 12 C.F.R. § 7.7491 (1975).

155. 39 Fed. Reg. 44416, 44417 (1974).

156. *National Bank v. Saxon*, 268 F. Supp. 720, 723-24 (W.D. Pa. 1967).

157. *Id.* at 723-24.

158. *Id.* at 723-24.

EFTS on the whole banking structure and to propose a cohesive plan for their development.

CBCTs are the forerunners of a family of customer operated electronic terminals. Whether they constitute branches under the McFadden Act will depend upon the construction given the statute. Although a functional interpretation of the definition might insure a continuation of the "competitive equality" among our banks begun in 1863, a revision of the McFadden Act might be the best solution. The modernization of the banking system should not be impeded by a 1927 law. The most important consideration is determining how our banking system should develop and what competitive balances we wish to maintain. Technology can revolutionize banking. Its implementation, however, should be carefully scrutinized to prevent a chaotic, piecemeal construction of a new banking industry.