

110TH CONGRESS
2D SESSION

H. R. 5546

To amend the antitrust laws to ensure competitive market-based rates and terms for merchants' access to electronic payment systems.

IN THE HOUSE OF REPRESENTATIVES

MARCH 6, 2008

Mr. CONYERS (for himself, Mr. CANNON, Ms. ZOE LOFGREN of California, Mr. SHUSTER, Mr. WEINER, Mr. DELAHUNT, Mr. PLATTS, Mr. WELCH of Vermont, Mr. SULLIVAN, Mr. WILSON of South Carolina, Mr. GOHMERT, Mr. HALL of Texas, Mr. BOOZMAN, and Mr. PETERSON of Pennsylvania) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the antitrust laws to ensure competitive market-based rates and terms for merchants' access to electronic payment systems.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Credit Card Fair Fee
5 Act of 2008".

1 **SEC. 2. LIMITED ANTITRUST IMMUNITY FOR THE NEGOTIA-**
2 **TION AND DETERMINATION OF RATES AND**
3 **TERMS FOR ACCESS TO COVERED ELEC-**
4 **TRONIC PAYMENT SYSTEMS.**

5 (a) DEFINITIONS.—For purposes of this Act:

6 (1) “Access agreement” means an agreement
7 giving a merchant permission to access a covered
8 electronic payment system to accept credit cards
9 and/or debit cards from consumers for payment for
10 goods and services as well as to receive payment for
11 such goods and services, conditioned solely upon the
12 merchant complying with the rates and terms speci-
13 fied in the agreement.

14 (2) “Acquirer” means a financial institution
15 that provides services allowing merchants to access
16 an electronic payment system to accept credit cards
17 and/or debit cards for payment, but does not include
18 independent third party processors that may act as
19 the acquirer’s agent in processing general-purpose
20 credit or debit card transactions.

21 (3) “Antitrust Division” means the Antitrust
22 Division of the U.S. Department of Justice.

23 (4) “Antitrust Laws” has the meaning given it
24 in subsection (a) of the first section of the Clayton
25 Act (15 U.S.C. 12(a)), except that such term in-
26 cludes section 5 of the Federal Trade Commission

1 Act (15 U.S.C. 45) to the extent section 5 applies
2 to unfair methods of competition as well as any
3 similar State law.

4 (5) “Base year” means the most recent full cal-
5 endar year prior to the initiation of a proceeding
6 under this Act.

7 (6) “Commission” means the Federal Trade
8 Commission Bureau of Competition.

9 (7) “Credit card” means any general-purpose
10 card or other device issued or approved for use by
11 a financial institution allowing the cardholder to ob-
12 tain goods or services on credit on terms specified by
13 that financial institution.

14 (8) “Covered electronic payment system” means
15 an electronic payment system that has been used for
16 at least 20% of the combined dollar value of U.S.
17 credit, signature-based debit, and PIN-based debit
18 card payments processed in the applicable base year.

19 (9) “Debit card” means any general-purpose
20 card or other device issued or approved for use by
21 a financial institution for use in debiting a card-
22 holder’s account for the purpose of that cardholder
23 obtaining goods or services, whether authorization is
24 signature-based or PIN-based.

1 (10) “Electronic payment system” means the
2 proprietary services and infrastructure that route in-
3 formation and data to facilitate transaction author-
4 ization, clearance, and settlement that merchants
5 must access in order to accept a specific brand of
6 general-purpose credit and/or debit cards as pay-
7 ment for goods and services.

8 (11) “Financial institution” has the same
9 meaning as in section 603(t) of the Fair Credit Re-
10 porting Act.

11 (12) “Issuer” means a financial institution that
12 issues credit cards and/or debit cards or approves
13 the use of other devices for use in an electronic pay-
14 ment system, but does not include independent third
15 party processors that may act as the issuer’s agent
16 in processing general-purpose credit or debit card
17 transactions;

18 (13) “Market power” means the ability profit-
19 ably to raise prices above those that would be
20 charged in a perfectly competitive market.

21 (14) “Merchant” means any person who ac-
22 cepts credit cards and/or debit cards in payment for
23 goods or services that they provide.

24 (15) “Normal rate of return” means the aver-
25 age rate of return that a firm would receive in an

1 industry when conditions of perfect competition pre-
2 vail.

3 (16) “Party” means either all providers of a
4 single covered electronic payment system collectively
5 or all merchants collectively.

6 (17) “Person” has the meaning given it in sub-
7 section (a) of the first section of the Clayton Act (15
8 U.S.C. 12(a)).

9 (18) “Provider” means any person who owns,
10 operates, controls, serves as an issuer, or serves as
11 an acquirer for a covered electronic payment system.

12 (19) “State” has the meaning given it in sec-
13 tion 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

14 (20) “Terms” means all rules applicable either
15 to providers of a single covered electronic payment
16 system or to merchants, and that are required in
17 order to provide or access that covered electronic
18 payment system for processing credit and/or debit
19 card transactions.

20 (21) “Voluntarily negotiated access agreement”
21 means an executed agreement voluntarily negotiated
22 between 1 or more providers of a single covered elec-
23 tronic payment system and 1 or more merchants
24 that sets the rates and terms pursuant to which the
25 1 or more merchants can access that covered elec-

1 tronic payment system to accept credit cards and/or
2 debit cards from consumers for payment of goods
3 and services, and receive payment for such goods
4 and services.

5 (b) ACCESS TO COVERED ELECTRONIC PAYMENT
6 SYSTEMS.—Access to any covered electronic payment sys-
7 tem by merchants shall be subject to this Act.

8 (c) AUTHORITY AND LIMITED ANTITRUST IMMUNITY
9 FOR NEGOTIATIONS AND PARTICIPATION IN PRO-
10 CEEDINGS.—Notwithstanding any provision of the anti-
11 trust laws, in negotiating access rates and terms and par-
12 ticipating in any proceedings in accordance with sub-
13 section (d), any providers of a single covered electronic
14 payment system and any merchants may jointly negotiate
15 and agree upon the rates and terms for access to the cov-
16 ered electronic payment system, including through the use
17 of common agents that represent either providers of a sin-
18 gle covered electronic payment system or merchants on a
19 non-exclusive basis. Any providers of a single covered elec-
20 tronic payment system also may jointly determine the pro-
21 portionate division among themselves of paid access fees.

22 (d) DETERMINATION OF ACCESS RATES AND
23 TERMS.—

24 (1) PROCEEDINGS.—Proceedings under this Act
25 shall determine rates and terms for access to a cov-

1 ered electronic payment system during the 3-year
2 period beginning on January 1 of the second year
3 following the year in which the proceedings are to be
4 commenced, except where a different transitional pe-
5 riod is provided under section 6. Except as specified
6 in a voluntarily negotiated access agreement, no
7 other fees, terms, or conditions of any kind may be
8 imposed directly or indirectly on any merchant for
9 accessing a covered electronic payment system. The
10 parties to each proceeding shall bear their own costs.

11 (2) DETERMINATIONS OF THE ELECTRONIC
12 PAYMENT SYSTEM JUDGES.—

13 (A) APPLICABILITY.—The schedule of
14 rates and terms determined by the Electronic
15 Payment System Judges with respect to a sin-
16 gle covered electronic payment system shall,
17 subject to paragraph (4), be binding on all pro-
18 viders of that single covered electronic payment
19 system and merchants affected by this para-
20 graph during the 3-year period specified in sub-
21 paragraph (1). For any given covered electronic
22 payment system, such rates and terms shall be
23 the same for all merchants, regardless of mer-
24 chant category or volume of transactions (either
25 in number or dollar value) generated.

1 (B) STANDARD FOR DETERMINATIONS.—

2 In establishing rates and terms for access to a
3 covered electronic payment system by mer-
4 chants, the Electronic Payment System Judges
5 shall establish rates and terms that most closely
6 represent the rates and terms that would be ne-
7 gotiated in a hypothetical perfectly competitive
8 marketplace for access to an electronic payment
9 system between a willing buyer with no market
10 power and a willing seller with no market
11 power. In determining such rates and terms,
12 the Electronic Payment System Judges shall
13 consider the costs necessary to provide and ac-
14 cess an electronic payment system for proc-
15 essing credit and/or debit card transactions as
16 well as a normal rate of return in such a hypo-
17 thetical perfectly competitive marketplace. The
18 Electronic Payment System Judges shall not in-
19 clude any anticompetitive rates or terms.

20 (C) USE OF EXISTING RATES AND TERMS

21 AS EVIDENCE.—In determining such rates and
22 terms, the Electronic Payment System Judges
23 generally shall decide the appropriate weight to
24 be given to any evidence submitted by a party
25 regarding the rates and terms for access to

1 comparable electronic payment systems, includ-
2 ing rates and terms set forth in voluntarily ne-
3 gotiated access agreements filed pursuant to
4 subparagraph (4). The Electronic Payment Sys-
5 tem Judges shall give significant weight, how-
6 ever, to rates voluntarily negotiated between
7 one or more providers of a single covered elec-
8 tronic payments system and one or more mer-
9 chants that are substantially below those rates
10 reflective of the market power of covered elec-
11 tronic payment systems that existed prior to the
12 enactment of this Act.

13 (3) INITIATION.—The procedures under sub-
14 paragraphs (1) and (2) shall be initiated pursuant to
15 section 5.

16 (4) VOLUNTARILY NEGOTIATED ACCESS AGREE-
17 MENTS.—

18 (A) AGREEMENTS BETWEEN THE PAR-
19 TIES.—Voluntarily negotiated access agree-
20 ments may be executed at any time between 1
21 or more providers of a single covered electronic
22 payment system and 1 or more merchants, and
23 such voluntarily negotiated access agreements
24 shall be given effect with respect to those par-

1 ties in lieu of any determination by the Elec-
2 tronic Payment System Judges.

3 (B) FILING AGREEMENTS WITH THE ELEC-
4 TRONIC PAYMENT SYSTEM JUDGES.—Any pro-
5 viders of a single covered electronic payment
6 system and merchants affected by this section
7 must jointly file with the Electronic Payment
8 System Judges any voluntarily negotiated ac-
9 cess agreements that affect any domestic or
10 international market, including related docu-
11 mentation evidencing any consideration being
12 given, any marketing or promotional agree-
13 ments between the parties, and any subsequent
14 amendments to such agreements and docu-
15 mentation.

16 (C) TIMING OF AND ACCESS TO FILINGS.—
17 The parties to any voluntarily negotiated access
18 agreement executed subsequent to the enact-
19 ment of the Credit Card Fair Fee Act of 2008
20 must jointly file such agreement, amendment,
21 or documentation with the Electronic Payment
22 System Judges within 30 days of executing the
23 agreement, amendment, or documentation. The
24 Electronic Payment System Judges shall make
25 publicly available all such agreements, amend-

1 ments, and related documentation executed sub-
2 sequent to the date of enactment of this Act.

3 **SEC. 3. ELECTRONIC PAYMENT SYSTEM JUDGES.**

4 (a) APPOINTMENT.—The Antitrust Division and
5 Commission shall appoint 3 full-time Electronic Payment
6 System Judges, and shall appoint 1 of the 3 as the Chief
7 Electronic Payment System Judge.

8 (b) FUNCTIONS.—Subject to the provisions of this
9 Act, the function of the Electronic Payment System
10 Judges shall be to make determinations of access rates
11 and terms calculated to most closely represent the rates
12 and terms that would be negotiated in a hypothetical per-
13 fectly competitive marketplace for access to an electronic
14 payment system between a willing buyer with no market
15 power and a willing seller with no market power. In deter-
16 mining such rates and terms, the Electronic Payment Sys-
17 tem Judges shall consider the costs necessary to provide
18 and access an electronic payment system for processing
19 credit and/or debit card transactions as well as a normal
20 rate of return in such a hypothetical perfectly competitive
21 marketplace.

22 (c) RULINGS.—The Electronic Payment System
23 Judges may make any necessary procedural or evidentiary
24 rulings in any proceeding under this Act and may, before
25 commencing a proceeding under this Act, make any proce-

1 dural rulings that would apply to the proceedings con-
2 ducted by the Electronic Payment System Judges.

3 (d) ADMINISTRATIVE SUPPORT.—The Antitrust Divi-
4 sion and Commission shall provide the Electronic Payment
5 System Judges with the necessary administrative services
6 related to proceedings under this Act.

7 (e) LOCATION.—The offices of the Electronic Pay-
8 ment System Judges and staff shall be in the Antitrust
9 Division or Commission.

10 (f) QUALIFICATIONS OF ELECTRONIC PAYMENT SYS-
11 TEM JUDGES.—

12 (1) IN GENERAL.—Each Electronic Payment
13 System Judge shall be an attorney who has at least
14 7 years of legal experience. The Chief Electronic
15 Payment System Judge shall have at least 5 years
16 of experience in adjudications, arbitrations, or court
17 trials. Of the other 2 Electronic Payment System
18 Judges, 1 shall have significant knowledge of elec-
19 tronic payment systems, and the other shall have
20 significant knowledge of economics. An individual
21 may serve as an Electronic Payment System Judge
22 only if the individual is free of any financial conflict
23 of interest under subsection (m).

24 (2) DEFINITION.—In this subsection, the term
25 “adjudication” has the meaning given that term in

1 section 551 of title 5, but does not include medi-
2 ation.

3 (g) STAFF.—The Chief Electronic Payment System
4 Judge shall hire 3 full-time staff members to assist the
5 Electronic Payment System Judges in performing their
6 functions.

7 (h) TERMS.—The individual first appointed as the
8 Chief Electronic Payment System Judge shall be ap-
9 pointed to a term of 6 years, and of the remaining individ-
10 uals first appointed as Electronic Payment System
11 Judges, 1 shall be appointed to a term of 4 years, and
12 the other shall be appointed to a term of 2 years. There-
13 after, the terms of succeeding Electronic Payment System
14 Judges shall each be 6 years. An individual serving as an
15 Electronic Payment System Judge may be reappointed to
16 subsequent terms. The term of an Electronic Payment
17 System Judge shall begin when the term of the prede-
18 cessor of that Electronic Payment System Judge ends.
19 When the term of office of an Electronic Payment System
20 Judge ends, the individual serving that term may continue
21 to serve until a successor is installed.

22 (i) VACANCIES OR INCAPACITY.—

23 (1) VACANCIES.—If a vacancy should occur in
24 the position of Electronic Payment System Judge,
25 the Antitrust Division and Commission shall act ex-

1 peditionally to fill the vacancy, and may appoint an
2 interim Electronic Payment System Judge to serve
3 until another Electronic Payment System Judge is
4 appointed under this section. An individual ap-
5 pointed to fill the vacancy occurring before the expi-
6 ration of the term for which the predecessor of that
7 individual was appointed shall be appointed for the
8 remainder of that term.

9 (2) INCAPACITY.—In the case in which an Elec-
10 tronic Payment System Judge is temporarily unable
11 to perform his or her duties, the Antitrust Division
12 and Commission may appoint an interim Electronic
13 Payment System Judge to perform such duties dur-
14 ing the period of such incapacity.

15 (j) COMPENSATION.—

16 (1) JUDGES.—The Chief Electronic Payment
17 System Judge shall receive compensation at the rate
18 of basic pay payable for level AL-1 for administra-
19 tive law judges pursuant to section 5372(b) of title
20 5, and each of the other two Electronic Payment
21 System Judges shall receive compensation at the
22 rate of basic pay payable for level AL-2 for adminis-
23 trative law judges pursuant to such section. The
24 compensation of the Electronic Payment System
25 Judges shall not be subject to any regulations adopt-

1 ed by the Office of Personnel Management pursuant
2 to its authority under section 5376(b)(1) of title 5.

3 (2) STAFF MEMBERS.—Of the staff members
4 appointed under subsection (g)—

5 (A) the rate of pay of 1 staff member shall
6 be not more than the basic rate of pay payable
7 for level 10 of GS–15 of the General Schedule;

8 (B) the rate of pay of 1 staff member shall
9 be not less than the basic rate of pay payable
10 for GS–13 of the General Schedule and not
11 more than the basic rate of pay payable for
12 level 10 of GS–14 of such Schedule; and

13 (C) the rate of pay for the third staff
14 member shall be not less than the basic rate of
15 pay payable for GS–8 of the General Schedule
16 and not more than the basic rate of pay payable
17 for level 10 of GS–11 of such Schedule.

18 (3) LOCALITY PAY.—All rates of pay referred to
19 under this subsection shall include locality pay.

20 (k) INDEPENDENCE OF ELECTRONIC PAYMENT SYS-
21 TEM JUDGE.—

22 (1) IN MAKING DETERMINATIONS.—

23 (A) IN GENERAL.—The Electronic Pay-
24 ment System Judges shall have full independ-
25 ence in making determinations concerning ad-

1 justments and determinations of rates and
2 terms for access to covered electronic payment
3 systems and in issuing other rulings under this
4 title, except that the Electronic Payment Sys-
5 tem Judges may consult with the Antitrust Di-
6 vision and Commission on any matter other
7 than a question of fact.

8 (B) CONSULTATION.—Notwithstanding the
9 provisions of subparagraph (A), the Electronic
10 Payment System Judges shall consult with the
11 Antitrust Division and Commission with respect
12 to any determination or ruling that would re-
13 quire that any act be performed by the Anti-
14 trust Division and Commission, and any such
15 determination or ruling shall not be binding
16 upon the Antitrust Division or Commission.

17 (2) PERFORMANCE APPRAISALS.—

18 (A) IN GENERAL.—Notwithstanding any
19 other provision of law or any regulation of the
20 Antitrust Division and Commission, and subject
21 to subparagraph (B), the Electronic Payment
22 System Judges shall not receive performance
23 appraisals.

24 (B) RELATING TO SANCTION OR RE-
25 MOVAL.—To the extent that the Antitrust Divi-

1 sion and Commission adopt regulations under
2 subsection (m) relating to the sanction or re-
3 moval of an Electronic Payment System Judge
4 and such regulations require documentation to
5 establish the cause of such sanction or removal,
6 the Electronic Payment System Judge may re-
7 ceive an appraisal related specifically to the
8 cause of the sanction or removal.

9 (l) INCONSISTENT DUTIES BARRED.—No Electronic
10 Payment System Judge may undertake duties that conflict
11 with his or her duties and responsibilities as an Electronic
12 Payment System Judge.

13 (m) STANDARDS OF CONDUCT.—The Antitrust Divi-
14 sion and Commission shall adopt regulations regarding the
15 standards of conduct, including financial conflict of inter-
16 est and restrictions against ex parte communications,
17 which shall govern the Electronic Payment System Judges
18 and the proceedings under this Act.

19 (n) REMOVAL OR SANCTION.—The Antitrust Division
20 and Commission may sanction or remove an Electronic
21 Payment System Judge for violation of the standards of
22 conduct adopted under subsection (m), misconduct, ne-
23 glect of duty, or any disqualifying physical or mental dis-
24 ability. Any such sanction or removal may be made only
25 after notice and opportunity for a hearing, but the Anti-

1 trust Division and Commission may suspend the Elec-
2 tronic Payment System Judge during the pendency of
3 such hearing. The Antitrust Division and Commission
4 shall appoint an interim Electronic Payment System
5 Judge during the period of any such suspension.

6 **SEC. 4. PROCEEDINGS OF ELECTRONIC PAYMENT SYSTEM**

7 **JUDGES.**

8 (a) PROCEEDINGS.—

9 (1) IN GENERAL.—The Electronic Payment
10 System Judges shall act in accordance with regula-
11 tions issued by the Electronic Payment System
12 Judges and the Antitrust Division and Commission,
13 and on the basis of a written record, prior deter-
14 minations and interpretations of the Electronic Pay-
15 ment System Judges under this Act, and decisions
16 of the court of appeals under this section.

17 (2) JUDGES ACTING AS PANEL AND INDIVID-
18 UALLY.—The Electronic Payment System Judges
19 shall preside over hearings in proceedings under this
20 Act en banc. The Chief Electronic Payment System
21 Judge may designate an Electronic Payment System
22 Judge to preside individually over such collateral
23 and administrative proceedings, and over such pro-
24 ceedings under paragraphs (1) and (2) of subsection
25 (b), as the Chief Judge considers appropriate.

1 (3) DETERMINATION LIMITED TO CHOOSING
2 ONE OF THE TWO FINAL OFFERS.—Prior to the
3 commencement of a direct hearing in a proceeding
4 under section 5(b)(3)(B)(xi), the party entitled to
5 receive access fee payments shall file with the Elec-
6 tronic Payment System Judges its final offer of
7 rates and terms. Simultaneously, the party obligated
8 to pay access fee payments shall file with the Elec-
9 tronic Payment System Judges its final offer of
10 rates and terms. The parties also shall exchange
11 these final offers, which cannot be amended. In
12 making a determination under section 5(c), the Elec-
13 tronic Payment System Judges shall be limited to
14 choosing, without modification, one of these two
15 final offers.

16 (4) VOTING AND DISSENTING OPINIONS.—Final
17 determinations of the Electronic Payment System
18 Judges in proceedings under this Act shall be made
19 by majority vote. An Electronic Payment System
20 Judge dissenting from the majority on any deter-
21 mination under this Act may issue his or her dis-
22 senting opinion, which shall be included with the de-
23 termination.

24 (b) PROCEDURES.—

1 (1) INITIATION.—The Electronic Payment Sys-
2 tem Judges shall cause to be published in the Fed-
3 eral Register notice of commencement of proceedings
4 referred to in section 3 as provided under section 6.

5 (2) VOLUNTARY NEGOTIATION PERIOD.—

6 (A) IN GENERAL.—Promptly after the
7 commencement of a proceeding, the Electronic
8 Payment System Judges shall initiate a vol-
9 untary negotiation period among the parties.

10 (B) LENGTH.—The voluntary negotiation
11 period initiated under subparagraph (A) shall
12 be 3 months. Nothing in this subsection, how-
13 ever, prohibits parties from negotiating and en-
14 tering into voluntarily negotiated access agree-
15 ments at any other time.

16 (C) DETERMINATION OF NEED FOR SUB-
17 SEQUENT PROCEEDINGS.—At the close of the
18 voluntary negotiation proceedings, the Elec-
19 tronic Payment System Judges shall determine
20 if further proceedings under this Act are nec-
21 essary. In any such proceeding, all providers of
22 the covered electronic payment system shall
23 participate as a single party and all merchants
24 shall participate as a single party, except to the

1 extent certain providers or merchants pursue
2 voluntarily negotiated access agreements.

3 (3) REGULATIONS.—

4 (A) IN GENERAL.—The Electronic Pay-
5 ment System Judges may issue regulations to
6 carry out their functions under this title. All
7 regulations issued by the Electronic Payment
8 System Judges are subject to the approval of
9 the Antitrust Division and Commission. Not
10 later than 120 days after Electronic Payment
11 System Judges are first appointed after the en-
12 actment of the Credit Card Fair Fee Act of
13 2008, such judges shall issue regulations to
14 govern proceedings under this Act. In setting
15 these regulations, the Electronic Payment Sys-
16 tem Judges shall consider the regulations
17 issued by the Copyright Royalty Judges pursu-
18 ant to 17 U.S.C. 803(b)(6).

19 (B) REQUIREMENTS.—Regulations issued
20 under subparagraph (A) shall include the fol-
21 lowing:

22 (i) WRITTEN DIRECT STATEMENTS.—

23 The written direct statements of the par-
24 ties to a proceeding shall be filed by a date
25 specified by the Electronic Payment Sys-

1 tem Judges, which may be not earlier than
2 4 months, and not later than 5 months,
3 after the end of the voluntary negotiation
4 period under paragraph (3). Notwith-
5 standing the preceding sentence, the Elec-
6 tronic Payment System Judges may allow
7 a party in a proceeding to file an amended
8 written direct statement based on new in-
9 formation received during the discovery
10 process, within 15 days after the end of
11 the discovery period specified in clause (ii).
12 In this Act, the term “written direct state-
13 ments” means witness statements, testi-
14 mony, and exhibits to be presented in the
15 proceedings, and such other information
16 that is necessary to establish access terms
17 and rates as set forth in regulations issued
18 by the Electronic Payment System Judges.

19 (ii) DISCOVERY SCHEDULE.—Fol-
20 lowing the submission to the Electronic
21 Payment System Judges of written direct
22 statements by the parties to a proceeding,
23 the judges shall meet with the parties for
24 the purpose of setting a schedule for con-
25 ducting and completing discovery. Such

1 schedule shall be determined by the Elec-
2 tronic Payment System Judges. Discovery
3 in such proceedings shall be permitted for
4 a period of 60 days, except for discovery
5 ordered by the Electronic Payment System
6 Judges in connection with the resolution of
7 motions, orders, and disputes pending at
8 the end of such period.

9 (iii) INITIAL DISCLOSURES.—In a pro-
10 ceeding under this Act to determine rates
11 and terms for access to a single covered
12 electronic payment system, certain persons
13 must make initial disclosures within 30
14 days of commencement of the proceeding.
15 The 10 largest issuers for the covered elec-
16 tronic payment system, the 10 largest
17 acquirers for the covered electronic pay-
18 ment system, and any person operating or
19 controlling the covered electronic payment
20 system must produce to merchants both
21 the costs necessary to provide that elec-
22 tronic payment system for processing cred-
23 it and/or debit card transactions that were
24 incurred during the most recent full cal-
25 endar year prior to the initiation of the

1 proceeding and any agreements regarding
2 rates and terms for access to the covered
3 electronic payment system. The 10 largest
4 merchants in terms of utilization of the
5 covered electronic payment system must
6 produce to the providers of the covered
7 electronic payment system both the costs
8 necessary to access an electronic payment
9 system for processing credit and/or debit
10 card transactions during the most recent
11 full calendar year prior to the initiation of
12 the proceeding and any agreements regard-
13 ing rates and terms for access to the cov-
14 ered electronic payment system. Any dis-
15 agreement between the providers of a sin-
16 gle covered electronic payment system and
17 the merchants regarding which persons are
18 required to make such initial disclosures
19 shall be resolved by the Electronic Pay-
20 ment System Judges.

21 (iv) DEPOSITIONS.—

22 (I) In a proceeding under this
23 Act to determine access rates and
24 terms, each party shall be permitted
25 to take depositions of every witness

1 identified by the other party. Each
2 party also shall be permitted to take
3 five additional depositions in the en-
4 tire proceeding.

5 (II) A deposition notice or sub-
6 poena may name as the deponent a
7 public or private corporation or a
8 partnership or association and de-
9 scribe with reasonable particularity
10 the matters on which examination is
11 requested. In that event, the organiza-
12 tion so named shall designate one or
13 more officers, directors, or managing
14 agents, or other persons who consent
15 to testify on its behalf, and may set
16 forth, for each person designated, the
17 matters on which the person will tes-
18 tify. A subpoena shall advise a non-
19 party organization of its duty to make
20 such a designation. The persons so
21 designated shall testify as to matters
22 known or reasonably available to the
23 organization.

24 (III) The Electronic Payment
25 System Judges may increase the per-

1 mitted number of depositions for good
2 cause in exceptional circumstances,
3 and shall resolve any disputes among
4 persons within either party regarding
5 the allocation of the depositions per-
6 mitted under this clause.

7 (v) WRITTEN DISCOVERY.—In a pro-
8 ceeding under this Act to determine access
9 rates and terms, each party shall be per-
10 mitted to serve written discovery requests
11 on 10 persons. These written discovery re-
12 quests may include requests for production
13 or inspection, a total of no more than 10
14 requests for admission in the entire pro-
15 ceeding, and a total of no more than 25 in-
16 terrogatories in the entire proceeding. The
17 Electronic Payment System Judges may
18 increase the permitted number of requests
19 for admission or interrogatories for good
20 cause in exceptional circumstances, and
21 shall resolve any disputes among persons
22 within either party regarding the allocation
23 of the requests for admission or interroga-
24 tories permitted under this clause.

1 (vi) SUBPOENAS.—Upon the request
2 of a party to a proceeding to determine ac-
3 cess rates and terms, the Electronic Pay-
4 ment System Judges may issue a subpoena
5 commanding a person to appear and give
6 testimony, or to produce and permit in-
7 spection of documents or tangible things, if
8 the Electronic Payment System Judges’
9 resolution of the proceeding may be sub-
10 stantially impaired by the absence of such
11 testimony or production of documents or
12 tangible things. Such subpoena shall speci-
13 fy with reasonable particularity the mate-
14 rials to be produced or the scope and na-
15 ture of the required testimony. Nothing in
16 this clause shall preclude the Electronic
17 Payment System Judges from requesting
18 the production by a person of information
19 or materials relevant to the resolution by
20 the Electronic Payment System Judges of
21 a material issue of fact.

22 (vii) OBJECTIONS TO DISCOVERY RE-
23 QUESTS.—Any objection to such a request
24 or subpoena shall be resolved by a motion
25 or request to compel production made to

1 the Electronic Payment System Judges in
2 accordance with regulations adopted by the
3 Electronic Payment System Judges. Each
4 motion or request to compel discovery shall
5 be determined by the Electronic Payment
6 System Judges, or by an Electronic Pay-
7 ment System Judge when permitted under
8 subsection (a)(2). Upon such motion, the
9 Electronic Payment System Judges may
10 order discovery pursuant to regulations es-
11 tablished under this paragraph. In deter-
12 mining whether discovery will be granted
13 under this clause, the Electronic Payment
14 System Judges may consider—

15 (I) whether the burden or ex-
16 pense of producing the requested in-
17 formation or materials outweighs the
18 likely benefit, taking into account the
19 needs and resources of the parties, the
20 importance of the issues at stake, and
21 the probative value of the requested
22 information or materials in resolving
23 such issues;

24 (II) whether the requested infor-
25 mation or materials would be unrea-

1 sonably cumulative or duplicative, or
2 are obtainable from another source
3 that is more convenient, less burden-
4 some, or less expensive; and

5 (III) whether the party seeking
6 discovery has had ample opportunity
7 by discovery in the proceeding or by
8 other means to obtain the information
9 sought.

10 (viii) VOLUNTARILY NEGOTIATED AC-
11 CESS AGREEMENTS.—In proceedings to de-
12 termine access rates and terms, the Elec-
13 tronic Payment System Judges shall make
14 available to the parties all documents filed
15 pursuant to section 3(d)(4), including re-
16 lated documentation evidencing any consid-
17 eration being given, any marketing or pro-
18 motional agreements between the parties,
19 and subsequent amendments to such
20 agreements and documentation.

21 (ix) SETTLEMENT CONFERENCE.—
22 The Electronic Payment System Judges
23 shall order a settlement conference between
24 the parties in the proceeding to facilitate
25 the presentation of offers of settlement be-

1 tween the parties. The settlement con-
2 ference shall be held during a 21-day pe-
3 riod following the end of the discovery pe-
4 riod and shall take place outside the pres-
5 ence of the Electronic Payment System
6 Judges.

7 (x) DIRECT AND REBUTTAL HEAR-
8 INGS.—At the conclusion of the 21-day pe-
9 riod following the end of the discovery pe-
10 riod, the Electronic Payment System
11 Judges shall determine if further pro-
12 ceedings under this Act are necessary. If
13 so, the Electronic Payment System Judges
14 shall schedule a direct hearing of not more
15 than 30 court days and a rebuttal hearing
16 of not more than 20 court days during
17 which both parties will be allowed to put
18 on witnesses.

19 (xi) SPONSORING WITNESSES.—No
20 evidence, including exhibits, may be sub-
21 mitted in the written direct statement or
22 written rebuttal statement of a party with-
23 out a sponsoring witness, except for re-
24 quests for admission that have been admit-
25 ted by the receiving party, where the Elec-

1 tronic Payment System Judges have taken
2 official notice, in the case of incorporation
3 by reference of past records, or for good
4 cause shown.

5 (xii) HEARSAY.—Hearsay may be ad-
6 mitted in proceedings under this Act to the
7 extent deemed relevant and reliable by the
8 Electronic Payment System Judges.

9 (xiii) APPLICABILITY OF THE FED-
10 ERAL RULES OF EVIDENCE.—To the extent
11 not inconsistent with this subparagraph,
12 the Federal Rules of Evidence shall apply
13 to proceedings under this Act.

14 (4) PENALTIES FOR FAILURE TO COMPLY WITH
15 A DISCOVERY REQUEST.—

16 (A) FAILURE TO COMPLY.—Any person
17 fails to comply with a discovery request if they,
18 their employee, or agent fails, without substan-
19 tial justification, to:

20 (i) make initial disclosures required
21 under section 3(b)(3)(B);

22 (ii) be sworn or to answer a question
23 as a deponent after being directed to do so
24 by the Electronic Payment System Judges;

1 (iii) answer an interrogatory sub-
2 mitted pursuant to section 3(b)(3)(B);

3 (iv) produce non-privileged documents
4 requested pursuant to section 3(b)(3)(B);
5 or

6 (v) admit the genuineness of any doc-
7 ument or the truth of any matter as re-
8 quested under section 3(b)(3)(B), and the
9 person requesting the admissions there-
10 after proves the genuineness of the docu-
11 ment or the truth of the matter.

12 For purposes of this Act, any disclosure, an-
13 swer, or response that is false or substantially
14 misleading, evasive, or incomplete is to be treat-
15 ed as a failure to disclose, answer, or respond.

16 (B) NEGATIVE INFERENCE IN CURRENT
17 PROCEEDING.—If any person fails to comply
18 with a discovery request, the Electronic Pay-
19 ment System Judges may issue an order that
20 the matters regarding which the order was
21 made or any other designated facts shall be
22 taken to be established for the purposes of the
23 current proceeding in accordance with the claim
24 of the person seeking discovery and obtaining
25 the order.

1 (C) CIVIL PENALTY.—

2 (i) GENERALLY.—Any person who
3 fails to comply with a discovery request
4 shall be subject to a civil penalty, which
5 shall be assessed by the Electronic Pay-
6 ment System Judges, of not more than
7 \$25,000 for each violation. Each day of
8 violation shall constitute a separate viola-
9 tion.

10 (ii) NOTICE AND HEARINGS.—No civil
11 penalty may be assessed under this sub-
12 section except pursuant to an order of the
13 Electronic Payment System Judges and
14 unless the person accused of the violation
15 was given prior notice and opportunity to
16 request and participate in a hearing before
17 the Electronic Payment System Judges
18 with respect to the violation.

19 (iii) DETERMINING AMOUNT.—In de-
20 termining the amount of any penalty as-
21 sessed pursuant to this subsection, the
22 Electronic Payment System Judges shall
23 take into account the nature, cir-
24 cumstances, extent, and gravity of the vio-
25 lation or violations and, with respect to the

1 violator, ability to pay, any prior history of
2 such violations, the degree of culpability,
3 economic benefit or savings (if any) result-
4 ing from the violation, and such other mat-
5 ters as justice may require.

6 (iv) REVIEW.—Any person who re-
7 quested a hearing with respect to a civil
8 penalty under this subsection and who is
9 aggrieved by an order assessing the civil
10 penalty may file a petition for judicial re-
11 view of such order with the United States
12 Court of Appeals for the District of Co-
13 lumbia Circuit. Such a petition may be
14 filed only within the 30-day period begin-
15 ning on the date the order making such as-
16 sessment was issued. The court shall have
17 jurisdiction to enter a judgment affirming,
18 modifying, or setting aside in whole or in
19 part, the order of the Electronic Payment
20 System Judges, or the court may remand
21 the proceeding to the Electronic Payment
22 System Judges for such further action as
23 the court may direct. The Antitrust Divi-
24 sion shall represent the Electronic Pay-
25 ment System Judges before the court.

1 (v) ENFORCEMENT.—If any person
2 fails to pay an assessment of a civil pen-
3 alty after it has become a final and
4 unappealable order or after the appropriate
5 court has entered final judgment, the Elec-
6 tronic Payment System Judges shall re-
7 quest the Antitrust Division to institute a
8 civil action in an appropriate district court
9 of the United States to collect the penalty,
10 and such court shall have jurisdiction to
11 hear and decide any such action. In hear-
12 ing such action, the court shall have au-
13 thority to review the violation and the as-
14 sessment of the civil penalty on the record.

15 (c) DETERMINATION OF ELECTRONIC PAYMENT SYS-
16 TEM JUDGES.—

17 (1) TIMING.—The Electronic Payment System
18 Judges shall issue their determination in a pro-
19 ceeding the earlier of either (i) 11 months after the
20 conclusion of the 21-day settlement conference pe-
21 riod under subsection (b)(3)(B)(ix) or (ii) 15 days
22 before the expiration of the then current statutory
23 rates and terms.

24 (2) REHEARINGS.—

1 (A) IN GENERAL.—The Electronic Pay-
2 ment System Judges may, in exceptional cases,
3 upon motion of a party in a proceeding under
4 this Act, order a rehearing, after the determina-
5 tion in the proceeding is issued under para-
6 graph (1), on such matters as the Electronic
7 Payment System Judges determine to be appro-
8 priate.

9 (B) TIMING FOR FILING MOTION.—Any
10 motion for a rehearing under subparagraph (A)
11 may be filed only within 15 days after the date
12 on which the Electronic Payment System
13 Judges deliver to the parties in the proceeding
14 their initial determination concerning rates and
15 terms.

16 (C) PARTICIPATION BY OPPOSING PARTY
17 NOT REQUIRED.—In any case in which a re-
18 hearing is ordered, any opposing party shall not
19 be required to participate in the rehearing, ex-
20 cept that nonparticipation may give rise to the
21 limitations with respect to judicial review pro-
22 vided for in subsection (d)(1).

23 (D) NO NEGATIVE INFERENCE.—No nega-
24 tive inference shall be drawn from lack of par-
25 ticipation in a rehearing.

1 (E) CONTINUITY OF RATES AND TERMS.—

2 (i) If the decision of the Electronic
3 Payment System Judges on any motion for
4 a rehearing is not rendered before the expi-
5 ration of the statutory rates and terms
6 that were previously in effect, in the case
7 of a proceeding to determine successors to
8 rates and terms that expire on a specified
9 date, then the initial determination of the
10 Electronic Payment System Judges that is
11 the subject of the rehearing motion shall
12 be effective as of the day following the date
13 on which the rates and terms that were
14 previously in effect expire.

15 (ii) The pendency of a motion for a
16 rehearing under this paragraph shall not
17 relieve persons obligated to make access
18 fee payments who would be affected by the
19 determination on that motion from paying
20 the access fees required and complying
21 with the terms under the relevant deter-
22 mination or regulations.

23 (iii) Notwithstanding clause (ii),
24 whenever access fees described in clause
25 (ii) are paid, the recipient of those pay-

1 ments shall, within 60 days after the mo-
2 tion for rehearing is resolved or, if the mo-
3 tion is granted, within 60 days after the
4 rehearing is concluded, return any excess
5 amounts previously paid to the extent nec-
6 essary to comply with the final determina-
7 tion of access rates and terms by the Elec-
8 tronic Payment System Judges. Any un-
9 derpayment of access fees resulting from a
10 rehearing shall be paid within the same pe-
11 riod.

12 (3) CONTENTS OF DETERMINATION.—A deter-
13 mination of the Electronic Payment System Judges
14 shall include the rates and terms for access to the
15 relevant covered electronic payment system, shall be
16 supported by the written record, and shall set forth
17 the findings of fact relied on by the Electronic Pay-
18 ment System Judges. The Electronic Payment Sys-
19 tem Judges shall make publicly available in their en-
20 tirety all determinations issued pursuant to this
21 paragraph.

22 (4) CONTINUING JURISDICTION.—The Elec-
23 tronic Payment System Judges may, with the ap-
24 proval of the Antitrust Division and Commission,
25 issue an amendment to a written determination to

1 correct any technical or clerical errors in the deter-
2 mination in response to unforeseen circumstances
3 that would frustrate the proper implementation of
4 such determination. Such amendment shall be set
5 forth in a written addendum to the determination
6 that shall be distributed to the parties to the pro-
7 ceeding and shall be published in the Federal Reg-
8 ister.

9 (5) PROTECTIVE ORDER.—The Electronic Pay-
10 ment System Judges may issue such orders as may
11 be appropriate to protect confidential information,
12 including orders excluding confidential information
13 from the record of the determination that is pub-
14 lished or made available to the public, except that
15 any terms or rates of an access agreement, including
16 those set forth in filings under section 3(d)(4), may
17 not be excluded.

18 (6) PUBLICATION OF DETERMINATION.—Within
19 60 days of the Electronic Payment System Judges
20 issuing a determination pursuant to this subsection,
21 the Antitrust Division and Commission shall cause
22 the determination, and any corrections thereto, to be
23 published in the Federal Register. The Electronic
24 Payment System Judges also shall publicize the de-
25 termination and corrections in such other manner as

1 the Antitrust Division and Commission consider ap-
2 propriate, including, but not limited to, publication
3 on the Internet. The Electronic Payment System
4 Judges also shall make the determination, correc-
5 tions, and the accompanying record available for
6 public inspection and copying.

7 (7) LATE PAYMENT.—A determination of Elec-
8 tronic Payment System Judges may include terms
9 with respect to late payment, but in no way shall
10 such terms prevent providers of a single covered
11 electronic payment system from asserting other
12 rights or remedies provided under this title.

13 (d) JUDICIAL REVIEW.—

14 (1) APPEAL.—Any determination of the Elec-
15 tronic Payment System Judges under subsection (c)
16 may, within 30 days after the publication of the de-
17 termination in the Federal Register, be appealed, to
18 the United States Court of Appeals for the District
19 of Columbia Circuit, by any aggrieved party to the
20 proceeding under this Act who would be bound by
21 the determination. Any party that did not partici-
22 pate in a rehearing may not raise any issue that was
23 the subject of that rehearing at any stage of judicial
24 review of the hearing determination. If no appeal is
25 brought within that 30-day period, the determina-

1 tion of the Electronic Payment System Judges shall
2 be final, and shall take effect as set forth in para-
3 graph (2).

4 (2) EFFECT OF RATES AND TERMS.—

5 (A) The pendency of an appeal under this
6 subsection shall not relieve persons obligated to
7 make access fee payments who would be af-
8 fected by the determination on appeal from pay-
9 ing the access fees required and complying with
10 the terms under the relevant determination or
11 regulations.

12 (B) Notwithstanding subparagraph (A),
13 whenever access fees described in subparagraph
14 (A) are paid, the recipient of such payments
15 shall, within 60 days after the final resolution
16 of the appeal, return any excess amounts pre-
17 viously paid (and interest thereon, if ordered
18 pursuant to paragraph (3)) to the extent nec-
19 essary to comply with the final determination of
20 access rates and terms on appeal. Any under-
21 payment of access fees resulting from an appeal
22 (and interest thereon, if ordered pursuant to
23 paragraph (3)) shall be paid within the same
24 period.

1 (3) JURISDICTION OF COURT.—If the court,
2 pursuant to section 706 of title 5, modifies or va-
3 cates a determination of the Electronic Payment
4 System Judges, the court may enter its own deter-
5 mination with respect to the amount or distribution
6 of access fees and costs, and order the repayment of
7 any excess fees, the payment of any underpaid fees,
8 and the payment of interest pertaining respectively
9 thereto, in accordance with its final judgment. The
10 court also may vacate the determination of the Elec-
11 tronic Payment System Judges and remand the case
12 to the Electronic Payment System Judges for fur-
13 ther proceedings.

14 (e) ADMINISTRATIVE MATTERS.—

15 (1) AUTHORIZATION OF APPROPRIATIONS.—
16 There are authorized to be appropriated such sums
17 as may be necessary to pay the costs incurred under
18 this Act. All funds made available pursuant to this
19 subparagraph shall remain available until expended.

20 (2) POSITIONS REQUIRED FOR ADMINISTRA-
21 TION.—Section 307 of the Legislative Branch Ap-
22 propriations Act, 1994, shall not apply to employee
23 positions in the Antitrust Division and Commission
24 that are required to be filled in order to carry out
25 section 3.

1 **SEC. 5. INSTITUTION OF PROCEEDINGS BEFORE ELEC-**
2 **TRONIC PAYMENT SYSTEM JUDGES.**

3 (a) INITIAL PROCEEDINGS.—

4 (1) TIMING.—Proceedings referred to in section
5 3(d)(1) shall be commenced as soon as practicable
6 after the effective date of the Credit Card Fair Fee
7 Act of 2008 to determine access terms and rates
8 under section 3 for access to covered electronic pay-
9 ment systems, to be effective for the period begin-
10 ning on January 1, 2010, and ending on December
11 31, 2011. The Electronic Payment System Judges
12 shall cause notice of commencement of such pro-
13 ceedings to be published in the Federal Register.

14 (2) PROCEDURES SPECIFIC TO THE INITIAL
15 PROCEEDINGS.—

16 (A) DISCOVERY PERIOD.—Notwithstanding
17 section 5(b)(4)(B)(iv), discovery in the initial
18 proceedings addressed in this subsection shall
19 be permitted for a period of 90 days, except for
20 discovery ordered by the Electronic Payment
21 System Judges in connection with the resolu-
22 tion of motions, orders, and disputes pending at
23 the end of such period.

24 (B) CONSIDERATION OF CHANGES IN
25 RATES AND TERMS BETWEEN DATE OF ENACT-
26 MENT AND INITIAL DETERMINATION.—In deter-

1 mining the access rates and terms under section
2 3 for access to covered electronic payment sys-
3 tems, to be effective for the period beginning on
4 January 1, 2010 and ending on December 31,
5 2011, the Electronic Payment System Judges
6 shall consider changes in rates and terms made
7 by a covered electronic payments system be-
8 tween the date of enactment of this Act and
9 such initial determination. Based upon such
10 consideration, the Electronic Payment System
11 Judges may adjust their determination of the
12 rates and terms for this initial proceeding to re-
13 flect the economic impact such changes had on
14 the parties.

15 (b) SUBSEQUENT PROCEEDINGS.—Subsequent to the
16 proceedings addressed in subsection (a), proceedings re-
17 ferred to in section 3(d)(1) shall next be commenced in
18 2010 to determine access rates and terms to become effec-
19 tive on January 1, 2012. Thereafter, such proceedings
20 shall be repeated in each subsequent third calendar year.
21 The Electronic Payment System Judges shall cause notice
22 of commencement of proceedings referred to in section
23 3(d)(1) to be published in the Federal Register.

1 **SEC. 6. GENERAL RULE FOR VOLUNTARILY NEGOTIATED**
2 **ACCESS AGREEMENTS.**

3 Any access rates or terms under this title that—

4 (1) are agreed to pursuant to a voluntarily ne-
5 gotiated access agreement for a period shorter than
6 would otherwise apply under a determination pursu-
7 ant to this Act and

8 (2) are then adopted by the Electronic Payment
9 System Judges as part of a determination under this
10 Act

11 shall remain in effect for such period of time as would
12 otherwise apply under such determination, except that the
13 Electronic Payment System Judges shall adjust those
14 rates to reflect national monetary inflation during the ad-
15 ditional period the rates remain in effect beyond that con-
16 templated in the voluntarily negotiated access agreement.

17 **SEC. 7. EFFECTIVE DATE.**

18 The effective date of this Act shall be the date of en-
19 actment.

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