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## The Future of Shared Automatic Teller Networks in the Wake of Marine Midland Bank: A Call for Federal Legislation

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## I. INTRODUCTION

Congress enacted the National Bank Act,<sup>1</sup> known as the McFadden Act, in 1927 in an effort to strengthen the national banking system and to place it at a level of competitive equality with state banking systems.<sup>2</sup> Prior to 1927 national banks could not establish branch banks. Federal law permitted national banks to operate only out of one office in the state in which the bank was located.<sup>3</sup> State law, however, governed state-chartered banks and often permitted branching with varying degrees of geographical re-

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1. National Bank [McFadden] Act, ch. 191, § 7, 44 Stat. 1224, 1228 (1927), as amended by Glass-Steagall Act, ch. 89, § 23, 48 Stat. 162, 189 (1933) (codified as amended at 12 U.S.C. § 36 (1982)).

2. First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252, 257, 261 (1966); Comment, *Customer-Bank Communication Terminals and the McFadden Act Definition of a "Branch Bank,"* 42 U. CHI. L. REV. 362, 372 (1975).

3. Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1133, 1152 (1981); Comment, *Circumventing the McFadden Act: The Comptroller of the Currency's Efforts to Broaden the Branching Capabilities of National Banks*, 72 KY. L.J. 707, 712 & n.37 (1983-84).

restrictions.<sup>4</sup> The McFadden Act allowed national banks to establish branches if state banks in that particular state enjoyed similar freedom.<sup>5</sup> Representative McFadden, the sponsor of the bill, stated in his analysis of the Act that the statute would both preserve the dual banking system and promote competitive equality between national and state banks.<sup>6</sup>

Section 36(f) of the National Bank Act defines a bank branch as "any branch place of business . . . at which deposits are received, or checks paid, or money lent."<sup>7</sup> Federal courts in recent years have interpreted section 36(f) under circumstances very different from those that existed in 1927. The growing use of automatic teller machine systems (ATMs),<sup>8</sup> customer-bank communication terminals (CBCTs),<sup>9</sup> and point-of-sale (POS)<sup>10</sup> terminals

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4. See Ginsburg, *supra* note 3, at 1152.

5. Under the McFadden Act, national banks follow state law regarding the location of national branch banks. 12 U.S.C. § 36(c) (1982). Section 36(c) provides that:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

*Id.*

6. Representative McFadden stated: "As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal reserve system." 68 CONG. REC. 5815 (1927).

7. 12 U.S.C. § 36(f) (1982). Section 36(f) provides in full:

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

8. An ATM is an electronic funds transfer terminal that can perform such banking services as deposits, withdrawals, account transfers, balance inquiries, extensions of credit, and payments to third parties. A customer activates the terminal with an access card and a personal identification number. See N. PENNEY & D. BAKER, *THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS* ¶ 6.01 (1980).

9. The Comptroller of the Currency defines a CBCT branch as "an automated device, established (*i.e.*, owned or rented) by a national bank at a location separate from the main office or a domestic branch, that: (1) Takes deposits, or (2) Disburses cash drawn against: (i) A customer's deposit account, or (ii) A customer's pre-approved loan account." 12 C.F.R. § 5.31(b) (1985).

10. Point-of-sale (POS) terminals are terminals located "anywhere consumers pay for goods or services." Goldberg, *Shared Electronic Funds Transfer Systems: Some Legal Implications*, 98 BANKING L.J. 715, 718 (1981). POS terminals provide two types of services: check authorization and guarantee services and direct debit services. *Id.*

has spawned increasing controversy and litigation over the issue of whether electronic fund transfer (EFT) systems<sup>11</sup> actually are branches of the banks that use them.

A recent federal district court decision, *Independent Bankers Association v. Marine Midland Bank*,<sup>12</sup> held that a national bank violated the McFadden Act by participating in an interstate ATM network that used an ATM owned and operated by a New York supermarket.<sup>13</sup> The district court decision threatened to cause a major crisis in the banking industry by effectively prohibiting national banks from participating in shared ATM network systems. On appeal, however, the United States Court of Appeals for the Second Circuit reversed the district court decision, holding that the McFadden Act excludes an ATM that a national bank does not own or operate from the definition of a branch bank for federal law purposes.<sup>14</sup> Congress also reacted to the district court decision by holding hearings on a proposed amendment to the National Bank Act that, if passed, would overrule effectively and permanently the district court decision.<sup>15</sup>

This Recent Development contends that the Second Circuit's reversal of the lower court decision only temporarily preserves the regional and national interchange systems that have become increasingly popular in the last several years. Federal legislation is necessary to ensure the development of electronic banking technology and to reestablish competitive equality in the dual banking system. Part II traces the treatment of ATMs and shared ATM networks by state legislatures, the Office of the Comptroller of the Currency, and federal courts since the enactment of the McFadden Act. Part III discusses the *Marine Midland Bank* decision as the first case to call into question the validity of shared ATM networks. Part III also introduces the Banking Convenience Act of 1984, which is Congress' reaction to the district court decision in *Marine Midland Bank*. Part IV analyzes the effect that *Marine Midland Bank* will have on the future use of ATMs by national banks and encourages passage of a proposed amendment to the

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11. EFT systems are computer systems that handle bank payment services and procedures. See N. PENNEY & D. BAKER, *supra* note 8, ¶ 1.01.

12. 583 F. Supp. 1042 (W.D.N.Y. 1984), *rev'd*, 757 F.2d 453 (2d Cir. 1985).

13. The district court also held that the national bank's use of the ATM violated New York's home office protection law. 583 F. Supp. at 1048.

14. 757 F.2d 453, 463 (2d Cir. 1985).

15. See The Banking Convenience Act of 1984, S. 2898, 98th Cong., 2d Sess. See generally *infra* notes 119-20 and accompanying text for discussion of Senate Hearings on the proposed amendment.

McFadden Act, which effectively codifies the *Marine Midland Bank* appellate decision. Part V concludes that Congress should act promptly, despite the Second Circuit's reversal of the *Marine Midland Bank* district court decision, to clarify the legal status of shared ATMs for national banks and to regain the competitive equality that Congress thought it achieved in 1927 with the National Bank Act.

## II. LEGAL BACKGROUND

### A. *Competitive Equality*

#### 1. The McFadden Act

Congress enacted the McFadden Act<sup>16</sup> in 1927 in response to the Comptroller of the Currency's requests to act to avert the potential destruction of the national banking system.<sup>17</sup> Branching among state-chartered banks grew in large proportion from 1900 to 1923, yet national banks could not participate in similar expansion because Congress had not provided for branch banking for national banks.<sup>18</sup> The Comptroller feared that national banks would convert to state banks in order to enjoy the benefits of state law.<sup>19</sup>

The McFadden Act permitted national banks to operate branches in the same locations and to the same extent that state law permitted state banks to engage in branch banking; the Act, therefore, left to the states the ultimate decision of whether to allow national banks the privilege of branch banking.<sup>20</sup> By deferring

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16. 12 U.S.C. § 36 (1982).

17. See Comment, *supra* note 3, at 712-14. See generally *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 256-67 (1966) (stating that national banks are instruments of the federal government for exercising fiscal powers).

18. See *First Nat'l Bank v. Missouri*, 263 U.S. 640, 657 (1924) (federal law confined national banking associations to one office or banking house); see also *Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co.*, 409 F. Supp. 1167, 1171 n.1 (N.D. Ill. 1975), *aff'd in part and rev'd in part*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); Comment, *supra* note 3, at 712 (legislative omission interpreted as prohibiting branch banking by national banks). In *First Nat'l Bank v. Missouri* the Court discussed the existence of the national banking system and stated that although national banks are instruments of the federal government, "national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States." 263 U.S. at 656.

19. See Comment, *supra* note 2, at 373 (Representative McFadden described "accelerating trend towards conversion of national banks into state chartered institutions"); Comment, *supra* note 3, at 712 n. 37 (national banks began changing to state charters to achieve increased banking authority).

20. See 12 U.S.C. § 36(c) (1982); see also *First Nat'l Bank v. Walker Bank & Trust*

to the states, Congress achieved its goal of preserving competitive equality and avoided a confrontation with states' rights advocates. Under the Act national banks could profitably retain their national status because they could participate in local competition for business and offer services and branch offices similar to those that state banks offered.<sup>21</sup> Congress, however, did not delegate complete decisionmaking power to the states. Congress intended the question of what constituted a national bank branch to remain a federal question to which federal law would apply.<sup>22</sup>

In *First National Bank in Plant City v. Dickinson*,<sup>23</sup> a leading early case construing the McFadden Act, the United States Supreme Court provided a starting point for subsequent lower court analyses of purported bank branching activities that involved electronic terminals. In *Plant City* the Court considered (1) whether a national bank's use of an armored car messenger service to deliver cash to and pick up deposits from its customers constituted branch banking, and (2) whether an off-premises receptacle used for deposits constituted branch banking.<sup>24</sup> The Court first reviewed the policy considerations supporting the McFadden Act<sup>25</sup> and emphasized that federal law was responsible for defining the term "branch" for a national bank.<sup>26</sup>

Referring to section 36(f) of the McFadden Act<sup>27</sup> and noting that the statutory definition of a branch bank did not use conclu-

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Co., 385 U.S. at 260. According to the Court, after the Banking Act of 1933 amended the National Bank Act, Congress permitted national banks to establish outside branches if state banks could establish such branches under state law. *Id.*

21. See *supra* note 6.

22. See *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 134 (1969); *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820, 822 (10th Cir. 1972); *Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co.*, 409 F. Supp. 1167, 1172 (N.D. Ill. 1975), *aff'd in part and rev'd in part*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976).

23. 396 U.S. 122 (1969).

24. *Id.* at 126. Under a contract between First National Bank and its customers, the armored car messenger was the agent of the customer and transactions were not complete until delivered at the bank's premises. The Court stated that although nothing precluded the parties from making these contractual agreements, the arrangements could not determine the applicability of § 36(f). *Id.* at 136. The Florida Comptroller had advised First National that the activities constituted illegal branching under Florida law. *Id.* at 125 n.1; see FLA. STAT. § 659.06(1)(a) (1966).

25. See *Plant City*, 396 U.S. at 133. According to the Court, "The policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation." *Id.*

26. *Id.* at 134.

27. See *supra* note 7.

sive, limiting terminology, the Court reasoned that any location offering even *one* of the three services mentioned in section 36(f)—receiving deposits, paying checks, or lending money—was a branch.<sup>28</sup> The Court asserted that the armored car messenger service and the off-premises deposit receptacles did provide the national bank with a competitive advantage over state banks because state law prohibited state banks from offering these customer conveniences.<sup>29</sup> The Court, therefore, held that the armored car and the off-premises receptacle constituted illegal branches.<sup>30</sup> Case law following the *Plant City* decision generally has relied on a strict statutory interpretation of a branch and has limited the forms of bank services that national banks can provide to their customers.<sup>31</sup>

## 2. State Branching Laws and EFT Systems

State branch banking laws, although differing in some respects, generally allow branch banking with various geographical restrictions.<sup>32</sup> Eighteen states and the District of Columbia permit state-wide branch banking;<sup>33</sup> twenty-three states provide for

28. The Court noted:

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"; by 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.

*Plant City*, 396 U.S. at 135 (emphasis in original). Numerous cases have cited this quote as support for a holding that a bank's activities constitute branch banking. *See, e.g.*, Independent Bankers Ass'n v. Smith, 534 F.2d 921, 938 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976); Securities Indus. Ass'n v. Comptroller, 577 F. Supp. 252, 259 (D.D.C. 1983); Illinois *ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co.*, 409 F. Supp. 1167, 1172 (N.D. Ill. 1975), *aff'd in part and rev'd in part*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976).

29. *Plant City*, 396 U.S. at 137.

30. *Id.* The dissents in *Plant City* criticized the lack of deference shown to the Comptroller of the Currency, who as the supervisory agent for administering § 36, had determined earlier that armored car messenger services did not constitute branch banking. *Id.* at 140-41 (Douglas, J. and Stewart, J., dissenting).

31. *See, e.g.*, St. Louis County Nat'l Bank v. Mercantile Trust Co. Nat'l Ass'n, 548 F.2d 716 (8th Cir. 1976) (trust services), *cert. denied*, 433 U.S. 909 (1977); Securities Indus. Ass'n v. Comptroller, 577 F. Supp. 252 (D.D.C. 1983) (discount brokerage services); *see also infra* notes 47-55 and 63-69 and accompanying text.

32. *See* 1 FED. BANKING L. REP. (CCH) ¶ 3106 (July 19, 1985).

33. *See id.* The following states permit state-wide branch banking: Alaska, Arizona, California, Connecticut, Delaware, District of Columbia, Idaho, Maine, Maryland, New Jersey, Nevada, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and Washington.

branch banking on a limited basis;<sup>34</sup> and eight states prohibit branching altogether.<sup>35</sup> In states that allow branch banking, the general substantive standard that the state superintendents (or the Comptroller of the Currency in the case of a national bank branch) must apply in reviewing a bank's application to open a branch is a "convenience and needs" test.<sup>36</sup> Before a state superintendent or the Comptroller of the Currency will approve a bank's application to operate a branch office, the bank must satisfy the appropriate agency that the establishment of a bank branch, otherwise allowed under state law, is feasible economically and serves public convenience and necessity.<sup>37</sup>

State laws vary in their treatment of ATMs.<sup>38</sup> In all, forty states have enacted laws that deal with ATMs and their use within the state.<sup>39</sup> Six states define ATMs as branches,<sup>40</sup> while thirty-four

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34. These states include: Alabama, Arkansas, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin.

35. See 1 FED. BANKING L. REP. (CCH) ¶ 3106 (July 19, 1985). The following state statutes prohibit branching: COLO. REV. STAT. § 11-6-101 (Supp. 1984); Ill. Banking Act, § 6, ILL. ANN. STAT. ch. 17, § 313 (Smith-Hurd 1981); KAN. STAT. ANN. § 9-1111 (1982); MINN. STAT. ANN. § 48.34 (West Supp. 1985); MO. REV. STAT. § 362.105(1) (Supp. 1985); MONT. CODE ANN. § 32-1-372 (1983); NEB. REV. STAT. § 8-157 (1983); TEX. STAT. ANN. art. 342-903 (Vernon Supp. 1985).

36. See, e.g., ARK. STAT. ANN. § 67-360 (Supp. 1983); KY. REV. STAT. § 287.180 (1981); N.M. STAT. ANN. § 58-5-2 (1978).

37. See, e.g., ARK. STAT. ANN. § 67-360 (Supp. 1983) (establishment of branch must be economically feasible and serve public convenience and necessity); R.I. GEN. LAWS § 19-1-13 (1982) (public convenience and advantage); W. VA. CODE § 31A-8-12(j)(1) (Supp. 1985) (same).

Many states also apply a capital and surplus requirement for each branch. See, e.g., IND. CODE ANN. § 28-2-13-19 (Burns Supp. 1985) (one branch for each \$200,000 of unimpaired capital and surplus); OHIO REV. CODE ANN. § 1105.02(B)(2) (Page 1968) (additional capital, surplus, and undivided profits to aggregate not less than \$100,000 for each branch); VA. CODE § 6.1-39 (1983) (authorizing branch if bank has unimpaired capital and surplus in amount deemed necessary to warrant additional expansion).

38. See *supra* note 8 for the definition of an ATM.

39. See ARK. STAT. ANN. § 67-367 (1980); CAL. FIN. CODE §§ 550-559 (West Supp. 1985); COLO. REV. STAT. § 11-6.5-104 (Supp. 1984); CONN. GEN. STAT. ANN. §§ 36-193a to -193h (West 1981 & Supp. 1985); DEL. CODE ANN. tit. 5, § 770(c) (Supp. 1984); FLA. STAT. ANN. § 658.65 (West 1984); GA. CODE ANN. § 13-203.2 (Harrison Supp. 1984); HAWAII REV. STAT. § 403-53 (Supp. 1984); IDAHO CODE § 26-309 (Supp. 1985); Electronic Fund Transfer Transmission Facility Act, §§ 1-100 to 14-100, ILL. ANN. STAT. ch. 17, §§ 1301-1360 (Smith-Hurd 1981 & Supp. 1985); IND. CODE ANN. § 28-2-13-4 (Burns Supp. 1985); IOWA CODE ANN. § 527.1-12 (West Supp. 1985); KAN. STAT. ANN. § 9-1111 (1982); ME. REV. STAT. ANN. tit. 9-B, §§ 131, 334, 339 (1964 & Supp. 1985); MD. FIN. INST. CODE ANN. § 5-502 (1980 & Supp. 1985); MASS. GEN. LAWS ANN. ch. 167B, §§ 1-24 (West 1984 & Supp. 1985); MICH. COMP. LAWS ANN. §§ 488.1-488.31 (West Supp. 1985); MINN. STAT. ANN. §§ 47.61-.75 (West Supp. 1985); MISS. CODE ANN. § 81-5-100 (Supp. 1985); MO. ANN. STAT. § 362.107 (Vernon Supp.



states give ATMs special treatment or provide that the terminals, whether individually owned or utilized in shared systems, are not branches of the banks that establish or use them.<sup>41</sup> Sharing off-premises terminals among banks located in the state is mandatory

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1985); MONT. CODE ANN. §§ 32-6-102 to -103, 36-6-201 to -204 (1983); NEB. REV. STAT. § 8-157 (1983); N.H. REV. STAT. ANN. § 384-B:7 (1983 & Supp. 1983); N.J. STAT. ANN. §§ 17:9A-1, :9A-20 (West 1984); N.M. STAT. ANN. § 58-16-5 to -16-18 (1978); N.Y. BANKING LAW § 105-a (McKinney 1975 & Supp. 1984-1985); N.C. GEN. STAT. § 53-62 (1982 & Supp. 1983); N.D. CENT. CODE § 6-03-02 (Supp. 1985); OHIO REV. CODE ANN. § 1111.03 (Page Supp. 1984); OKLA. STAT. ANN. tit. 6, § 422 (West 1984); OR. REV. STAT. §§ 714.210, .230, .250 (1983); R.I. GEN. LAWS § 19-29-1 (1982); S.D. CODIFIED LAWS ANN. §§ 51-20A-1 to -20A-7 (1980); TENN. CODE ANN. §§ 45-3-104, -308 (1980 & Supp. 1985); TEX. REV. CIV. STAT. ANN. art. 342-903a (Vernon Supp. 1985); UTAH CODE ANN. §§ 7-16-2 to -16-19 (Supp. 1985); VA. CODE §§ 6.1-39.1, -39.2 (1983); WASH. REV. CODE ANN. §§ 30.43.010 to -.045 (Supp. 1986); W. VA. CODE § 31A-8-12b (Supp. 1985); WIS. STAT. ANN. § 221.04 (West 1982 & Supp. 1985). Alabama does not have a statute that expressly addresses ATMs, but state regulations allow for remote service units (RSUs), EFT systems, POS terminals, and ATMs. The regulations do not characterize these facilities as bank branches; rather, the regulations treat these facilities as extensions of existing banks. See Comment, *A Survey of The State Laws Governing Branching and Other Modes of Bank Expansion in Alabama, Florida, and Georgia*, 35 U. MIAMI L. REV. 1067, 1079 (1981).

40. See DEL. CODE ANN. tit. 5, § 770(c) (Supp. 1984); ME. REV. STAT. ANN. tit. 9-B, § 334 (1980); N.J. STAT. ANN. § 17:9A-1 (West 1984); N.M. STAT. ANN. § 58-16 (1983) (POS terminals are not branches as per § 58-26-7); OHIO REV. CODE ANN. § 1111.03 (Page Supp. 1983); VA. CODE § 6.1-39.1 (1983). Louisiana does not have a statute that concerns the operation of ATMs, but an Attorney General opinion states that the use of ATM sites to make cash advances does constitute the use of a branch bank, even when another bank owns the ATM. See Op. Att'y Gen. No. 79-579, [1979-1980 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 98,096 (Sept. 10, 1979).

41. CAL. FIN. CODE § 550(a) (West Supp. 1985); COLO. REV. STAT. § 11-6.5-102 (Supp. 1984); CONN. GEN. STAT. ANN. § 36-193d (West 1981); FLA. STAT. ANN. § 658.65(8) (West 1984); GA. CODE ANN. § 13-203.2(a) (Harrison Supp. 1984); HAWAII REV. STAT. § 403-53 (Supp. 1984); IDAHO CODE § 26-309 (Supp. 1985); ILL. BANKING ACT, § 2, ILL. ANN. STAT. ch. 17, § 302 (Smith-Hurd Supp. 1985); IND. CODE ANN. § 28-2-13-7 (Burns Supp. 1985); IOWA CODE ANN. § 524.1212 (West Supp. 1985); KAN. STAT. ANN. § 9-1111(f) (Supp. 1984); MD. FIN. INST. CODE ANN. § 5-502(f) (1980); MASS GEN. LAWS ANN. ch. 167B, § 1 (West 1984 & Supp. 1985); MICH. COMP. LAWS ANN. § 488.10 (West Supp. 1985); MINN. STAT. ANN. § 47.61 (West Supp. 1985); MISS. CODE ANN. § 81-5-100 (Supp. 1985); MO. ANN. STAT. § 362.107 (Vernon Supp. 1985); MONT. CODE ANN. § 32-1-372(3)(a) (1983); NEB. REV. STAT. § 8-157(3) (1983); N.H. REV. STAT. ANN. §§ 384-B:2, :7 (Supp. 1983); N.Y. BANKING LAW § 105-a (McKinney Supp. 1984) (New York has home office protection and if a proposed ATM will be installed in a city or town with a population of less than 50,000 and the city or town already supports a principal office of a bank, then an ATM is deemed to be a branch and thus prohibited); N.C. GEN. STAT. § 53-62(c), (d1) (1982 & Supp. 1983); N.D. CENT. CODE § 6-03-02(8) (Supp. 1985); OKLA. STAT. ANN. tit. 6, § 422(C) (West 1984); OR. REV. STAT. § 706.005 (1983); R.I. GEN. LAWS § 19-29-1 (1982); S.D. CODIFIED LAWS ANN. § 51-20A-5 (1980); TENN. CODE ANN. § 45-3-104 (1980 & Supp. 1985); (branch office as defined does not include EFTs or RSUs, but § 45-3-308 provides that an association may install RSUs only in those counties in which the association may establish a branch); TEX. STAT. ANN. art. 342-903a (Vernon Supp. 1985); WASH. REV. CODE ANN. § 30.43.010 (Supp. 1986); W. VA. CODE § 31A-8-12b(2) (Supp. 1985); WIS. STAT. ANN. § 221.04(1) (West 1982 & Supp. 1984-1985). By regulation, Alabama and Kentucky treat ATMs as nonbranches. See Comment, *supra* note 39, at 1076.

in twenty-four states, and permissive in ten.<sup>42</sup> Only Wyoming is silent on the issue of branch banking.<sup>43</sup>

The banking system has experienced tremendous growth over the last ten to fifteen years in the use of EFT systems.<sup>44</sup> Banks have recognized the potential for expansion in their customer bases by offering twenty-four hour service and more convenient locations. Consequently, banks have installed ATMs on the premises of their principal offices and later installed the terminals in shopping centers, supermarkets, and other public locations. Customer confidence and use has increased as the unmanned teller facilities have become more common and more reliable.

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42. For the states that mandate the sharing of ATMs, see ARK. STAT. ANN. § 67-367.2 (1980) (within county); COLO. REV. STAT. § 11-6.5-104 (Supp. 1984); CONN. GEN. STAT. ANN. § 36-193c (West & Supp. 1985); FLA. STAT. ANN. § 658.65(4)-(5) (West 1984) (mandatory sharing for POS terminal if owned by bank; permissive sharing of remote service terminal); HAWAII REV. STAT. § 403-53 (Supp. 1984); IDAHO CODE § 26-309(2) (Supp. 1985); ILL. Banking Act, § 5(16)(g), ILL. ANN. STAT. ch. 17, § 311(16)(g) (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 527.5 (West Supp. 1985); KAN. STAT. ANN. § 9-1111(g) (Supp. 1984); ME. REV. STAT. ANN. tit. 9-B, § 334(4) (Supp. 1985); MICH. COMP. LAWS ANN. § 488.10(3) (West Supp. 1985); MINN. STAT. ANN. § 47.64 (West Supp. 1985); MONT. CODE ANN. § 32-6-203(1) (1983); NEB. REV. STAT. § 8-157(3) (1983); N.H. REV. STAT. ANN. § 384-B:7 (Supp. 1983); N.D. CENT. CODE § 6-03-02(8) (Supp. 1985); OKLA. STAT. ANN. tit. 6, § 422(D) (West 1984); OR. REV. STAT. § 714.230 (1983); S.D. CODIFIED LAWS ANN. § 51-20A-3 (1980); TEX. REV. CIV. STAT. ANN. art. 342-903a(4) (Vernon Supp. 1985); WASH. REV. CODE ANN. § 30.43.030 (Supp. 1986); WIS. STAT. ANN. § 221.04(1)(k) (West 1982 & Supp. 1985). The following state statutes provide for permissive sharing of off-premises ATMs: CAL. FIN. CODE § 559 (West Supp. 1985); DEL. CODE ANN. tit. 5, § 770(c) (Supp. 1984); GA. CODE ANN. § 13-203.2(b)(4) (Harrison Supp. 1984); IND. CODE ANN. § 28-2-13-22 (Burns Supp. 1985); MASS. GEN. LAWS ANN. ch. 167B, § 3 (West 1984); N.J. STAT. ANN. § 17:9A-20(D) (West 1984); N.M. STAT. ANN. § 58-16-6(D) (1983) (permissive sharing with an institution that has no office in the county); R.I. GEN. LAWS § 19-29-1(a) (1982); VA. CODE 6.1-39.1 (1983).

Mandatory sharing abates the concern that banks and nonfinancial institutions may violate antitrust laws by restricting use of electronic transfer systems to one or only a few banks. See *Goldberg, supra* note 10, at 722 (citing "EFT in the United States: Policy Recommendations and the Public Interest," *The Final Report of the National Commission on Electronic Fund Transfers* (Oct. 28, 1977), which considered four sharing policies in light of federal antitrust law). The article also discusses balancing the benefits of shared EFT systems against the potential competitive harms that may result from sharing. See *Goldberg, supra* note 10, at 728-29.

43. See 1 FED. BANKING L. REP. (CCH) ¶ 3106 (July 19, 1985).

44. See generally N. PENNEY & D. BAKER, *supra* note 8, ¶ 1.01[4] (history of development of EFT systems). The authors discuss the reasons for offering ATMs in ¶ 6.04[2], listing competition, cost savings, and marketing as the major driving forces. In 1978 Congress passed the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r (1982), which deals with the mechanics of electronic transactions, liability of financial institutions, compulsory use of electronic transfers, and the relation of these concerns to state laws. Nonfinancial institutions offering electronic transfer services also are subject to the provisions of the Act. The EFT Act was a congressional response to the rapid, uncontrolled, and uneven growth of EFT systems and an attempt to set consistent standards for all institutions and corporations utilizing and offering electronic services.

Along with this developing technology, however, has grown a new set of obstacles. Banks that used these banking facilities encountered opposition not only from other banks that lacked available capital to establish the same number of ATMs and CBCTs, but also from courts and legislatures originally unwilling to find exceptions to prohibitive state branching laws.<sup>45</sup> Prior to the 1976 *Independent Bankers Association v. Smith*<sup>46</sup> decision, district courts varied in their conclusions as to whether the McFadden Act governed national banks' use of off-premises EFT systems. In *Independent Bankers v. Camp*<sup>47</sup> a district court held that although automated teller machines do not fit easily within the meaning of 12 U.S.C. § 36(c)<sup>48</sup> or applicable state law,<sup>49</sup> a national bank could not install automated teller branches in the absence of explicit statutory permission.<sup>50</sup> Similarly, the court in *Illinois ex rel. Lignoul v. Continental Illinois National Bank & Trust Co.*<sup>51</sup> held that section 36 of the Act does not permit national banks to maintain unmanned CBCTs. Continental operated two unmanned CBCTs in the Chicago area where its customers could make withdrawals, deposits, transfers, and loan and credit card payments.<sup>52</sup> The bank had opened the CBCTs after the Comptroller had issued an interpretive ruling in 1975 in which he concluded that CBCTs were not "offices within the meaning of 12 U.S.C. § 36(f)" of the banks that owned and operated them.<sup>53</sup> The Comptroller stated that "even if

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45. See N. PENNEY & D. BAKER, *supra* note 8, ¶ 6.04[3][d]; see also *Independent Bankers v. Camp*, 357 F. Supp. 1352, 1354 (D. Or. 1973) (opposition to applications for two automated tellers on basis that they would be cheap way for bank to preempt valuable branch location). See generally Comment, *supra* note 2, at 363 (discussing case law surrounding 12 C.F.R. § 7.7491); *infra* notes 53-69 and accompanying text, which also discuss case law surrounding 12 C.F.R. § 7.7491.

46. 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

47. 357 F. Supp. 1352 (D. Or. 1973).

48. See *supra* note 5.

49. 1953 Or. Laws ch. 150, § 7 (*repealed by* 1973 Or. Laws ch. 797, § 428) (OR. REV. STAT. § 714.020).

50. *Independent Bankers v. Camp*, 357 F. Supp. at 1357. The court noted in particular that the automated tellers would not promote public convenience and advantage, a requirement for any branch under OR. REV. STAT. § 707.080(f), because only the establishing bank's customers and the holders of specially coded Bankamericards would be able to use the machines.

51. 409 F. Supp. 1167 (N.D. Ill. 1975), *aff'd in part and rev'd in part*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976).

52. *Id.* at 1168-69.

53. 12 C.F.R. § 7.7491 (1975); see *Lignoul*, 409 F. Supp. at 1170. According to the Comptroller, because bank customers could not consummate some of the normal banking transactions at a CBCT (*i.e.*, opening an account, applying for a loan, obtaining money orders), the CBCT did not meet the definition of a branch bank. The Comptroller character-

a CBCT is considered to be a branch office, branch agency, or branch place of business, it is not receiving deposits, paying checks, or making loans within the meaning of 12 U.S.C. § 36(f)."<sup>54</sup> Despite this ruling, the *Lignoul* court decided that the operation of the CBCTs in question constituted branch banking and, therefore, was prohibited under section 36(c).<sup>55</sup>

The court in *Oklahoma ex rel. State Banking Board v. Bank of Oklahoma*,<sup>56</sup> giving deference to the Comptroller's 1975 ruling,<sup>57</sup> held that a CBCT that a bank operated in a parking lot and a POS terminal<sup>58</sup> that the same bank used in a retail clothing store did not violate either subsections 36(c) and (f) of the National Bank

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ized CBCTs as instruments through which customers could communicate with their banks, similar to mailboxes and telephones. See *Lignoul*, 409 F. Supp. at 1172-73; see also N. PENNEY & D. BAKER, *supra* note 8, ¶ 22.01[1][b].

54. 12 C.F.R. § 7.7491 (1975).

55. *Lignoul*, 409 F. Supp. at 1174-75. In reaching this decision, the court relied on three earlier district court decisions. See *Missouri ex rel. Kostman v. First Nat'l Bank*, 405 F. Supp. 733 (E.D. Mo. 1975), *aff'd*, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976) (machines that performed same functions as those in instant case constituted branch banking under 12 U.S.C. § 36(f)); *Independent Bankers Ass'n v. Smith*, 402 F. Supp. 207 (D.D.C. 1975) (Comptroller's ruling violated National Bank Act and thus void; legislative history of § 36(f) clearly included CBCTs within definition of branch), *aff'd*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976); *Colorado ex rel. State Banking Board v. First Nat'l Bank*, 394 F. Supp. 979 (D. Colo. 1975) (because machine accepted deposits, it was prohibited branch), *aff'd in part and rev'd in part*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

56. 409 F. Supp. 71 (N.D. Okla. 1975). The court in *Lignoul* also relied on the Supreme Court's analysis in *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), in which the Court concluded that offering an additional location for taking deposits and making withdrawals gave a national bank an advantage over state banks, exactly the type of advantage Congress designed the McFadden Act to prevent. According to the *Plant City* Court, notwithstanding the bank's policy of verification and its contractual arrangements with its customers, the physical receipt of deposits and withdrawals constituted branch banking in violation of state law. *Id.* at 136-37. The district court in *Lignoul* held that the withdrawals were not the equivalent of cashing checks within the meaning of § 36(c), but the Seventh Circuit reversed that portion of the holding, relying on *Independent Bankers Ass'n v. Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976), in which the court held that all functions performed by a CBCT constituted branch banking. See *Lignoul*, 409 F. Supp. at 1175-78.

57. 12 C.F.R. § 7.7491 (1975). In its conclusion, the court asserted that "administrative interpretation, as expressed in the Comptroller's Interpretative Ruling 7.7491, as amended, should be given substantial weight in its construction of the McFadden Act." *State Banking Bd. v. Bank of Okla.*, 409 F. Supp. at 90.

58. *Utica National Bank*, a codefendant, owned and operated two manned CBCTs in retail stores. These POS units were connected directly to Utica's banking computer. A customer could make withdrawals from his or her checking account to purchase merchandise at the retail store or for any other purpose, and also could make deposits to the checking account. *State Banking Bd. v. Bank of Okla.*, 409 F. Supp. at 78-79. See *supra* note 10 for definition of POS terminal.

Act or Oklahoma banking laws.<sup>59</sup> Noting that CBCTs were not within the contemplation of the drafters of the McFadden Act, the court analogized CBCTs to mailboxes and telephones used in banking.<sup>60</sup> The court concluded that because the CBCT deposits and withdrawals took place at the main office and not at the terminals and because the clothing store maintained complete dominion and control over the POS terminal, the machines constituted receptacles for bank transactions<sup>61</sup> and, therefore, were not bank branches.<sup>62</sup>

The Comptroller's interpretive ruling, however, was shortlived. In *Independent Bankers Association v. Smith*,<sup>63</sup> after two other district courts had questioned the ruling's validity,<sup>64</sup> the District Court for the District of Columbia overruled the Comptroller's ruling and enjoined its further implementation.<sup>65</sup> On appeal, the

59. Oklahoma's relevant statutes were OKLA. STAT. tit. 6, §§ 415, 501, 1001, 2061 (1971). Oklahoma amended §§ 415 and 501 in 1983 to provide for branch banking. The legislature repealed § 2061.

60. *State Banking Bd. v. Bank of Okla.*, 409 F. Supp. at 84.

61. *Id.* at 82.

62. *Id.* at 92. The court stated:

If banks are not permitted to change with the times and meet their customers' needs at the lowest cost, the ultimate loser will be the consumer, who will be forced to bear the increased costs of inefficient operation. A further loser will be commercial banks as a class, which will be denied the right to compete on an equal basis with thrift institutions that have free access to EFTS. Competition is the genius behind the American experience, and competitive equality is the policy which underlies the branching provisions of the McFadden Act. . . . To give the McFadden Act a restrictive meaning and deny to commercial banks the use of the pro-competitive, efficient, and cost-saving EFTS would actually be at odds with the purpose and intent of the McFadden Act.

*Id.* at 89-90.

63. 402 F. Supp. 207 (D.D.C. 1975), *aff'd*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

64. *See Missouri ex. rel. Kostman v. First Nat'l Bank*, 405 F. Supp. 733 (E.D. Mo. 1975), *aff'd*, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976); *Colorado ex. rel. State Banking Bd. v. First Nat'l Bank*, 394 F. Supp. 979 (D. Colo. 1975), *aff'd in part and rev'd in part*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

65. 402 F. Supp. at 210. The traditional standard of review for determinations of the Comptroller was whether the Comptroller's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also City Nat'l Bank v. Smith*, 513 F.2d 479, 483 (D.C. Cir. 1975). The court could decide purely legal issues in a *de novo* fashion, but the courts could overturn the Comptroller's factual determinations only if no rational basis existed for the decision. The district court in *Independent Bankers Ass'n v. Smith* did not defer to the Comptroller's ruling. The district court decision reflected a disregard both for the studies and research that preceded the Comptroller's ruling, which indicated that the use of CBCTs did not defeat the intent and purpose of § 36, and the Comptroller's intention to monitor the developing electronic banking technology in light of his ruling. *Cf.* Brief of Amici Curiae, *The Consumer Bankers Ass'n and The Cal. Bankers Clearing House Ass'n* at 12-13, *Independent Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453 (2d Cir. 1985) ("If . . . the court

United States Court of Appeals for the District of Columbia affirmed the lower court decision and held that CBCTs did constitute branches under the National Bank Act because CBCTs performed at least one of the traditional banking services of receiving deposits, paying checks, and lending money.<sup>66</sup> The court noted that banks owning CBCTs must now (1) obtain approval from the Comptroller and (2) comply with capital and surplus requirements under both the National Bank Act<sup>67</sup> and state banking statutes.

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determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, . . . the question for the court is whether the agency's answer is based on a [reasonable] construction of the statute." (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778, 2782 (1984)); *Securities Indus. Ass'n v. Comptroller*, 577 F. Supp. 252, 254 (D.D.C. 1983) (deference is owed to the Comptroller because of the scope of his authority, knowledge, and application of undefined statutory terms to particular facts). As part of the banking deregulation trend, Congress recently narrowed the Comptroller's discretionary sphere by enacting 12 U.S.C. § 93a (1982), which prohibits the Comptroller from prescribing rules and regulations under § 36.

66. *Independent Bankers Ass'n v. Smith*, 534 F.2d at 930. Legislative history of the McFadden Act revealed that a structure might be defined as a branch even if a customer could perform none of the three traditional banking services. Representative McFadden described the scope of § 36(f) as "[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office . . ." 68 CONG. REC. 5816 (1927). Acting in reliance on this legislative history, the court in *Securities Indus. Ass'n v. Comptroller*, 577 F. Supp. 252 (D.D.C. 1983), held that a bank that offered discount brokerage services at nonbranch offices had engaged in branch banking subject to state law restrictions. See also *St. Louis County Nat'l Bank v. Mercantile Trust Co. Nat'l Ass'n*, 548 F.2d 716, 719 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977), in which the court held that a trust office opened by a national bank constituted branch banking, because the services offered at the office were indicia of branch banking in the same manner as the three traditional banking functions. The dissent in *Mercantile Trust* argued that if Congress had intended to include a trust office in its definition of a branch for the purposes of the McFadden Act, it would have done so specifically, given that trust departments were an integral part of the banking business in 1927. See *Mercantile Trust*, 548 F.2d at 721 (Hendley, J., dissenting). These cases illustrate the problem of utilizing a narrow reading of § 36(f) of the McFadden Act. If state banks do not engage in trust services or discount brokerage activities, then the competitive equality policy will not be furthered under these holdings. To the contrary, national banks will not be able to engage in certain aspects of the banking business in some states simply because the state banks have chosen not to participate or are prohibited by state law, while in other states national and state banks may enjoy such freedoms. To call these offices branches does not fulfill the intent and purpose of the McFadden Act.

67. 12 U.S.C. § 36(d) (1982) provides that "[t]he aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated."

Section 51 states that:

[N]o national banking association shall be organized with a capital of less than \$100,000. . . . No such association shall be organized in a city the population of which

Although the court felt that the classification of CBCTs as non-branches might be accurate, the court held that the Comptroller's ruling overreached its authority and could not stand because it preempted state law that prohibited off-premises terminals.<sup>68</sup>

Although prohibiting the national bank from using the EFT system, the language of the *Smith* court ironically has become the basis both for the establishment of shared or interchange ATM networks and for the membership of national banks in those networks. In criticizing the Comptroller's attempt to analogize ATM services to banking by mail or telephone, the court stated that the analogy failed "because, in the case of a mailbox or a telephone, no place or facility established (*i.e.*, owned or rented) by a bank is involved."<sup>69</sup> The Comptroller issued a new ruling in 1982 that incorporated the *Smith* establishment criterion<sup>70</sup> and articulated the Comptroller's general policy of approving CBCT applications that do not violate applicable federal and state law.<sup>71</sup>

### B. Shared ATM Networks

Courts addressing the legality of EFT systems have rested their decisions on the functions performed by the computer terminals,<sup>72</sup> the ownership or rental by the national banks of the ATMs and CBCTs,<sup>73</sup> and the underlying policy of competitive equality.<sup>74</sup>

exceeds fifty thousand persons with a capital of less than \$200,000 . . . . No such association shall hereafter be authorized to commence the business of banking until it shall have a paid-in surplus equal to 20 per centum of its capital.

12 U.S.C. § 51 (1982).

68. *Independent Bankers Ass'n v. Smith*, 534 F.2d at 932.

69. *Id.* at 941 (footnote omitted) (emphasis added). According to the court, a broad definition of branch would serve two purposes: first, it would confirm state preeminence in branch banking decisions and, second, it would guarantee the flexibility necessary to apply and adapt a 1927 statute to computer technology in the banking field. *Id.* at 943.

70. 12 C.F.R. § 5.31 (1982); see *supra* note 9 for the Comptroller of the Currency's definition of a CBCT.

71. 12 C.F.R. at § 5.31(c)(1); see also *Bank of North Shore v. FDIC*, 743 F.2d 1178 (7th Cir. 1984) (two shared ATMs approved by federal banking agencies in reliance on 12 C.F.R. § 5.31).

72. See, e.g., *Colorado ex rel. State Banking Bd. v. First Nat'l Bank*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *Independent Bankers Ass'n v. Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976); *Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co.*, 409 F. Supp. 1167 (N.D. Ill. 1975), *aff'd in part and rev'd in part*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *Oklahoma ex rel. State Banking Bd. v. Bank of Okla.*, 409 F. Supp. 71 (N.D. Okla. 1975).

73. See *Independent Bankers Ass'n v. Smith*, 534 F.2d at 921.

74. See generally *Colorado ex rel. State Banking Bd. v. First Nat'l Bank*, 540 F.2d 497 (10th Cir. 1976) (broad meaning given to § 36(f) so as to place national and state banks in a position of competitive equality), *cert. denied*, 429 U.S. 1091 (1977); *Independent Bankers*

The initiation of regional and national shared ATM systems has made the struggle over how to treat ATMs under the McFadden Act even more difficult and confusing.<sup>75</sup> Relying on *Independent Bankers Association v. Smith*<sup>76</sup> and a Comptroller's ruling issued pursuant to this decision,<sup>77</sup> national and state banks and other financial and nonfinancial institutions have formed eight national<sup>78</sup> and approximately two hundred regional ATM systems.<sup>79</sup> In an interstate ATM network, individual members of participating institutions, subsidiary ATM systems, or nonfinancial institutions own the terminals. If a national or state bank owns the terminal, the ATM must, under both federal law and the branching law of the state in which the bank's principal office is located, have qualified as a branch of the bank that established the terminal.<sup>80</sup> The customers of each member institution may utilize an ATM of any other member in any locality, and the customers may have access to their accounts simply by inserting a plastic card in the terminal

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Ass'n v. Smith, 534 F.2d 921, 936 n.62 (D.C. Cir.) (reviewing doctrine of competitive equality), cert. denied, 429 U.S. 862 (1976); Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co., 409 F. Supp. 1167 (N.D. Ill. 1975), aff'd in part and rev'd in part, 536 F.2d 176 (7th Cir.), cert. denied, 429 U.S. 871 (1976); Independent Bankers v. Camp, 357 F. Supp. 1352 (D. Or. 1973); Jackson v. First Nat'l Bank, 292 F. Supp. 156 (N.D. Ga. 1968) (armored car messenger service at issue).

75. Four different financial institution-sharing arrangements exist: the shared, interchange, piggy-back, and single-institution systems. In a shared system, a group of institutions mutually installs and operates the terminals. In an interchange system, separate institutions or shared systems contribute an ATM and allow the customers of other member institutions to use the machines. The institution whose customer utilizes the ATM pays the establishing institution an interchange fee or transaction fee. The piggy-backing system is a simpler version of the interchange system, in that one institution allows customers of other banks to use the institution's ATMs. Under the single-institution system, only the customers of the establishing institution have access to the terminal. N. PENNEY & D. BAKER, *supra* note 8, ¶ 6.02[5].

76. 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976).

77. 12 C.F.R. § 5.31 (1985). The Comptroller's ruling, which adopted the "establishment criteria" of the *Smith* decision, indicated that a national bank does not violate the McFadden Act by using an ATM the bank does not own or operate.

78. See *Status of ATM's Under State Branching Laws: Hearings on S. 2898 Before the Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 2d Sess. 59 (1984) (statement of Roland E. Brandel, member, Consumer Bankers Ass'n) [hereinafter cited as *S. Hearings*]. National ATM networks include: Cirrus (43 states), Citishare (15 states), The Exchange (33 states), Express Cash (27 states), MasterTeller (5 states), Nationet (10 states), Plus (47 states), and Visa (9 states). See *No Shakeout Yet for ATM Systems*, 3 BANKING EXPANSION REP. 2, 3 (Sept. 17, 1984).

79. See *S. Hearings*, *supra* note 78, at 195 n.26 (Brief of Amicus Curiae, Mastercard International, Inc. at 17, *Marine Midland Bank*) (listing the ten largest regional ATM systems and their locations)).

80. See *S. Hearings*, *supra* note 78, at 11 (statement on behalf of Plus System, Inc.).



and keying in a personal identification number.<sup>81</sup> Withdrawals, account transfers, and balance inquiries are the typical transactions that a shared ATM will perform; certain state laws, however, forbid deposit-taking in an effort to encourage investing money in the local community.<sup>82</sup> In August 1983, shared networks utilized over 16,000 of the 40,000 ATMs in the United States,<sup>83</sup> and more than one-half of the commercial banks belonged to these shared networks.<sup>84</sup>

An institution typically receives a transaction fee each time a customer of another member bank uses the institution's ATM.<sup>85</sup> These fees assist the ATM-owning institutions in defraying the

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81. See *S. Hearings, supra* note 78, at 145 (statement of Mary-Pat Cottrell, Vice-Pres., City-Trust and Chairman, Electronic Funds Transfer Ass'n). Membership in shared ATM networks includes both state and national financial institutions and is not restricted to commercial banks. See *id.* at 142. Most state laws govern only state and national financial institutions; therefore, a nonfinancial institution theoretically would not be subject to state branching restrictions and requirements. See N. PENNEY & D. BAKER, *supra* note 8, ¶ 23.02[2]; see also Interpretive Letter No. 160 [1981-1982 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 85,241 (1980) (three correspondent banks permitted to form bank service corporation to operate EFT network but warned to avoid antitrust problems and to share terminals on nondiscriminatory basis; this operation would not constitute branch banking).

82. *S. Hearings, supra* note 78, at 9 (statement on behalf of Plus System, Inc.); see, e.g., FLA. STAT. ANN. § 658.65(9) (West Supp. 1984); Electronic Fund Transfer Transmission Facility Act, § 6-104, ILL. ANN. STAT. ch. 17, § 1331 (Smith-Hurd Supp. 1984) (state statutes prohibiting deposits to out-of-state banks); see also *S. Hearings, supra* note 78, at 75 (statement of Roland E. Brandel, member, Consumer Bankers Ass'n, recommending removal of language in proposed amendment to § 36 to alleviate concerns of state banks that federal law might preempt state law and allow deposit-taking when state law prohibits the activity at shared ATMs). In an interpretive letter, however, the Office of the Comptroller of the Currency (OCC) responded to an inquiry whether the interstate use of CBCTs by national banks when the CBCT located in another state accepted deposits for the bank, constituted prohibited interstate branch banking. The OCC staff responded that because the bank utilized the CBCT on a transactional fee basis, its use would not constitute branch banking and would not upset the balance of competitive equality in the other state. See Interpretive Letter No. 153 [1981-1982 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 85,234 (July 7, 1980).

83. *S. Hearings, supra* note 78, at 11 (statement on behalf of Plus System, Inc.). There are approximately 50 million ATM access cards useable in shared networks. *Id.* at 11-12.

84. *Id.* at 12.

85. The legal division of the OCC stated in a 1981 interpretive letter that the payment of transaction fees by a national bank would be permissible as long as the fee did not resemble a rental payment. The letter discussed a sponsorship arrangement whereby Bank A, the owner of the CBCT, made the system available to other banks and charged "rental fees" based on asset size. The contract between the banks entitled Bank B to have its name at the top of the list of participating institutions and receive a fee for transactions by customers of other banks. The OCC declared that this arrangement constituted branch banking because Bank B's utilization of the CBCT evidenced a certain degree of control over the CBCT and a stake in its success and was more analogous to the "establishment" criteria in 12 C.F.R. § 5.31 (1982). Interpretive Letter No. 188 [1981-1982 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 85,269 (May 12, 1981).

costs of establishing an ATM. At the same time, smaller banks benefit by (1) being able to provide more convenient banking services to their customers and (2) being able to compete with larger institutions for customers in a broader market area.<sup>86</sup> Transaction fees arguably constitute rental of an ATM and, under the *Smith*<sup>87</sup> analysis, the ATM that a bank's customer uses would be a branch of that bank and would have to meet federal and state branching laws.<sup>88</sup>

Some states already have confronted the problem of how to deal with developing technology and shared ATM networks. Fifteen jurisdictions allow some form of interstate utilization of ATMs in interchange systems<sup>89</sup> while five states expressly prohibit interstate exchange networks.<sup>90</sup> State laws generally promote the use of EFT systems on an intrastate basis and many states specifically include national banks in their treatment of off-premises electronic facilities.<sup>91</sup>

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86. See *S. Hearings, supra* note 78, at 146, 158 (statements of Mary-Pat Cottrell, Vice-President, City-Trust, and Chairman, Electronic Funds Transfer Ass'n, and John C. Elliott, Exec. Vice-Pres. Mastercard Int'l, Inc.).

87. *Independent Bankers Ass'n v. Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

88. A strong counterargument is that a transaction fee does not give the bank responsibility and control over an ATM. It would be unreasonable, therefore, to treat the shared ATM as a branch with status equal to a "brick and mortar" branch. See *S. Hearings, supra* note 78, at 166 (statement of John C. Elliott, Exec. Vice-Pres., Mastercard Int'l, Inc.).

89. See ALA. CODE § 5-2A-7(b) (1981); ARK. STAT. ANN. § 67-367.4 (1980); CONN. GEN. STAT. ANN. § 36-193b (West Supp. 1985) (allowing in-state banks to use out-of-state terminals on transaction fee basis while not allowing out-of-state banks to use in-state terminals); DEL. CODE ANN. tit. 5, § 770(c) (Supp. 1984); FLA. STAT. ANN. § 658.65(9) (West 1984); Electronic Fund Transfer Transmission Facility Act, § 6-104, ILL. ANN. STAT. ch. 17, § 1331 (Smith-Hurd Supp. 1985); MD. FIN. INST. CODE ANN. § 12-207 (1980) (allowing foreign banks to have electronic terminals in the state for limited purposes); MASS. GEN. LAWS ANN. ch. 167B, § 3 (West 1984); MINN. STAT. ANN. § 47.64 (West Supp. 1985) (limited purposes); OR. REV. STAT. § 714.250 (1983) (reciprocal privileges); S.D. CODIFIED LAWS ANN. § 51-20A-7 (1980) (permitting customers of foreign banks to use in-state RSU with consent of local bank maintaining or using same unit); UTAH CODE ANN. § 7-16-9 (1982); WASH. REV. CODE ANN. §§ 30.43.020, .045 (Supp. 1986); W. VA. CODE § 31A-8-12b (Supp. 1985); WIS. STAT. ANN. § 221.04(1) (West 1982) (permissive sharing with out-of-state banks).

90. The following states prohibit interstate networks: Colorado, Iowa, Maine, Montana, and New Jersey.

91. States that specifically include national banks under their EFT laws include: Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi (with OCC approval), Missouri, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Oregon, Texas, Utah, Virginia, Washington, and West Virginia.

Separate statutes govern savings and loan associations, and state branching restrictions do not constrain federal savings and loans. See Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. § 1464(b)(1) (1982) (amending § 5(b)(1) of the Home Owners' Loan

## III. RECENT DEVELOPMENT

## A. Independent Bankers Association v. Marine Midland Bank

In *Independent Bankers Association v. Marine Midland Bank*<sup>92</sup> the District Court for the Western District of New York considered whether Marine Midland Bank had engaged in branch banking in violation of section 36 of the McFadden Act<sup>93</sup> and New York's home office protection law<sup>94</sup> by using an ATM that Wegmans Food Markets, Inc. had installed at its supermarket in Canandaigua, New York. Wegmans had contracted with Marine to become a member of the HarMoney network.<sup>95</sup> The HarMoney network at that time consisted of one nonfinancial institution, Wegmans, and eight financial institutions.<sup>96</sup> The network linked each member's computer to a central computer system, known as the "Switch," which permitted customers of each institution to utilize the ATMs of fellow members.<sup>97</sup> Wegmans retained ownership and control of the ATM, but Marine owned the Switch.<sup>98</sup> The

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Act of 1933). According to this Act, "Notwithstanding any limitation of this section, associations may establish remote service units for the purpose of crediting savings or demand accounts, debiting such accounts, crediting payments on loans, and the disposition of related financial transactions, as provided in regulations prescribed by the Board." 12 U.S.C. § 1464(b)(1)(F) (1982)). Similarly, federal savings and loan associations may establish, use, and otherwise participate in RSUs on an unrestricted geographical basis. 12 C.F.R. § 545.4-2(c) (1982); see also *Oklahoma ex rel. State Banking Bd. v. Bank of Okla.*, 409 F. Supp. 71, 85 (N.D. Okla. 1975) (permitting thrift institutions' point-of-sale terminals everywhere in the United States). See generally *Independent Bankers Ass'n v. Smith*, 534 F.2d 921, 935 n.59 (D.C. Cir.) (discussion of disparity in treatment between national banks, savings and loans, and credit unions), cert. denied, 429 U.S. 862 (1976).

92. 583 F. Supp. 1042 (W.D.N.Y. 1984), rev'd, 757 F.2d 453 (2d Cir. 1985).

93. See *supra* note 5.

94. According to a 1980 census, Canandaigua has a population of approximately 10,419. See Joint Appendix at 19, Affidavit of George W. Hamlin, IV, *Marine Midland Bank*, 757 F.2d 453 (2d Cir. 1985). Canandaigua thus qualified for inclusion under New York's home office protection laws. See N.Y. BANKING LAW § 105(1) (1971) (amended by 1971 N.Y. Laws ch. 380, § 8 (effective Jan. 1, 1976)). Canandaigua National Bank & Trust Co. maintained its principal place of business in Canandaigua.

95. *Marine Midland Bank*, 583 F. Supp. at 1044.

96. Brief for Defendant-Appellant at 2-3, *Marine Midland Bank*.

97. Wegmans also made its ATMs available to any interested financial institutions. In addition to HarMoney, Wegmans contracted with MetroTeller, another shared ATM network. Member institutions of both networks could issue access cards to their customers for the Wegmans ATM. HarMoney's members were: Elmira Savings Bank, First National Bank of Rochester, Griffis-Oneida Federal Credit Union, Manufacturers Hanover, N.A., Marine Midland Bank, N.A., The National Bank of Geneva, Salamanca Trust Co., and SeaComm Federal Credit Union. The MetroTeller Network consisted of 45 financial institutions. See Brief for Defendant-Appellant at 2-3, *Marine Midland Bank*.

98. Marine Midland Bank's ownership of the switch was somewhat unusual in a shared ATM network. Bank service corporations, data processing companies, and other non-

customers of each HarMoney member could access their accounts through Wegmans' ATM, and Wegmans then would receive a transaction fee.<sup>99</sup>

The *Marine Midland Bank* court was the first court confronted with a national bank's participation in an interchange ATM network since the *Independent Bankers Association v. Smith*<sup>100</sup> decision and the Comptroller's 1978 ruling,<sup>101</sup> which had incorporated the *Smith* establishment criteria and had exempted shared ATMs from branch treatment. Marine argued that the *Smith* decision supported the position that ATMs are not branch banks because the bank's activities did not meet the two-part test developed in *Smith*.<sup>102</sup> The *Smith* court held that to find that a CBCT is a branch, (1) the national bank must have established the terminal, and (2) the CBCT must offer a convenience that gives the bank a competitive advantage over other banks in the area.<sup>103</sup> *Smith* had defined "established" as meaning "owned or rented," and Marine, like other national banks, had relied upon this test and this definition in making its decision to participate in the interchange ATM network.<sup>104</sup> Marine pointed out that it did not own or rent the terminal and that other banks also could utilize the Wegmans ATM, thereby assuring that competitive equality still existed.<sup>105</sup> The district court rejected this argument and accused Marine of asserting form over substance. The court held that based on the services performed at the ATM, Marine had estab-

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financial institutions often own the switching system the network uses. *See id.* at 6; *see also* Interpretive Letter No. 160 [1981-1982 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 85,241 (1980) (national banks allowed to form bank service corporations to operate EFT network; these actions are within Bank Service Corporation Act, 12 U.S.C. § 1861 (1982) and do not constitute branch banking).

99. The member institution whose customer utilized the ATM would pay the switch owner a transaction fee and the switch owner would then pay a portion of the fee to the owner of the ATM. *See* Brief for Defendant-Appellant at 4, *Marine Midland Bank*.

100. 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976); *see supra* notes 63-71 and accompanying text.

101. 12 C.F.R. § 5.31 (1982).

102. *Marine Midland Bank*, 583 F. Supp. at 1046.

103. 534 F.2d at 951.

104. *Id.*; *Marine Midland Bank*, 583 F. Supp. at 1046.

105. *Marine Midland Bank*, 583 F. Supp. at 1046. The court rejected this argument with little analysis and held Congress responsible for providing a remedy. *Id.* at 1048. *See also supra* notes 87-89 and accompanying text for a discussion of ownership and control criteria. *See generally* Peck & McMahon, *Recent Federal Litigation Relating to Customer-Bank Communication Terminals ("CBCTs") and the McFadden Act*, 32 BUS. LAW. 1657, 1678 (1977) (discussing the significance of the "established" distinction as a mitigating factor in competitive disadvantage controversy).

lished a branch equivalent to any "brick and mortar" branch.<sup>106</sup>

Marine also argued that it had complied with a recent regulation that excluded from the section 36(f) definition of "branch" those CBCTs that a national bank did not own or rent.<sup>107</sup> The court rejected this argument. Because the Comptroller had not taken a long-standing and consistent position on the interpretation of section 36, the court decided that the Comptroller's regulation did not deserve substantial weight or deference.<sup>108</sup>

On appeal, the Second Circuit reversed the district court decision.<sup>109</sup> In the court's attempt to resolve the issue, the Second Circuit first examined the statutory construction of 12 U.S.C. § 36(c) and (f) to determine the meaning of "establish and operate." The court noted that "[a] rigid application of the language of [the] 1927 [McFadden Act] to the new technology fails to confront the economic realities facing a court, and leads to anomalous results."<sup>110</sup> The court, however, concluded that simply examining the statute could not provide an answer and turned to both legislative intent and the views of the Comptroller for guidance. Reiterating the McFadden Act's policy of competitive equality, the court discussed how characterizing the ATM as a branch would affect banks and independent banking associations and concluded that national banks would be at a technological disadvantage if shared ATM usage constituted the "establishment" of a "branch" for federal law purposes.<sup>111</sup>

Unlike the district court, the Second Circuit accorded great weight to the Comptroller of the Currency's interpretive rulings

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106. *Marine Midland Bank*, 583 F. Supp. at 1047. The court reviewed the legislative history of the McFadden Act and earlier case law interpreting the term "branch" as used in § 36 of the Act. *Id.* at 1045. All appellate courts prior to the *Smith* decision had treated ATMs as branches. See *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) (federal law controls definition of branch for national bank purposes); *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966); *Independent Bankers Ass'n v. Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976); *Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co.*, 409 F. Supp. 1167 (N.D. Ill. 1975), *aff'd in part and rev'd in part*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *Missouri ex rel. Kostman v. First Nat'l Bank*, 405 F. Supp. 733 (E.D. Mo. 1975), *aff'd*, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976); *Colorado ex rel. State Banking Bd. v. First Nat'l Bank*, 394 F. Supp. 979 (D. Colo. 1975), *aff'd in part and rev'd in part*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

107. See *supra* note 70.

108. *Marine Midland Bank*, 583 F. Supp. at 1046-47.

109. *Independent Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453 (2d Cir. 1985).

110. *Id.* at 459.

111. *Id.* at 461; see also Hawke, *2nd Circuit Expands Powers of National Banks*, *Legal Times*, Mar. 18, 1985, at 18, col. 1 (decision clearly vindicates the OCC position).

and regulations because the Comptroller is the executive agency charged with enforcing the McFadden Act.<sup>112</sup> Emphasizing the deference owed to the Comptroller's views,<sup>113</sup> the court stated, "Fashioning policies in response to events that were unforeseeable when the legislation was written is one of the primary functions of executive agencies."<sup>114</sup> The Second Circuit also noted as an important consideration in its decision the substantial growth of shared ATM networks, which resulted from reliance on *Smith* and subsequent Comptroller rulings. Congress had remained silent in the wake of both the *Smith* decision, which developed the "establishment" criteria, and the Comptroller's regulation,<sup>115</sup> which incorporated the language of *Smith*. The Second Circuit concluded that this silence equalled acquiescence and held that absent legislative action, shared ATMs would not constitute branches of the banks that utilized their services within the meaning of subsections 36(c) and (f) of the McFadden Act.<sup>116</sup>

### B. Banking Convenience Act of 1984

Congress reacted quickly to the district court decision in *Marine Midland Bank*.<sup>117</sup> In September 1984, the Senate Committee on Banking, Housing, and Urban Affairs held hearings on a proposed amendment to the National Bank Act that effectively

112. See *supra* notes 57, 65 and accompanying text.

113. 757 F.2d at 461; see also *supra* note 65.

114. *Marine Midland Bank*, 757 F.2d at 461.

115. See *supra* note 70 and accompanying text.

116. See *Marine Midland Bank*, 757 F.2d at 462. The court refused to halt the momentum of electronic banking technology and commented that if the momentum should be stopped "it should be done by Congress, and not by this court, particularly when the barrier we are asked to impose would be based upon definitions framed over 50 years ago." *Id.*

117. Congress proposed the Banking Convenience Act of 1984, which would add the following subsection (i) to § 36 of the McFadden Act:

(1) Notwithstanding any other provision of this section or of a similar State law, a national bank may share, or permit its customers to use, an automated device that is not established by that bank, and such automated device shall not be considered a branch of that bank within the meaning of subsection (f) of this section.

(2) For the purpose of this subsection—

(A) an automated device is established by a national bank only if it is owned or rented by that bank;

(B) an automated device is not established by a national bank if the bank is assessed transactional fees or similar charges for its use; and

(C) the term "automated device" includes, without limitation, automated teller machines, customer bank communication terminals, point-of-sale terminals, and cash dispensing machines.

S. 2898, 98th Cong., 2d Sess. § 2 (1984).

would overrule the district court decision.<sup>118</sup> The sponsors of the amendment<sup>119</sup> explained that the purpose of the proposed legislation was to preserve and promote the ability of national banks to participate in shared ATM networks and to protect the consumer benefits of shared ATMs, which the district court decision in *Marine Midland Bank* had jeopardized.<sup>120</sup>

The Senate hearings reflected a wide base of support for allowing national bank participation in shared ATM systems.<sup>121</sup> Proponents of the legislation noted the need for federal legislation to clarify for national banks, in the same manner that state legislation clarified for state banks, the position ATM networks hold in the national banking system.<sup>122</sup> Proponents of the amendment argued that national banks currently experience a competitive disadvantage in many states.<sup>123</sup> State depository institutions may participate in interchange ATM networks in most states, and federal law places no restrictions on the interstate use of ATMs by federally-chartered savings and loan associations and credit unions.<sup>124</sup> Supporters of the bill also pointed out that the proposed amendment would alleviate the problems that the district court's functional definition of "branch" caused in *Marine Midland Bank*.<sup>125</sup> According to the amendment's proponents, the *Marine Midland Bank* rationale, when carried to its extreme, suggests that any retail establishment honoring a bank credit card or cashing custom-

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118. *S. Hearings, supra* note 78.

119. Senators Paul Trible (Va.) and Gordon J. Humphrey (N.H.) introduced the bill.

120. *See S. Hearings, supra* note 78, at 2 (statement of Sen. Trible).

121. *See, e.g., S. Hearings, supra* note 78, at 8, 18, 56, 138 (statements by Plus System, Inc., Michael Mancusi, Roland E. Brandel, and Mary-Pat Cottrell).

122. *See S. Hearings supra* note 78, at 72, 113, 138, 159 (statements by Roland E. Brandel, American Bankers Ass'n, Mary-Pat Cottrell, and John C. Elliott).

123. *See S. Hearings, supra* note 78, at 9, 18, 72, 138, 163 (statements by Plus System, Inc., Michael A. Mancusi, Roland E. Brandel, Mary-Pat Cottrell, and John C. Elliott).

124. *See supra* note 92; *see also S. Hearings, supra* note 78, at 72-73 (statement of Roland E. Brandel) (S. 2898 would resolve geographical inequities and remove the deployment restrictions on national banks that institutions such as Merrill-Lynch, Sears, and Safeway are not required to follow). Congress has expressed an interest in ATMs and shared ATM networks over the past 10 years. The International Banking Act of 1978, Electronic Fund Transfer Act, and the Garn-St Germain Depository Institutions Act of 1982 reflect the receptive attitude that Congress has taken toward computer banking technology. Congress' silence after the *Independent Bankers Ass'n v. Smith* decision and the Comptroller's ruling based on *Smith* indicates its acquiescence in the course embarked upon by the banking industry in the realm of shared ATM networks. *See* Brief for Amici Curiae, Consumer Bankers Ass'n and Cal. Bankers Clearing House Ass'n at 27, *Marine Midland Bank*; *see also* Goldberg, *supra* note 10, at 740-41.

125. *See S. Hearings, supra* note 78, at 66; *Marine Midland Bank*, 583 F. Supp. at 1047.

ers' checks would constitute a bank branch.<sup>126</sup> All the supporters of the amendment stressed that the millions of dollars invested in these regional and national interchange ATM networks would be wasted if the district court's *Marine Midland Bank* decision forced national banks to withdraw their membership.<sup>127</sup> These advocates urged Congress to pass the narrowly drafted amendment, which varied little from the law in those states exempting ATMs from the definition of branch, thereby putting national banks in an equivalent position with state banks in all fifty states.<sup>128</sup>

#### IV. ANALYSIS

##### A. *The Argument for a Public Policy Approach to ATM Networks*

The Second Circuit's public policy approach in *Marine Midland Bank* temporarily averted a major crisis in the banking industry. The district court decision in *Marine Midland Bank* effectively would have prohibited national banks from participating in interstate ATM networks because the banks then would be engaged in illegal interstate branching. The district court, relying on earlier case law and a strict interpretation of section 36 of the McFadden Act, included within the definition of branch<sup>129</sup> any ATM at which a bank's customers could perform any banking transac-

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126. See *S. Hearings, supra* note 78, at 66; see also Brief for Amici Curiae, Consumer Bankers Ass'n and Cal. Bankers Clearing House Ass'n at 22, *Marine Midland Bank* (The district court decision reflects the view that "a third party that provides financial services to a consumer, which services in turn affect an account relationship with a bank, is merely providing 'a vehicle for the bank and its customers to do business.'").

127. See *S. Hearings, supra* note 78, at 6, 13, 20, 70, 138 (statements of Marine Midland Bank, Plus System, Inc., Michael A. Mancusi, Roland E. Brandel, Mary-Pat Cottrell, and John C. Elliott).

128. See *supra* notes 90-92 and accompanying text; see also *S. Hearings, supra* note 78, at 9, 18 (statements of Plus System, Inc., and Michael A. Mancusi) (bill would preserve "*status quo ante*"). One article has noted that to exempt a CBCT from the definition of a branch would not create any risk of concentrating monetary resources or promoting monopolistic control over community banking because a CBCT could not offer all the services of a "brick and mortar" branch. See Comment, *supra* note 2, at 385.

Senators Paul S. Trible, Gordon J. Humphrey, and John P. East reintroduced the proposed amendment in the 99th Congress as Senate Bill 206. The Senate then referred the amendment to the Senate Committee on Banking, Housing, and Urban Affairs on January 21, 1985. Representative John J. LaFalie introduced the amendment in the House of Representatives as House Bill 688, and, on January 24, 1985, the House referred the amendment to the Committee on Banking, Finance, and Urban Affairs.

129. Courts use federal law to determine what constitutes a branch of a national bank. See *supra* text accompanying notes 22 and 26.



tion.<sup>130</sup> The appellate court, however, realized that it could not categorize the modern methods of performing banking transactions as neatly in 1985 as a court could in 1927 and, therefore, following a more modern and rational line of reasoning, the court excluded shared ATMs from the federal definition of a branch.<sup>131</sup>

State banks in at least fifteen states<sup>132</sup> participate in regional or national interchange networks without violating state branch banking laws because in these states the definition of a branch bank does not include ATMs. Under the Second Circuit's *Marine Midland Bank* decision, national banks also may participate in shared networks at an interstate level without violating any state laws. The district court decision would have reinstated the competitive disadvantage that the McFadden Act sought to remove from the dual banking system. The appellate court, however, recognized that to label a shared ATM a branch of any national bank that participates in an interstate network would limit the ability of national banks to compete in the area of developing banking technology.<sup>133</sup> The Second Circuit correctly noted that the district court misinterpreted *Smith* and misapplied its establishment criteria.<sup>134</sup> *Smith* had emphasized the requirement that a facility be "established (*i.e.*, owned or rented)," in order to constitute a branch.<sup>135</sup> The Second Circuit correctly recognized that without the establishment criteria, the definition of branch would include *any* method of communication with a bank.<sup>136</sup>

The Second Circuit noted the significant consumer demand for electronic banking,<sup>137</sup> and the court's reversal of the lower court decision avoided several adverse effects on consumers. First,

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130. See *Marine Midland Bank*, 583 F. Supp. at 1047.

131. See *Marine Midland Bank*, 757 F.2d at 459.

132. See *supra* note 90.

133. See *Marine Midland Bank*, 757 F.2d at 460-61. Other financial institutions could have continued their participation in the networks because the *Marine Midland Bank* decision had no legal effect on them. See also *supra* note 92; D. BAKER & R. BRANDEL, *THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS* ¶ 6.02[5] (Supp. 1984) (geographic restrictions lifted at national level on ATMs for federal savings and loan associations); Goldberg, *supra* note 10, at 742-43 (banks suffer competitive disadvantage when compared to federally-chartered savings and loan associations and federal credit unions).

134. See *Marine Midland Bank*, 757 F.2d at 462.

135. See *supra* text accompanying notes 69-70.

136. See *Marine Midland Bank*, 757 F.2d at 462 (broad definition of branch theoretically could include accepted conveniences such as banking by mail and banking by telephone). See also *supra* notes 56-62 and accompanying text for a discussion of *State Banking Bd. v. Bank of Okla.*, in which the court also analogized CBCTs to banking by mail and by telephone.

137. See *Marine Midland Bank*, 757 F.2d at 462.

shared ATM networks provide many advantages for those individuals who utilize the terminals.<sup>138</sup> Customers no longer are forced to bank during inconvenient banking hours; they enjoy twenty-four hour availability for the most common transactions. Second, travelers and vacationers do not have to carry large amounts of cash with them; ATMs located in other states are available for their needs. Third, smaller banks and other financial institutions actually achieve competitive equality with the larger institutions. These smaller institutions now may offer their customers better service and greater accessibility through the networks without having to expend their own capital to construct and maintain several ATMs.<sup>139</sup> Fourth, location no longer plays a determinative role in forming a customer base; instead, banks may promote their services when attracting clients. Last, sharing ATMs avoids the possible monopolistic control that larger institutions could exert over emerging computer banking technology.<sup>140</sup> The *Marine Midland Bank* district court decision threatened to destroy these consumer benefits because many of the larger national banks would have been forced to withdraw from the shared networks. The smaller banks then would have had to bear the financial burden of operating the interstate systems, and the customers ultimately would have paid higher service fees attributed to the loss of the economies of scale.<sup>141</sup>

The Second Circuit's reasoning indicates a willingness to take a public policy approach rather than to follow a strict interpretation of the McFadden Act. The Second Circuit's decision, however, only temporarily preserves the development of electronic transfer systems. Recent developments in other areas of banking lend further support to the Second Circuit's approach in *Marine Midland Bank* and cast doubt upon the reasoning used by courts previously faced with the issue of whether to treat ATMs as branches. For example, the Comptroller recently approved the establishment of limited-service banks, popularly known as "nonbank banks," by

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138. See, e.g., *S. Hearings*, *supra* note 78, at 13 (statement on behalf of Plus System, Inc.); N. PENNEY & D. BAKER, *supra* note 8, ¶ 6.04[2]; Goldberg, *supra* note 10, at 724.

139. Through their membership in interchange ATM networks, smaller banks avoid passing the costs involved in owning an ATM on to their customers.

140. See Goldberg, *supra* note 10, at 724-37 (discussion of federal antitrust laws and sharing of EFT systems).

141. See *S. Hearings*, *supra* note 78, at 140 (statement of Mary-Pat Cottrell); Sczudlo, *The Marine Midland Decision and Shared ATM Systems*, 3 BANKING EXPANSION REP. 1, 9-10 (Oct. 15, 1984).

Chase Manhattan Corporation.<sup>142</sup> Nonbank banks are financial institutions that either accept demand deposits or make commercial loans. By performing only one function, these institutions avoid the Bank Holding Company Act's federal definition of a bank.<sup>143</sup> Thus, bank holding companies may participate in limited forms of interstate banking.<sup>144</sup> If limited-service banks may operate at the interstate level,<sup>145</sup> then no logical reason exists for prohibiting national banks from participating in interstate ATM networks.

The court in *Independent Bankers Association v. Smith* stated that CBCTs were branches "[b]ecause all CBCT's perform one of the branch banking functions described in section 36(f)."<sup>146</sup> The weakness of the logic used by the district court in *Marine Midland Bank* and in earlier case law endorsing a similar interpretation is apparent when compared to current banking deregulation trends<sup>147</sup> and the proposed limited-service banks. ATMs cannot perform all banking services<sup>148</sup> and, therefore, do not pose any greater threat to local banks than do the nonbank banks. Several states prohibit deposit-taking or account transfers at ATMs in an effort to keep community assets invested in the community.<sup>149</sup> Consumers still require staffed offices for many bank services, and the placement of a computer terminal in a town several hundred miles away from a bank's principal office or branch office does not create insurmountable or unfair competition for the banks that do

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142. See Wall St. J., Feb. 6, 1985, at 2, col. 1.

143. Bank Holding Company Act, 12 U.S.C. § 1841(c) (1982) ("[B]ank" defined as "any institution . . . which (1) accepts deposits . . . and (2) engages in the business of making commercial loans.").

144. See *supra* note 143; see also 70 FED. RES. BULL. 312, 318 (Apr. 1984) (statement of Paul A. Volcker, Chairman, Bd. of Gov'rs of Fed. Res. Sys.); *id.* at 298, 299 (statement by Paul A. Volcker before the S. Comm. on Banking, Housing, and Urban Affairs) (recommending strengthened definition of "bank" in Bank Holding Company Act to close loophole for "nonbank banks" and prevent undermining of congressional prohibition on interstate banking).

145. In 1985 Chase Manhattan Corp. will open limited-service banks that make consumer and commercial loans and offer money market accounts and certificates of deposit in five states.

146. *Independent Bankers Ass'n v. Smith*, 534 F.2d at 928.

147. See North Carolina Regional Reciprocal Banking Act, N.C. GEN. STAT. §§ 53-209 to -218 (Supp. 1984) (reciprocal interstate banking); Tennessee Regional Reciprocal Banking Act, TENN. CODE ANN. §§ 45-12-101 to -108 (Supp. 1985). See Comment, *supra* note 3, at 721-22, for a discussion of the possibility that modern commercial activities have rendered the McFadden Act obsolete.

148. ATMs cannot open new accounts, dispense cashier's checks or money orders, make loans without a pre-approved line of credit, or open certificates of deposit.

149. Florida, Illinois, and Maryland are a few of the states with restrictions that prohibit ATMs from receiving deposits.

maintain an office in the area.

### B. *The Argument for a Legislative Solution*

The majority of the earlier judicial decisions that addressed electronic banking issues accorded little importance to regulations and rulings of the Comptroller.<sup>150</sup> The Second Circuit's reasoning in *Marine Midland Bank*, however, relied on a 1982 Comptroller's ruling<sup>151</sup> and assumed a more deferential stance toward the administrative agency. Although this deferential approach is the most appropriate attitude for courts to adopt, nothing in the *Marine Midland Bank* decision guarantees that future courts in other circuits will follow the lead of the Second Circuit. Case law reflects a pattern of disregard for Comptroller interpretations in the electronic banking field, and the lower court decision is an example of how courts may misapply the *Smith* establishment criteria.<sup>152</sup>

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150. See *supra* notes 55 and 63-68 and accompanying text. But see *supra* notes 56-62 for one district court's contrary position.

151. The court relied on 12 C.F.R. § 5.31 (1982). See *supra* note 9.

152. The *Smith* court emphasized the importance of a federal definition of "branch" and pointed out that the "resolution of whether a CBCT is a branch for purposes of federal law should be the same, for example, in California, which permits statewide branch banking, as in Texas, whose constitution prohibits branching." *Independent Banker's Ass'n v. Smith*, 534 F.2d at 933 (quoting 39 Fed. Reg. 44418 (1974)). Although the *Smith* court used this statement to find that CBCTs were branches of the national banks that established them, the court's reasoning supports the Second Circuit's decision in *Marine Midland Bank* because no national bank established the ATM in question. The *Smith* court held that if a state permitted state-chartered banks to establish CBCTs to receive deposits, pay checks, or lend money, then national banks could establish CBCTs for the same purposes. *Id.* at 948. More importantly, the court stated that the same rule would hold true even in a state that prohibited branch banking but exempted CBCTs from the definition of "branch." The lower court in *Marine Midland Bank* failed to consider this part of the *Smith* holding. Federal law, according to the district court decision, defines CBCTs as branches. If a state does not define a CBCT as a branch, state banks will be able to establish, operate, rent, and utilize the terminals, yet the national banks will not be able to participate in the same activities because the state prohibits branching and under federal law, the terminals are branches. See *id.* at 948 n.104 (hypothetical used by court exemplified result of narrow reading of § 36(c) in state that exempts ATMs from definition of "branch" for state law purposes). The district court in *Marine Midland Bank* misapplied the *Smith* "branch" criteria by ignoring essential elements of both parts of the test. First, the court assumed that Marine had "established" Wegmans' ATM and thus met the first prong of *Smith's* test, when in fact Marine neither owned nor rented the ATM. See *supra* text accompanying notes 87-89, 134-37. Marine took no part in the selection of the site or hardware of Wegmans' ATM, and did not supervise its installation or its daily operation. These acts would be evidence of ownership or rental; a transaction fee only gives Marine's customers the opportunity to access their accounts while away from the bank. See *S. Hearings, supra* note 78, at 166 (statement of John C. Elliott). Second, the court decided that Marine had achieved a competitive advantage over both national and state banks with its utilization of Wegmans' ATM. The court appeared to ignore the fact that other banks also utilized, or planned to utilize, the

Other courts will face identical issues and must similarly apply the outdated McFadden Act of 1927 to modern banking technology. The Second Circuit based its holding on sound reasoning, but that will not prevent other circuits from reaching the same conclusion that the district court reached in *Marine Midland Bank*. Although *Marine Midland Bank* preserved interstate networks in the Second Circuit, it will not reduce the litigation to which these networks may be subjected in other jurisdictions.<sup>153</sup> Both the *Marine Midland Bank* appellate court's reasoning and the strict approach taken in the district court decision are defensible, which illustrates that the Second Circuit's holding is subject to attack in subsequent cases. Continued litigation is inevitable without a federal statutory solution.<sup>154</sup>

The amendment to the National Bank Act<sup>155</sup> (the Banking Convenience Act of 1984) would provide a solution to the dilemma of how to treat shared ATMs utilized by national banks. The amendment specifically authorizes a national bank to use an automated device that the bank does not own or rent and clarifies that the payment of a transactional fee does not constitute the establishment of any automated device.<sup>156</sup> Under the amendment these terminals would not be considered branches within the meaning of section 36(f).<sup>157</sup>

The amendment addresses the immediate problem of how to restore competitive equality to the dual banking system in the same manner that *Independent Bankers Association v. Smith* restored competitive equality in 1976 and thereby protected state banks. *Smith* overruled a Comptroller ruling<sup>158</sup> that in effect preempted state law, particularly in those states with restrictive branching laws or with statutes that labelled ATMs as branches.<sup>159</sup>

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same terminal and that Wegmans was willing to contract with any financial institution. See Brief for Defendant-Appellant at 14-18, *Marine Midland Bank*.

153. Each national bank challenged by a state banking commissioner, independent bankers' association, or state bank may have to prove through litigation that the national bank's use of a shared ATM and its membership in an interchange network does not constitute illegal branch banking.

154. Litigation costs could discourage investments in shared systems and indirectly limit their memberships to the detriment of state and national members. See *S. Hearings*, *supra* note 78, at 20 (statement of Michael A. Mancusi, Sr. Deputy Comptroller of the Currency).

155. S. 2898, 98th Cong., 2d Sess. (1984).

156. *Id.* sec. 2, § (i)(2)(B).

157. *Id.* sec. 2, § (i)(1).

158. See *supra* note 53 and accompanying text.

159. *Independent Bankers Ass'n v. Smith*, 534 F.2d at 936 ("Undeniably, the Comp-

The proposed amendment would do nothing more than maintain the status quo of the law concerning interstate ATM networks, support the Comptroller regulation in a more preferable manner than acquiescence by silence,<sup>160</sup> and assist national banks by preserving competitive quality. A federal law that addresses the use of shared ATMs would prevent the national banking system from being subjected to fifty shared EFT systems laws and would establish needed uniformity in interstate banking. When establishing their own ATMs, national banks still would have to comply with state branching laws and state EFT laws. The amendment, however, would prevent national banks from having to comply with state branch banking laws in those states in which state law expressly exempts state bank ATMs from branching treatment.

The analysis used by the district court in *Marine Midland Bank* finds too much precedent in prior case law for the appellate court's decision to be regarded as the banking industry's solution. In subsequent litigation in other circuits, courts presented with the issue of how to treat ATMs easily could ignore or distinguish the Second Circuit decision and once more restrict a national bank's use of computer banking technology. Even though the *Marine Midland Bank* district court decision was reversed on appeal, Congress should consider seriously the proposed amendment, which was reintroduced in January of 1985. This amendment is consistent with the deregulation trend that the banking industry has experienced in the last few years<sup>161</sup> and would avoid further litigation over the treatment of developing banking technology.

## V. CONCLUSION

The district court's analysis in *Marine Midland Bank* possessed the potential to undermine the future of regional and national interchange ATM networks. The Second Circuit clarified the position that shared ATM networks hold in the dual banking system. The circuit court's holding will have a significant effect on computer banking technology across the country if other courts

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troller's ruling . . . would give national banks at least a temporary advantage over competing state banks in those jurisdictions which presently do not permit state-chartered banks to establish off-premises CBCT's."). Delaware, Louisiana, Maine, New Jersey, New Mexico, Ohio, and Virginia still label ATMs as branches. See *supra* note 40.

160. See *Marine Midland Bank*, 757 F.2d at 462.

161. See *supra* note 148; see also Depository Institutions Deregulation Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified as amended in scattered sections of 12 and 15 U.S.C.).

follow *Marine Midland Bank* in their own struggles over the treatment of EFT systems. Nothing in the *Marine Midland Bank* case guarantees that courts in other circuits will rely on the Second Circuit's rationale or defer to interpretations of the Comptroller and consistently hold that shared ATMs are not branches. The Banking Convenience Act of 1984 offers the ideal national solution for the problem of how to reconcile shared ATM networks with prohibitions on interstate banking, and Congress should act on this proposed amendment soon. Without legislative action, *Marine Midland Bank* may have only limited influence and precedential value. In years to come, reciprocal interstate banking may render these judicial and legislative decisions of limited significance. But for the present, these decisions provide the dual banking system with the stability needed to maintain the competitive equality that the drafters of the McFadden Act envisioned.

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