

By Mr. Walsh of Boston, petition of Richard L. Walsh and Nicholas A. Paleologos for legislation to protect consumers relative to electronic fund transfer systems. Banks and Banking.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Seventy-Nine.

AN ACT RELATIVE TO ELECTRONIC FUND TRANSFER SYSTEMS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Findings and Purpose.

2 (a) The General Court finds that the use of electronic systems to
3 transfer funds provides the potential for substantial benefits to
4 consumers. However, due to the unique characteristics of these
5 systems, existing consumer protection legislation may be in-
6 applicable, leaving the interests of consumers unprotected and the
7 rights and liabilities of consumers, financial institutions, and
8 intermediaries in electronic fund transfers undefined.

9 (b) It is the purpose of this chapter to provide a basic framework
10 establishing the rights, liabilities, and responsibilities of all
11 participants in electronic fund transfer systems. The primary
12 objective of this chapter, however, is the protection of individual
13 consumer rights.

1 SECTION 2. The General Laws are hereby amended by
2 inserting after chapter 167A the following new chapter: —

3 **CHAPTER 167B**

4 **ELECTRONIC FUND TRANSFER SYSTEMS**

5 *Section 1. Definitions.*

6 For the purpose of this chapter:

7 (1) The term "account" means an account established or a
8 deposit made for personal, family or household purposes.

9 (2) The term "card or other means of access" means a card, code
10 or other means of access to a consumer's account which can be

11 used to initiate an electronic fund transfer. A card or other means
12 of access is "accepted" if the person to whom it is issued: has
13 requested the card or other means of access in accordance with
14 section 3; has signed the electronic fund transfer agreement
15 required by section 4(a); has received the required disclosures in
16 accordance with section 4(b); and, has received the card or other
17 means of access.

18 (3) The term "automated teller machine" means a machine
19 owned, leased, maintained or controlled by a financial institution
20 which is used directly by consumers to initiate electronic fund
21 transfers. The term does not include a machine exclusively used for
22 point-of-sale transfers or check authorization.

23 (4) The term "consumer" means a natural person.

24 (5) The term "electronic fund transfer" means a transfer of funds
25 to or from a consumer's account which is effected in whole or
26 substantial part by electronic means and which does not require, as
27 a necessary element of the transfer, the use of an item, as defined in
28 section 4-104(g) of chapter one hundred and six, or the use of an
29 instrument, as defined in section 3-102(e) of chapter one hundred
30 and six. The term includes, but is not limited to, a transfer of funds
31 initiated by the consumer at an unmanned electronic terminal and
32 a transfer of funds authorized by the consumer over the telephone.
33 The term also includes a transaction whereby a financial
34 institution, through an electronic terminal located in a retail place
35 of business, authorizes a check for cashing by the retail business.

36 (6) The term "financial institution" means a state or national
37 bank, a state or federal savings and loan association, a mutual
38 savings bank, a state or federal credit union, a state or federal
39 commercial bank, or any other depository or nondepository
40 institution which holds or provides electronic fund transfer
41 services for a customer's account.

42 (7) The term "point-of-sale" transfer means an electronic fund
43 transfer initiated by a consumer at a seller's place of business which
44 transfers funds from the consumer's to the seller's account.

45 (8) The term "preauthorized transfer" means an electronic fund
46 transfer authorized more than twelve hours before the scheduled
47 occurrence of the transfer.

48 (9) The term "unauthorized or erroneous transfer" means:

49 (a) an electronic fund transfer affecting a consumer's account

50 which is not initiated by the consumer or by a person with the
51 consumer's knowledge and consent;

52 (b) an electronic fund transfer which is not made in the exact
53 amount or precise manner authorized by the consumer, except
54 where the consumer's account has insufficient funds; and

55 (c) a failure to reverse an electronic fund transfer when reversal
56 has been properly requested by the consumer in accordance with
57 section 7.

58 *Section 2. Compulsory use of electronic fund transfers.*

59 No person may —

60 (1) require a consumer, as a condition of employment, receipt of
61 government benefits, the extension of credit, or doing business to
62 use or participate in an electronic fund transfer. (A direct deposit
63 of payroll shall, in the absence of a voluntary written authorization
64 by the employee, create a presumptive violation of this section); or

65 (2) condition the receipt of payment by a consumer through an
66 electronic fund transfer on the consumer's participation in any
67 other electronic fund transfer.

68 *Section 3. Issuance of cards or other means of access.*

69 No person may issue a card or other means of access other
70 than —

71 (1) in response to a request or application that is in writing and
72 signed by the consumer; or

73 (2) as a renewal of, or in substitution for, an accepted card or
74 other means of access.

75 *Section 4. Electronic fund transfer agreements.*

76 (a) An electronic fund transfer involving a consumer's account
77 may be made only pursuant to an electronic fund transfer
78 agreement between the financial institution and the consumer.

79 (b) The electronic fund transfer agreement shall clearly disclose
80 in writing to the consumer all terms and conditions governing
81 electronic fund transfers involving the consumer's account. The
82 disclosures shall include, but not be limited to:

83 (1) the consumer's liability for unauthorized or erroneous
84 transfers under section 9;

85 (2) the telephone number and address of the person or
86 department to be notified in the event the consumer believes that
87 an unauthorized or erroneous transfer has been or may be effected;

88 (3) the type and nature of electronic fund transfers which the

89 consumer may initiate, including any limitations on the frequency
90 or dollar amount of such transfers;

91 (4) any charges for account maintenance, for reversal of
92 transfers and for electronic fund transfers;

93 (5) the consumer's right to reverse an electronic fund transfer
94 and the procedure to initiate a reversal in accordance with section
95 7;

96 (6) the consumer's right to receive documentation of each
97 electronic fund transfer under section 5;

98 (7) a summary of the dispute resolution procedure of section 8;

99 (8) the financial institution's liability to the consumer under
100 sections 9 and 14; and

101 (9) the financial institution's fiduciary duty to protect the
102 consumer's right to privacy and assure the integrity, accuracy, and
103 security of the consumer's account under section 12.

104 (c) A financial institution shall notify a consumer in writing at
105 least ninety days prior to the effective date of any changes in a term
106 or condition of the consumer's account required to be disclosed
107 under subsection (b). The notification shall be accompanied by a
108 statement containing the terms and conditions of the agreement
109 required to be disclosed by subsection (b), a statement of the
110 proposed term or condition, and a readily understandable
111 explanation of the significance of the change to the consumer. If,
112 after having received the notification and statement, a consumer
113 agrees, in writing, to allow the change to occur before the
114 expiration of the ninety days, then the change may occur at the
115 time agreed upon.

116 *Section 5. Documentation of transfers.*

117 (a) A financial institution shall deliver to a consumer written
118 documentation of each point-of-sale transfer and each transfer
119 conducted through an automated teller machine at the time the
120 consumer makes the transfer. The financial institution shall mail
121 or deliver to a consumer written documentation of any other
122 transfer affecting the consumer's account not later than five days
123 after the transfer takes place.

124 (b) The documentation required by subsection (a) shall clearly
125 set forth in readily understandable language:

126 (1) the amount, date, and nature of the transfer;

127 (2) the identity of the consumer's account with the financial

128 institution from which or to which funds were transferred;

129 (3) the identity of any third party to whom or from whom funds
130 were transferred;

131 (4) a brief description of any goods or services which were the
132 subject of the transfer; and

133 (5) a transfer identification number which provides a permanent
134 audit trail.

135 (c) A financial institution shall provide a consumer with a
136 periodic statement for each of the consumer's accounts that may be
137 accessed by means of an electronic fund transfer. The statement
138 shall be provided at least monthly for each monthly or shorter
139 cycle in which an electronic fund transfer affecting the account has
140 occurred, or every three months, whichever is more frequent. The
141 statement, which may follow information regarding transactions
142 other than electronic fund transfers, shall clearly set forth —

143 (1) with regard to each electronic fund transfer during the
144 period, the information required to be disclosed under subsection
145 (b);

146 (2) the amount of any fees or charges assessed by the financial
147 institution for electronic fund transfers for reversal of transfers and
148 for account maintenance; and

149 (3) the balance remaining in the consumer's account at the close
150 of the period.

151 (d) In any action involving a consumer and a third person, any
152 documentation or statement required by this section to be given to
153 the consumer which indicates that an electronic fund transfer was
154 made to the third person shall be admissible by the consumer as
155 evidence of the transfer and shall be presumptive proof that the
156 transfer was made. Thereafter, the burden of proof is upon the
157 third person to show that the electronic fund transfer was not
158 made.

159 (e) If a financial institution discloses to a person other than the
160 account holder information regarding an electronic fund transfer
161 beyond that necessary to effect the transfer or to prepare a periodic
162 statement, the next periodic statement required by subsection (c)
163 shall clearly set forth for each disclosure:

164 (1) the nature of the information disclosed;

165 (2) the name of the person to whom the information was
166 disclosed; and

167 (3) the authorization, if any, for the disclosure.

168 For the purpose of this subsection, the term "person" includes
169 the financial institution holding the consumer's account.

170 *Section 6. Preauthorized transfers.*

171 (a) A preauthorized transfer from or to a consumer's account
172 may take place only if the consumer has authorized the transfer in
173 writing. A copy of the authorization shall be provided to the
174 consumer at the time of his signing. The authorization shall
175 disclose in clear and readily understandable language:

176 (1) the dates or time period when the preauthorized transfer or
177 transfers will take place;

178 (2) the consumer's right to revoke authorization in accordance
179 with subsection (b);

180 (3) the procedure for revoking authorization;

181 (4) the limiting amount, if applicable, required by subsection (c);
182 and

183 (5) the consumer's right to notice of deficiency under subsection
184 (d).

185 (b) A consumer may revoke authorization for a preauthorized
186 transfer at any time before the transfer takes place.

187 (c) Every authorization for a preauthorized transfer from a
188 consumer's account shall specify a limiting amount. If a
189 preauthorized transfer exceeds the limiting amount, the financial
190 institution shall notify the consumer within five (5) business days
191 and the excess debit shall not be transferred until approved by the
192 consumer.

193 (d) If on the date that a preauthorized transfer from a
194 consumer's account is scheduled to be made the consumer's
195 account has insufficient funds to cover the payment, the financial
196 institution shall mail or deliver notification of this fact to the
197 consumer within five days of such date.

198 *Section 7. Reversal of transfers.*

199 A consumer is entitled to reverse any electronic fund transfer
200 affecting his account if the consumer notifies the financial
201 institution of his desire to reverse within three business days after
202 the transfer is made. Within 3 business days after such notification,
203 the financial institution shall permanently reverse the electronic
204 fund transfer and recredit the consumer's account for the amount
205 of the transfer. Notice under this section is sufficient when the

206 consumer takes those steps reasonably required in the ordinary
207 course of business to provide the financial institution with the
208 pertinent information whether or not any particular officer,
209 employee, or agent of the financial institution does in fact receive
210 the information.

211 *Section 8. Dispute resolution procedure.*

212 (a) When a consumer notifies a financial institution orally, in
213 writing or through an automated teller machine that an
214 unauthorized or erroneous transfer affecting his account has
215 occurred, the financial institution shall recredit the consumer's
216 account in the amount of the disputed transfer within three (3)
217 business days.

218 (b) The financial institution may reverse the recredit required by
219 (a) only after:

220 (1) it has investigated the disputed transfer;

221 (2) it has determined that the disputed transfer did not take
222 place, that the transfer was not unauthorized or erroneous, or that
223 the consumer is liable for the transfer under section 9; and

224 (3) it has delivered to the consumer, without cost, reproductions
225 of all documents which the financial institution used to make its
226 determination.

227 (c) If the financial institution determines at any time that an
228 unauthorized or erroneous transfer has occurred, it shall
229 promptly, but in no event more than one (1) business day after the
230 determination, correct the error, including the crediting of interest
231 where applicable.

232 (d) If in an action under section 14, the court finds that a
233 financial institution knowingly and willfully notified the consumer
234 under subsection (b) that the consumer's account was not in error
235 when such conclusion could not reasonably be drawn from the
236 preponderance of the evidence available to the financial institution
237 at the time of its investigation, the consumer shall be entitled to
238 treble damages under section 14(a)(1).

239 *Section 9. Liability for unauthorized or erroneous transfers.*

240 (a) Except as provided in subsection (b), a financial institution
241 shall be liable to a consumer for all actual damages resulting from
242 an unauthorized or erroneous transfer affecting the consumer's
243 account.

244 (b) A consumer shall be liable for the actual loss resulting from

245 an unauthorized or erroneous transfer affecting his account if the
246 following conditions are met:

247 (1) an accepted card or other means of access to the consumer's
248 account is used to effect the transfer;

249 (2) the financial institution has disclosed to the consumer the
250 terms and conditions of transfer in accordance with section 4(b);
251 and

252 (3) the transfer occurs before the consumer has notified the
253 financial institution of the loss or theft of the card or other means
254 of access used to effect the transfer.

255 The consumer's liability under this subsection shall be limited to
256 the lesser of the actual loss incurred or fifty (50) dollars.

257 (c) For the purpose of subsection (b) (4), notice is sufficient when
258 the consumer takes those steps reasonably required in the ordinary
259 course of business to provide the financial institution with the
260 pertinent information whether or not any particular officer,
261 employee, or agent of the financial institution in fact receives the
262 information.

263 (d) In an action involving a consumer's liability for an
264 unauthorized or erroneous transfer, the entire burden of proof
265 shall be upon the financial institution to show that:

266 (1) the electronic fund transfer was not unauthorized or
267 erroneous; or

268 (2) the conditions precedent to consumer liability under
269 subsection (b) have been met.

270 (e) A financial institution shall be liable for all consequential,
271 incidental or reputation damages suffered by a consumer as a
272 result of an unauthorized or erroneous transfer unless the financial
273 institution shows by a preponderance of the evidence that the
274 unauthorized or erroneous transfer resulted from a nonrepeating,
275 nonhuman malfunction which was:

276 (1) caused by circumstances, including acts of God, not
277 reasonably foreseeable and substantially beyond the control of the
278 financial institution; or

279 (2) disclosed in writing to the consumer at the time he attempted
280 to initiate an electronic fund transfer or, in the case of a
281 preauthorized transfer, at the time such transfer should have
282 occurred.

283 *Section 10. Automated teller machines.*

284 Every automated teller machine shall be designed so that a
285 consumer with an accepted card or other means of access is able
286 before initiating a transfer on the machine:

287 (1) to determine his current account balance;

288 (2) to determine whether or not a particular preauthorized
289 transfer has taken place;

290 (3) to initiate the dispute resolution procedure prescribed in
291 section 8;

292 (4) to revoke authorization for a preauthorized transfer as
293 allowed by section 6; and

294 (5) to reverse a transfer as allowed by section 7.

295 *Section 11. Suspension of obligations.*

296 In the event a technical malfunction prevents the effectuation of
297 an electronic fund transfer initiated by a consumer to another
298 person, and the other person has agreed to accept payment by such
299 means, the consumer's obligation to the other person shall be
300 suspended until the malfunction is corrected and the electronic
301 fund transfer may be completed.

302 *Section 12. Fiduciary duty of financial institutions.*

303 A financial institution shall be deemed to have a fiduciary duty
304 to each consumer for whom it effects electronic fund transfers to
305 protect his right to privacy and to assure the security, integrity,
306 accuracy, and confidentiality of each account of the consumer
307 accessible by means of such transfers. This duty includes the
308 following obligations:

309 (1) The financial institution shall promptly notify the consumer
310 of any inquiry made concerning his account or legal process
311 directed toward his account.

312 (2) The financial institution shall prevent information regarding
313 any electronic fund transfer from being disclosed to any person
314 other than:

315 (a) the consumer making the transfer;

316 (b) a person who is a party to the transfer or is necessary to effect
317 the transfer, but disclosure to such person shall be limited to that
318 necessary to effect the transfer;

319 (c) persons authorized by law to have access to the records of the
320 financial institution or to the records of the parties to the transfer;
321 and

322 (d) persons specifically named and authorized in writing by the
323 consumer to receive the information.

324 No authorization required by subsection 2(d) may remain in
325 effect longer than thirty (30) days.

326 (3) The financial institution shall meet any other duty of a
327 fiduciary nature recognized or imposed by Massachusetts law.

328 *Section 13. Waiver of rights.*

329 No writing or other agreement between a consumer and a
330 financial institution or between a consumer and a provider of
331 goods or services at retail may contain a provision which
332 constitutes a waiver of the rights conferred or causes of action
333 created by this chapter. Nothing in this section prohibits, however,
334 a writing or other agreement which grants to a consumer a more
335 extensive right or greater protection than contained in this chapter.

336 *Section 14. Civil liability.*

337 (a) Except as provided by section 9, any person who fails to
338 comply with any provision of this chapter with respect to a
339 consumer is liable to the consumer in an amount equal to the sum
340 of —

341 (1) all damages sustained by the consumer as a result of such
342 failure;

343 (2) (A) in the case of an individual action, under this
344 subparagraph, an amount not less than \$100 nor greater than
345 \$1,000; or

346 (B) in the case of a class action, an amount allowed by the court,
347 except that (i) as to each member of the class no minimum recovery
348 shall be applicable, and (ii) the total recovery under this
349 subparagraph in the action shall not be more than the lesser of
350 \$500,000 or \$ per centum of the net worth of the defendant; and

351 (3) in the case of a successful action to enforce the foregoing
352 liability, the costs of the action, together with a reasonable
353 attorney's fee as determined by the court.

354 (b) In determining the amount of award in a class action under
355 subsection (a) (2) (B), the court shall consider, among other
356 relevant factors, the amount of actual damages awarded, the
357 frequency and persistence of failures of compliance by the
358 defendant, the resources of the defendant, the number of persons
359 adversely affected, and the extent to which the defendant's failure
360 of compliance was intentional.

361 (c) An action under this section may be commenced only within
362 four years after the discovery of the violation.

363 *Section 15. Enforcement by the attorney general.*

364 (a) Whenever the attorney general has reason to believe that any
365 person is in violation of any provision of this chapter, and that
366 proceedings would be in the public interest, he may bring an action
367 in the name of the commonwealth against such person to restrain
368 the violation by temporary restraining order or preliminary or
369 permanent injunction. The action may be brought in the superior
370 court of the county in which such person resides or has his
371 principal place of business, or the action may be brought in the
372 superior court of Suffolk county with the consent of the parties or
373 if the person has no place of business within the commonwealth.
374 Said court may issue temporary restraining orders or preliminary
375 or permanent injunctions.

376 (b) Any person who violates the terms of an injunction or other
377 order issued under this section shall forfeit and pay to the
378 commonwealth a civil penalty of not more than ten thousand
379 dollars for each violation. For the purposes of this section, the
380 court issuing such an injunction or order shall retain jurisdiction,
381 and the cause shall be continued, and in such case the attorney
382 general acting in the name of the commonwealth may petition for
383 recovery of such civil penalty.

384 (c) In any case where the attorney general has authority to
385 institute an action or proceeding under this section, in lieu thereof
386 he may accept an assurance of discontinuance of any method, act
387 or practice in violation of this chapter from any person alleged to
388 be engaged or to have been engaged in such method, act or
389 practice. Any such assurance of discontinuance shall be in writing
390 and be filed with the superior court of Suffolk county. Matters thus
391 closed may at any time be reopened by the attorney general for
392 further proceedings in the public interest.

393 *Section 16. Severability.*

394 If any provision of this chapter is found to be unconstitutional or
395 void, the remaining provisions of this chapter shall remain valid.

